Hilary Term
[2017] UKPC 7
Privy Council Appeal No 0064 of 2016

JUDGMENT

Akita Holdings Limited (Appellant) *v* The Honourable Attorney General of The Turks and Caicos Islands (Respondent) (Turks and Caicos Islands)

From the Court of Appeal of the Turks and Caicos Islands

before

Lord Neuberger
Lord Kerr
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

27 March 2017

Heard on 1 February 2017

Appellant	*Respondent*
Ariel Misick QC Samuel Nicholls (Instructed by Harcus Sinclair LLP)	David Phillips QC Patrick Patterson (Instructed by Cooley (UK) LLP)

LORD CARNWATH:

1. This appeal concerns the remedies available against a knowing recipient of property acquired at an undervalue from the government by a minister acting in breach of his fiduciary duty.

The facts

2. The property in question is made up of four parcels of land on Providenciales, Turks & Caicos Islands ("TCl") registered at the Land Registry with title numbers 60605/13, 92, 96 and 107 ("the land") Mr Hanchell is a "belonger" (that is, a TCI citizen). In August 2003, he was appointed Minister for Works, Utilities and Communication of the TCI. As such, he was a member of the TCI's Executive Council (later the Cabinet). He remained a government minister until 2008.

3. At that time the Crown Land Policy entitled a belonger to apply for and be granted a Conditional Purchase Lease ("CPL") over Crown Land subject to certain conditions, including the obligation to pay rent and develop it in accordance with the terms of the CPL. If those conditions were satisfied, the belonger became entitled to purchase the freehold title at a discounted rate, in this case 50% of the open market value.

4. In 2004 Mr Hanchell applied for and was granted a CPL over the land. In setting the sale price under the CPL, the government relied on a 1998 valuation which gave its open market value as $150,400, resulting in a discounted price of $75,200. Unknown to the government, Mr Hanchell had recently obtained a private valuation of the property in its unimproved state at $500,000. A further private valuation in February 2006, after commencement of development, valued it at $1,200,000, apportioning $600,000 to the value of the bare land and $600,000 to the development so far carried out.

5. The development was substantially completed in accordance with the CPL. Before exercising his right to buy, Mr Hanchell transferred the right to the appellant ("Akita"), a TCI company jointly owned by himself and his brother. In December 2006, Akita acquired the freehold title, having paid the discounted price of $75,200. After the sale, development of the property continued, in part funded by bank loans, amounting eventually to some US$3.9m, charged on the property. In November 2008 a private valuation report for Mr Hanchell following further development valued the property with improvements at $4,250,000.

The proceedings

6. The Attorney-General (acting on behalf of the government) issued proceedings against Akita. As appears from the re-amended Statement of Claim, the basis of the claim was expressed in the alternative as for "unjust enrichment" or "unconscionable receipt". The former was put as a claim for US$174,800, being the difference between the price paid ($75,200) and the price which would have been paid on the undisclosed valuation ($250,000). The latter relied on the assertion that the price paid represented only 30.08% of the price which should have been paid, with the result that Akita "holds 69.92% of the land on trust for (the government)", which was accordingly entitled to "that proportion of the value of the land, including a proportionate share of any benefits made by the (Akita) that are attributable to its use of the land" (para 26E). Reference was also made to the fact that the improvements had been financed by bank loans secured on the land. The relief claimed was a declaration that the property was held on "constructive trust" for the payment of sums due, an account of the benefits received by the Akita "by reason of the 69.92% of the land that it holds on trust for the (government)"; and "restitution" of $174,800 with interest.

7. The matter came before the Chief Justice (Goldsborough CJ) who on 5 September 2014 gave judgment for the government. Having found the facts as summarised above, he turned to the appropriate remedy (paras 40ff), which he described as being "to trace the value of the benefit obtained by (Akita)", the starting point being to determine "the nature of the asset" held by it. He identified the asset as the land itself, which he regarded as "a mixed asset as described in *Foskett v McKeown* [2001] 1 AC 102". This was on the basis that the value put into its purchase by Akita represented "but a proportion of its value"; the balance having come "from the property of the (government)", the proportions being 30.02% to 69.92%. Having cited extracts from Lord Millett's speech relating to such mixed assets, he said:

> "Applying those principles, I arrive at the conclusion that (Akita) holds the freehold title on a constructive trust for payment of the value of the benefit to the (government). The (government) is entitled to recover the value of that proportion of the land for which it has not received value (referred to earlier on the present evidence as being 69.92%) that being the value of the unimproved land and the same percentage of the current value of the improved land insofar as the improvements are attributable to the (Akita's) use of the land. To that end I order that (Akita) account to the (government) for the benefit of its use of the land for which it has not received value." (para 45)

The governing principles for drawing up the account were to be as set out by Lewison J in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1836 (Ch); [2006] FSR 17, the

"fundamental rule" being that the fiduciary must not make an unauthorised profit; but the account "should not be allowed to operate as the unjust enrichment of the claimant". He invited counsel to make proposals on that basis.

