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## Case Comment

### Fiduciary relationships and constructive trusts in a commercial context

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**Case:** *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* (In Administrative Receivership) [2005] EWCA Civ 722; [2006] 1 B.C.L.C. 60 (CA (Civ Div))

#### **\*I.C.C.L.R. 479 Introduction**

In his seminal work Professor Finn described a fiduciary relationship as "one of the most illdefined, if not altogether misleading terms in our law".<sup>1</sup> It is, perhaps, this lack of a comprehensive definition that has made the law of fiduciaries not only an interesting area for legal scholars but also a difficult one when defining the circumstances in which such a relationship will arise. The difficulty is particularly acute in the context of commercial relationships. Commercial relationships are not said to be fiduciary *per se* simply because the assumption is that the parties to such relationships have equal bargaining power and are transacting at arm's length. There is, in other words, no duty of loyalty owed by one part to another which is inherent in a fiduciary relationship. Despite this general assumption, the courts have not declined to find a fiduciary relationship in commercial relationships when the facts are so particular so as to merit the finding of a fiduciary relationship.

This article examines the circumstances in which a court is prepared to find a fiduciary relationship in a commercial context and in doing so examines the recent Court of Appeal decision in *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd*<sup>2</sup> ("*Sinclair Investments*"). In this case the Court of Appeal attempted to explain the defining features of a fiduciary relationship as well as the circumstances in which such a relationship would be found in a commercial context. The case also raises a number of interesting points of law, which until recently remained unresolved. In the first place, can a director of a company owe parallel fiduciary duties to a company which has also become a trustee for a beneficiary to whom the director also owes fiduciary duties? Secondly, is there a general principle allowing for the imposition of a constructive trust on a person who commits a personal fraud?

#### **The concept of a fiduciary relationship**

As one leading text explains, "English law has never provided a comprehensive definition of a fiduciary".<sup>3</sup> However, despite this lack of a comprehensive definition, there has never been a problem in providing examples of fiduciary relationships. For example, there is absolutely no doubt in the mind of lawyers that the following are perfectly sound examples of fiduciary relationships: solicitor and client; principal and agent; company director and the company; and trustee and beneficiary. The reason for this is that English law, like many other common law jurisdictions, regards these relationships as fiduciary *per se*. It is inherent in these relationships that one party is acting in the best interests of the other party and thus is said to owe a duty of loyalty to the other. Judicial pronouncements of these features can be found in a number of English law cases. In *White v Jones*<sup>4</sup> Lord Browne-Wilkinson commented that "the paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B".<sup>5</sup> More recently, in *Bristol and West Building Society v Mothew*,<sup>6</sup> Millett L.J. explained that "a fiduciary is someone who has undertaken to act for

or on behalf of another in a particular matter in circumstances which give rise to relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary ...".<sup>7</sup> In other jurisdictions such as Australia and Canada the courts have employed \*I.C.C.L.R. 480 concepts such as "undertaking to act on behalf of another" or "the exercise of a power or discretion so as to affect the principal's legal position" so as to find a fiduciary relationship.<sup>8</sup>

Although certain relationships have been described as fiduciary *per se*, the courts are not precluded from finding a fiduciary relationship in circumstances which justify the imposition of such a relationship and the corresponding duties that follow with it. The reason for this, as Millet L.J. explained in *Mothew*, is that a fiduciary "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary".<sup>9</sup> In other words, it is the particular circumstances which give rise to the finding of a fiduciary relationship rather than the nature of the primary relationship of the parties. What the court is required to do is to examine whether any particular set of facts has the features that are identified by Millet L.J. in *Mothew*. Crucial to these features are an element of undertaking by the fiduciary to act for or on behalf of another to procure the best terms for that person, an element of reliance by the principal that the fiduciary will act in his or her best interest, and an element of vulnerability that the fiduciary may be in a position to negatively affect the interests of that other person. Using these criteria the courts have found fiduciary relationships beyond the recognised categories identified above. Thus it has been possible for professional advisers, bank managers, mortgagees, doctors and employees to be subject to fiduciary obligations even though they do not fit into the recognised relationships which are fiduciary *per se*.

