

JERSEY COURT ENDORSES PROPRIETARY CLAIM TO PROCEEDS OF CORRUPTION

IN RE THE REPRESENTATION OF LLOYDS TSB OFFSHORE TRUST COMPANY LIMITED

1. The Jersey Court has very recently made a significant finding regarding the basis upon which a financial institution holds money which is said to be the proceeds of bribery and corruption.
2. *In Re the Representation of Lloyds TSB Offshore Trust Company Limited* (31 October 2013), Jersey's Royal Court was asked to determine the ownership of the assets held in a Jersey law-governed discretionary trust, known as the Rex Trust.
3. The trust was established in Jersey in February 1999. The settlor, Mr Carlos Fragoso, described himself as a civil engineer and informed the trustee that the funds settled into the trust were the proceeds of civil engineering consultancy contracts which he had worked on over the previous twenty years, predominately in the United States, Swaziland and South Africa. He did not disclose that he had held public office in Mozambique.
4. In 2010 the trustee's periodic review brought to light some disturbing information arising from the recent conviction in England of Mabey & Johnson ("M&J") for paying bribes in order to secure construction contracts. An M&J internal investigation had led M&J to self-report to the SFO and to plead guilty to charges of bribery. M&J was ordered to pay £6.6 million in fines.
5. M&J's activities in Mozambique did not form the basis of any charge to which it pleaded guilty, but the opening statement of the prosecution, available on the internet, revealed that M&J had admitted that corrupt payments were made directly to elected or appointed Mozambique public officials.
6. M&J's investigation had found that between 1995 and 1999 M&J had received £6 million from contracts in Mozambique, that Mr Fragoso was National Director of the National Directorship of Roads and Bridges in Mozambique and subsequently the Chair of the National Road Administration, that M&J had met with Mr Fragoso, and that between 1997 and March 2000 it had paid him approximately £300,000.
7. In the light of this information the trustee submitted a Suspicious Activity Report to Jersey's Joint Financial Crimes Unit.
8. The trustee then informed Mr Fragoso of its concerns and sought evidence from him as to the source of funds and specifically that the funds were not the proceeds of crime, which he failed to provide.
9. The trustee then issued a Representation seeking a declaration from the Jersey Court that the trust fund was held by it as constructive trustee for the Government of Mozambique.
10. The Court joined Mr Fragoso to the proceedings, together with members of his family. It also joined the Government of Mozambique and the Chief Officer of the States of Jersey Police and appointed Advocate Hoy to represent the interests of the minor, unborn and unascertained beneficiaries.
11. Neither Mr Fragoso nor his family took any active part in the proceedings. Nor initially did the Government of Mozambique. At an early stage the Chief Office of Police was released by consent from the proceedings.

12. M&J was joined to the proceedings on the basis that, given that it had admitted to paying money to Mr Fragoso, it had a potential claim to the money held by the trustee (and it was also hoped that M&J might assist by filing evidence in the proceedings to reveal the extent of Mr Fragoso's wrongdoing and whether the trust property could properly be said to have derived from monies paid by M&J). However M&J took no active part in the proceedings.
13. Given the apparent lack of interest of Mozambique in the proceedings and the relative paucity of direct evidence regarding the source of the funds, the trustee successfully applied to join HM Attorney General for Jersey to the proceedings as party publique, in order to assist the court. The Attorney General resisted the joinder on the basis that *Ani v Barclays Private Bank and Trust Limited & Attorney General (2004 JLR 165)* and *Gichuru v Walbrook Trustees (Jersey) Limited & Others (2008 JLR 131)* suggested that he would have no role to play.
14. However, the Jersey Court did not accept his argument and convened the Attorney General to give whatever assistance he could to the Court in the determination of the issues raised in the Representation. At a late stage in the proceedings the Mozambique government decided to play an active part, and consequently the Attorney General's role decreased significantly.
15. One of the issues in the case was that it was not possible to trace all of the funds within the trust back to M&J. There was some evidence that certain money was paid by M&J into Mr Fragoso's Swiss bank account, some evidence that certain of that money was transferred into Mr Fragoso's Jersey bank account and some further evidence that certain of that money was transferred into the trust.
16. However, a substantial proportion of the money paid by M&J to Mr Fragoso was transferred to his Swiss bank account after the latest date on which money was transferred from that account to his Jersey bank account and onward into the trust.
17. The court placed reliance on the following factors. First, that Mr Fragoso had lied to the trustee when the trust was established both as to his occupation and as to the source of funds.
18. Second, there was clear documentary evidence of bribes being paid by M&J to Mr Fragoso and of the proceeds of those bribes being settled into the trust.
19. Third, Mr Fragoso attempted to stop his family being informed of the existence of the trust, but when they were informed, they denied any knowledge of it and have not asserted any interest in it.
20. Fourth, Mr Fragoso lied in his correspondence with the court by denying any receipt of bribes from M&J. M&J had admitted payment of bribes to him and the Mozambique government had supplied documents which confirmed Mr Fragoso's position as a public officer, confirmed the details of numerous contracts concluded by Mr Fragoso in that capacity, and confirmed that Mr Fragoso did not have any legitimate source of income during the relevant period other than his salary, which was relatively modest.
21. Fifth, Mr Fragoso had failed to produce any evidence as to the source of the remaining funds within the trust which could not be traced back to M&J, nor had he even offered an explanation as to why those remaining funds may have been derived from a legitimate source.
22. In those circumstances, the court was willing to infer that all of the monies paid into the trust were derived from Mr Fragoso's abuse of his position as a public officer for Mozambique, whether through contracts with M&J or otherwise.
23. The other key legal issue before the Jersey Court was whether or not, given this finding, the Mozambique government had any right to the trust fund by asserting a proprietary claim or whether it merely had a personal right of action against Mr Fragoso and M&J.
24. The Jersey court had to consider two conflicting lines of authority. On the one hand, a decision of the Privy Council in *Attorney General for Hong Kong v Reid [1993] UKPC 2*, a case on appeal from a New Zealand Court of Appeal; on the other hand, *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd & Others [2011] EWCA Civ 347*, an English Court of Appeal decision.