8. On 15 September 2014, having heard telephone submissions from leading counsel for both sides, he made an order for the account, largely in terms prepared (we were told) by counsel for the plaintiff. In summary, the plaintiff was to be entitled to 69.92% of (a) the current value of the unimproved land, (b) the current value of the improved land "insofar as the improvements are attributable to the defendant's use of the land", and (c) "the benefit received by the defendant by reason of its use of the land for the purposes of raising finance".

9. Akita appealed to the Court of Appeal, in summary on the grounds that the court had erred in applying the rules relating to mixed funds; and that, having elected not to assert a proprietary remedy by seeking return of the property, the only benefit for which Akita was accountable was the difference between the value of the land and the amount paid. A respondent's notice supported the reasoning of the Chief Justice, but in addition the claim was restated by reference to the principles of knowing receipt. The appeal was dismissed, in a judgment given by Mottley JA. After quoting from the authorities already referred to, and the more recent decision of the Board in *Arthur v Attorney General of The Turks and Caicos Islands* [2012] UKPC 30, he said:

> "The respondent does not seek to follow the original asset, the land which it conveyed to the appellant. The beneficial interest which the respondent had in the land is as a result of the appellant knowingly purchasing the land at what was clearly an under value. It held the difference in the price actually paid and the true value as constructive trustee for the respondent as owner of the land." (para 21)

Akita had also used the correct value of the land to obtain a mortgage to finance the development of the land, and had thus used funds held as trustee for the government, which it had "intermingled" with his own money. He was required to account for "any profit (it) has made as a result of the use or abuse of the property".

10. In this appeal Mr Misick QC, for Akita, submits that the asset transferred in breach of fiduciary duty was the property itself. Akita thereby became a "constructive trustee" of the property in the limited sense explained by Lord Sumption in *Williams v Central Bank of Nigeria* [2014] AC 1189; [2014] UKSC 10, para 31. However, it was not a "mixed asset"; nor was the amount of the underpayment a traceable asset, as found by the courts below. Akita became under a personal liability to account for any benefit received from the transaction, but was not in any sense a trustee of that benefit.

Although he accepts that an account of profits may form part of the remedy for knowing receipt, there must be a causal relationship between the breach of duty and the profit for which the fiduciary is accountable. The breach of duty in this case was not the sale of the land but the failure to disclose the private valuation. The profit earned from that breach was the amount of the undervalue, and no more. The profits from the use of the land were not unauthorised, because Akita was under an obligation to develop the land and entitled to retain the benefit of so doing. It would be disproportionate and unfair to require Akita to account for any part of that development. Accordingly, there should be substituted for the order of the Chief Justice an order that Akita pay the amount of the underpayment, that is $174,800, with interest.

11. For the government, Mr David Phillips QC agrees that the asset subject to the constructive trust is the land, not the amount of the underpayment. However, it is accepted that Akita's payment towards the purchase price gives it a beneficial interest in the land, so that the government has not sought to claim the entire interest in the land. In his submission, Akita holds the land on trust for the government and for itself in proportions determined by reference to (a) the amount of the underpayment and (b) the sum that it paid for the transfer. That in effect was the conclusion of the courts below. He relies on the judgment of Longmore LJ in *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 as confirming that a knowing recipient, like an express trustee, is liable to account for profits regardless of whether there has been a loss to the trust. While it may not have been strictly accurate to describe the land as a "mixed asset", in the sense used by Lord Millett in *Foskett v McKeown*, the rules stated by him can be applied by analogy.

12. There has been no issue or argument before the Board as to the form or interpretation of the order for account made by the Chief Justice (para 8 above). Nor has it been argued that Akita, as a constructive trustee of the land as a whole, might be liable to account for a greater share of the profits than the proportion claimed. It is accordingly unnecessary for the Board to express any view on those matters.