### **Fiduciary relationships in commercial transactions**

The extent to which fiduciary relationships can be imposed in a purely commercial context has been the subject-matter of much debate in recent times. There appear to be a number of reasons as to why the debate is more acute in the commercial context than any other. In the first place, there has been the long-standing debate as to the proper application of equitable doctrines in a purely commercial context. In *New Zealand & Australian Land Co v Watson*<sup>10</sup> Bramwell L.J. explained that he would be very sorry to see "the various intricacies and doctrines connected with trusts into commercial transaction".<sup>11</sup> Similarly, writing extra-judicially Millett L.J. commented that "it is of the first importance not to impose fiduciary obligations on parties to a purely commercial relationship".<sup>12</sup> The reasoning behind this relates to the nature of commercial transactions and the relationships created thereby. Unlike the relationship of trust, where the trustee undertakes to act in the best interests of the beneficiary, the assumption in commercial relationships is that each party is bargaining at arm's length and is not acting in the best interests of the other but has its own interests foremost. In the words of Snell, "it is normally inappropriate to expect a commercial party to subordinate its own interest to those of another commercial party".<sup>13</sup>

A second reason for the reluctance to have a liberal application of fiduciary law in a commercial context relates to the remedies which are available in cases of breach of fiduciary duty. Where a fiduciary breaches his duty of loyalty to his beneficiary, the beneficiary will have a right to equitable compensation in circumstances in which he has suffered a loss, or, where the fiduciary has made a profit, he will be entitled to restitution. Restitution can be effected in one of two ways: first, by requiring the fiduciary to account for the profit or, secondly, by imposing a constructive trust on the profit so as to allow the beneficiary a proprietary claim to such profit. It is the imposition of the constructive trust which is more controversial in recent times. The reason for this relates to the fact that the imposition of such a trust gives a particular commercial party, which is the beneficiary of a fiduciary relationship, priority over the property of an insolvent fiduciary. Leading academics have warned against the imposition of a constructive trust in such circumstances so as to adjust property rights on insolvency.<sup>14</sup>

Despite the reservations about the proper role of fiduciary law in a commercial context, it

would be nonsense to say that commercial transactions do not lend themselves to fiduciary obligations. Parties in a commercial relationship may well have intended to bring about a fiduciary relationship so that one party is acting in the interests of the other or the course of conduct between the parties shows that they are under a duty of loyalty to the other. Many agency relationships involve a commercial context where one company is acting in the interests of another. In other situations, the circumstances will themselves import a fiduciary relationship. For example, in the Canadian case *LAC Minerals Ltd v International Corona Resources Ltd*,<sup>15</sup> the Canadian Supreme Court *\*I.C.C.L.R. 481* found a fiduciary relationship in circumstances where two companies were negotiating a joint venture to exploit minerals. The land to be mined belonged to the plaintiff but the defendants, through the course of dealings, established that adjacent land also contained minerals. The defendants then mined the adjacent land without the plaintiff's consent. The court held that the defendants owed fiduciary duties to the plaintiffs because they had obtained confidential information from the plaintiffs.

### **Sinclair Investment Holdings SA**

The facts of this case involved an appeal by Versailles Trade Finance Ltd ("VTFL") against an order of Mr Nicholas Strauss Q.C. allowing an appeal against an earlier order refusing to strike out claims in the case. The background to the appeal involved VTFL, which was an associated company belonging to a group of companies known as the Versailles Group. An important feature of the case was that a major shareholder in the Versailles Group was a company called Marrlist Ltd, owned by Mr Cushnie, who was also a director of the companies in the Versailles Group. VTFL was a subsidiary of a listed company, Versailles Group Plc. The business of the group involved accelerated discount trading. The court did not go into detail about the nature of the business of the Versailles Group, save to say that it involved raising money from third-party investors and investing the money on their behalf in manufactured goods purchased from the manufacturer and sold on to purchasers. Sinclair Investment Holdings SA was one of the third-party investors who had entered into a trader's agreement with VTFL. The terms of the agreement involved, *inter alia*, that Sinclair Investments would provide VTFL with £2.35 million for the purposes of buying and selling goods for Sinclair Investments.

Despite the terms of the agreement between Sinclair Investments and VTFL, the moneys advanced by Sinclair Investments were not used in accordance with that agreement. In fact, the money belonging to Sinclair Investments was used by the Versailles Group to increase its turnover, with the result that Marrlist Ltd was able to sell its shares in the Versailles Group at a profit. In other words, the profits enjoyed by Marrlist, and ultimately Mr Cushnie, were made directly as a result of Sinclair Investments's money. The reason why it can be said that the money still belonged to Sinclair Investments, despite being handed over to VTFL, is that one of the terms of the traders' agreement was that any of the money not used for the purpose of buying and selling goods was to be held on trust in a bank account for Sinclair Investments. This meant that VTFL was holding the money on trust for Sinclair Investments. The profits made by Marrlist Ltd were used to repay a mortgage on a property in Kensington owned by Mr Cushnie and subsequently sold for £8.6 million. This money had been paid to the receivers of VTFL from whom Sinclair Investments on full trial would attempt to recover.