25. In the latter case, the English Court of Appeal declined to follow Reid and applied the much earlier English Court of Appeal decision in *Lister v Stubbs [1890] 45 Ch 1* in which the English Court of Appeal held that there is normally no proprietary claim to a bribe by the party to whose detriment it has been paid. If a party can make such a proprietary claim to the proceeds of a bribe, its rights trump those of other ordinary creditors with personal claims against the wrongdoer, who would have no claim to the trust fund.
26. The Jersey Court also considered the more recent English Court of Appeal decision in *FHR European Ventures LLP & Others v Ramsey Neil Mankarious & Others [2013] EWCA Civ 17*, a case in which an agent acting for purchasers of a hotel negotiated a secret commission from the seller. In that case, there was no challenge to the basic principle that a fiduciary is not entitled to profit from a breach of his fiduciary duties. The only issue before the court was whether the purchasers' remedy against the agent was a personal remedy or a proprietary one. The court considered the categorisation employed in *Sinclair* to determine whether or not a proprietary claim arose, and decided on the facts that it did.
27. The Jersey Court accepted the arguments put forward on behalf of the trustee and the Mozambique government and decided to follow *Reid*. It noted that it was not bound to follow decisions of the Privy Council on appeals from jurisdictions other than Jersey, but that decisions of the Privy Council, unconstrained by earlier judicial authority and in particular the English decision in *Lister* were of the highest degree of persuasiveness; *Reid* should consequently be accorded greater weight than the decision of the English Court of Appeal in *Sinclair*.
28. The Jersey Court also noted that there were "important reasons of policy" for Jersey to follow *Reid*, namely the need to deter fraud and corruption and to have the ability to strip fiduciaries who have channelled their illicit funds through Jersey of all benefits.
29. Consequently it declared that the trustee was holding the trust fund upon constructive trust for the Mozambique government, net of the costs and expenses of the trustee and the representative of the minor unborn and unascertained beneficiaries.
30. An earlier suggestion made on behalf of the Attorney General that in the event of such finding there would still be an issue to be dealt with under the Proceeds of Crime (Jersey) Law 1999 was dispensed with, in the light of the later acceptance by the Attorney General that there was in fact no bar to the trust fund being paid to the Mozambique government.
31. The decision sets Jersey apart from the English courts to the extent that it gives the victims of fraud and corruption a clear remedy, based on a proprietary claim, to deprive the wrongdoers of their ill-gotten gains.
32. In common with the English courts, the decision demonstrates that the Jersey Court is prepared to make inferences where there is no direct evidence, in order to draw factual conclusions in support of such claims.
33. Further, that despite certain previous decisions of the Jersey Court, it can sometimes be persuaded that the Attorney General should take an active role in assisting the Court, particularly or perhaps at least in circumstances where a friendly foreign government is the victim.

David Wilson (Advocate) Simon Thomas and Dilly Wright of Baker & Partners acted on behalf of the trustee.

David Wilson
Partner, Advocate

PO Box 842, 2 Mulcaster Street, St Helier, Jersey JE4 0US
Tel: +44 (0)1534 766254 Fax: +44 (0)1534 737355
Email: enquiries@bakerandpartners.com

3/3 - www.bakerandpartners.com

A full list of Partners, Associates and Consultants can be viewed on our website.