Discussion

13. For the basic principles of the law of knowing receipt, it is unnecessary to look beyond the advice of the Board in *Arthur v Attorney General* (above), a case which also indirectly involved Mr Hanchell, and which was argued by the same counsel on both sides. The issue was whether the Torrens system of land registration, as applied in TCI, precluded a claim based on a constructive trust arising from knowing receipt. That question was answered in the negative. Sir Terence Etherton, giving the opinion of the Board, referred to the essential requirements of knowing receipt as stated in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700 (per Hoffmann LJ):

> "For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."

14. He commented also on the need to distinguish between proprietary and personal remedies:

> "The beneficiaries or innocent trustees will pursue a proprietary claim by following the trust property wrongly transferred or tracing its inherent value into something substituted for it: *Foskett v McKeown* [2001] 1 AC 102, 127-129 (Lord Millett). The claim for personal liability is for the recipient to account as a constructive trustee and will usually only be necessary where following or tracing is not possible because, for example, the property has been acquired by a bona fide purchaser for value without notice or has been dissipated and is otherwise no longer identifiable." (para 34)

The latter comment should not be read as limiting the circumstances in which a personal remedy by way of account may be appropriate. The Court of Appeal was clearly right to reject the suggestion that the government had somehow precluded itself from seeking an account of profits by "electing" not to pursue a proprietary remedy.

15. The liability of a knowing participant to account for profits was discussed in *Novoship (UK) Ltd v Mikhaylyuk* (above), in that case in the context of dishonest assistance. Longmore LJ (adopting the words of *Snell's Equity* 32nd ed (2010), para 30-079) saw this liability as following from "the premise that the defendant is held liable to account as if he were truly a trustee to the claimant" (para 75). He illustrated the principle by reference to *Cook v Deeks* [1916] 1 AC 554, a Canadian case which has some parallels with the present. The defendants were directors of a construction company who had negotiated a lucrative construction contract, but then decided to take it over for themselves. To do so they set up a second company, which carried out the contract and received the profit. It was held by the Privy Council that the directors, being in breach of their fiduciary duty to the first company, held the benefit of the contract on its behalf; and further that the second company, having acquired their rights with full knowledge of all the facts were equally liable with them to account.

16. Akita is in a similar position to the second company in that case. Having acquired Mr Hanchell's right to buy the property at the discounted price, with full knowledge of his breach of fiduciary duty, it is in principle liable to account to the government in the

same way as him. The only material difference relates to the position of Mr Hanchell himself. Unlike the directors in the Canadian case, he had a right to acquire the benefit of the contract in his own name, and indeed a duty under it to develop the property. As Mr Misick submits, the breach of duty related not to the acquisition of the rights under the contract, but simply to the price. Hence he submits the fair remedy is to hold him, and in turn Akita, liable for the difference in price, but no more. For the government Mr Phillips submits that the causal connection between the claim and the wrongdoing is sufficiently observed by limiting it to that part of the enhanced value of the land as is fairly attributable to the underpayment. The judge's order gives effect that principle.

17. In the Board's view, Mr Misick's submission is based on a misunderstanding of the nature of the liability to account. As was made clear in the leading case *Regal (Hastings) Ltd v Gulliver (Note)* [1967] 2 AC 134, 144-5, the liability of a fiduciary to account for a profit made from his position does not depend on whether the principal has in fact been damaged or benefited, but "from the mere fact of a profit having, in the stated circumstances, been made". Similarly, Morritt LJ said in *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461, para 47:

> "If there is a fiduciary duty of loyalty and if the conduct complained of falls within the scope of that fiduciary duty as indicated by Lord Wilberforce in *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 then I see no justification for any further requirement that the profit shall have been obtained by the fiduciary 'by virtue of his position'. Such a condition suggests an element of causation which neither principle nor the authorities require. Likewise it is not in doubt that the object of the equitable remedies of an account or the imposition of a constructive trust is to ensure that the defaulting fiduciary does not retain the profit; it is not to compensate the beneficiary for any loss. Accordingly comparison with the remedy in damages is unhelpful."

It is true that in *Novoship* itself it was held that the same strict principles did not necessarily apply to a mere dishonest assistant who is not himself in a position of trust (paras 104-105, per Longmore LJ). However, in the circumstances of this case Mr Misick realistically has not sought to argue that Akita can be better off in this respect than Mr Hanchell himself. The liability arises "by virtue of his position" as a fiduciary, and does not depend on the amount of loss suffered by the government.

18. For these reasons, the Board will humbly advise Her Majesty that the appeal should be dismissed. Subject to any submissions received from the appellant within 14 days, the respondent's costs of the appeal will be paid by the appellant.