Sinclair Investments sought to recover their money from the £8.6 million on two grounds. First, that the profit made by Marrlist Ltd and ultimately Mr Cushnie had been made as a result of a breach of a fiduciary duty owed to Sinclair Investments by Mr Cushnie. Secondly, that part of the proceeds of sale were held on constructive trust for Sinclair Investments because the proceeds of the sale of the property in Kensington were made as a result of the fraud of Mr Cushnie, who was responsible for increasing the turnover of the Versailles Group by misusing the money of Sinclair Investments. The judge at first instance held that there was an arguable case on both of these points. VTFL, however, appealed, arguing that there was no fiduciary relationship between Mr Cushnie and Sinclair Investments and nor was there a general principle that a constructive trust should be imposed on a fraudster. These points can be examined in more detail.

## The fiduciary relationship in Sinclair Investment Holdings SA

While it is trite law that a director owes fiduciary duties to the company in which he is employed,<sup>16</sup> does a director owe fiduciary duties beyond that of his company? The general position is that a director does not owe fiduciary duties beyond those owed to the company; thus a director does not owe such duties to the shareholders generally. Mr Cushnie may well have been a director of the companies belonging to the Versailles Group and thus owing fiduciary duties to VTFL, but did he also owe fiduciary duties to Sinclair Investments? It was argued on behalf of VTFL that Mr Cushnie could not owe parallel duties to VTFL as well the Sinclair Investments for whom VTFL had become a trustee. This would simply put Mr Cushnie in a position of "hopeless conflict".<sup>17</sup> In support of this argument counsel for VTFL cited a powerful passage from Millett L.J.'s judgment in *Mothew*,<sup>18</sup> where his Lordship, when commenting on the features of a fiduciary relationship, explained that

"a fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; \*I.C.C.L.R. 482 he may not act for his own benefit or the benefit of third person without the informed consent of his principal".<sup>19</sup>

In the opinion of counsel for VTFL, Mr Cushnie simply did not give any undertaking of loyalty, express or implied, to Sinclair Investments.

Although on the facts Mr Cushnie's relationship with Sinclair Investments could not be categorised as fiduciary in the sense of belonging to the recognised categories of fiduciary relationships, Arden L.J. in the Court of Appeal proceeded to answer the question whether Mr Cushnie could have acquired fiduciary obligations towards Sinclair Investments. In her Ladyship's judgment:

"if it is alleged that a person who does not fall within the usual categories of a fiduciary relationship, such as trustee and director, made manifest his intention into [sic] enter into a fiduciary relationship--that is, to undertake to the other a duty of loyalty--there would be a sufficient pleading of fiduciary relationship".<sup>20</sup>

Having identified that a fiduciary relationship could arise where a person had undertaken a duty of loyalty to another, Arden L.J. proceeded to examine whether it was a necessary prerequisite to the finding of a fiduciary relationship that the fiduciary should have a relationship with any item of property belonging to the principal. This question was important on the facts because Mr Cushnie did not have legal title over the money advanced by Sinclair Investments to VTFL. Normally, in most other fiduciary relationships which are fiduciary *per se*, the fiduciary is exercising control over property for the benefit of another, for example the trustee-beneficiary relationship. In her Ladyship's opinion there nothing in the authorities to suggest that there was a need for fiduciary to have a particular relationship with any property. However, on the present facts this was a contentious issue because, although Mr Cushnie did not have legal title to the money advanced by Sinclair Investments, he was a director of VTFL and was in a position to control the exercise by VTFL of its powers over the money belonging to Sinclair Investments.

In the opinion of the Court of Appeal, Mr Cushnie, although a director of VTFL and as such not owing fiduciary duties to the traders investing with VTFL, nevertheless had by his own conduct given an undertaking of loyalty to the relevant traders that their sums advanced would be safeguarded and invested in an appropriate manner. This conduct was sufficient for the finding of a fiduciary relationship between Mr Cushnie and the traders.

## Fraud and the imposition of a constructive trust

The finding of a fiduciary relationship in Sinclair Investments would itself lead to a possibility that the court could at full trial ask Mr Cushnie to compensate Sinclair Investments for the loss suffered. Alternatively, the court could hold that the profits made by Mr Cushnie on the sale of the property in Kensington were made as a result of a breach of fiduciary duty, which is by the use of money belonging to Sinclair Investments, and as such the profits were held on constructive trust for Sinclair Investments. However, it was further argued on behalf of Sinclair Investments that there was a general principle on which a constructive trust could be imposed on a fraudster. In this case Mr Cushnie had

from the outset instigated a personal fraud and as such received the proceeds of the sale of the shares and then ultimately the house in Kensington on constructive trust for Sinclair Investments. This in turn would allow Sinclair Investments to assert a proprietary claim on the money in the hands of the receivers of VTFL. The question was whether there is a general principle that allows for the imposition of a constructive trust on grounds of personal fraud. In *Westdeutsche Landesbank Girozentrale v Islington LBC*,<sup>21</sup> Lord Browne-Wilkinson, in attempting to explain the theoretical basis of constructive trusts, commented that such a trust was imposed on the trustee "by reason of his unconscionable conduct".<sup>22</sup> His Lordship then went on to explain that, "although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity".<sup>23</sup> In the opinion of Arden L.J. the conduct of Mr Cushnie amounted to actual fraud and the profits made through the sale of the property in Kensington were thus arguably held on constructive trust for Sinclair Investments.

There is no doubt on the facts of *Sinclair Investments* that the conduct of Mr Cushnie was fraudulent; however, whether that fraud warranted the imposition of a constructive trust is more doubtful. The reason is self-evident from Lord Browne-Wilkinson's comments in *Islington LBC* where his Lordship commented that it was difficult to find a clear authority for the justification of the imposition of a constructive trust on grounds of fraud. The reason for this is that English law, unlike some Commonwealth countries, only recognises an institutional constructive trust as opposed to a *\*I.C.C.L.R. 483* remedial constructive trust. The idea behind an institutional constructive trust is quite simple: the court is required to identify certain facts which have occurred in the past which have given rise to the imposition of such a trust. The role of the court is to merely confirm that the trust arose some time in the past as a result of some triggering events. The events triggering the imposition of a constructive trust are fairly well defined, despite applying across a wide range of diverse situations. For example, it is clear that an unauthorised profit made by a fiduciary will be held on constructive trust. It is equally clear that a person who has a common intention to share the beneficial interest in land will hold the legal title on constructive trust for the non-legal owner.

What is not established in the existing authorities is whether there is a general principle which allows for the imposition of a constructive trust on grounds of personal fraud. No doubt some of the established grounds for the imposition of a constructive trust involve fraud, but there is nothing in those authorities to suggest that every time there is an allegation of fraud, the claimant can ask the court to impose a constructive trust on any profits made as a result of the fraud. For example, in *Sinclair Investments* counsel for VTFL put forward a series of cases which showed the absence of a jurisdiction to invoke a constructive trust on every instance of fraud. In *Halifax Building Society v Thomas*,<sup>24</sup> Peter Gibson L.J. refused to impose a constructive trust on a surplus obtained from a sale of property which had been purchased with the aid of a mortgage which had been obtained fraudulently. In the view of the court there was no general restitutionary remedy to a secured creditor who had received full satisfaction under the mortgage. In the course of his judgment, his Lordship commented *obiter* that there was no universal principle which allowed for the imposition of a constructive trust every time there was a personal fraud.

The only possible basis on which a constructive trust can be imposed universally on the profits acquired by a defendant as a result of personal fraud is where the constructive trust is recognised as remedial in nature. Unlike an institutional constructive trust, a remedial constructive trust is imposed to reverse an unjust enrichment. The role of the court is to identify that the defendant has been unjustly enriched at the expense of the claimant and then to impose a constructive trust on unjustly enriched property by way of a remedy. Although the House of Lords in *Islington LBC*<sup>25</sup> recognised the idea of a remedial constructive trust, English law has yet to establish the existence of such a trust. For example, in *Polly Peck International Plc (No.5) Re*,<sup>26</sup> the claimants argued that they were entitled to a constructive trust on the profits made by a company as a result of exploitation of their land. In refusing to award a constructive trust on the profits made by the company, Mummery L.J. commented that

"if the asset is the absolute beneficial property of the insolvent there is no general power in the ... court to amend or modify the statutory scheme so as to transfer that asset or to declare it to be held for the benefit of others ... The insolvency road is blocked of to remedial constructive trusts".[27](#)

The same, however, is not true in other Commonwealth jurisdictions such as Canada, where the remedial constructive trust is gradually being developed to reverse an unjust enrichment and is therefore operating as an appropriate remedial response to effect restitution.[28](#)

In *Sinclair Investments*, Arden L.J. held that, although counsel for VTFL had shown a powerful dictum to the effect that there was no general principle for the imposition of a constructive trust on grounds of personal fraud, such dicta were *obiter* and not binding on the court. In her Ladyship's opinion the facts in *Sinclair Investments* were more refined and therefore there was an arguable cause of action on trial for the imposition of a constructive trust. Mr Cushnie made a profit out of moneys invested in VTFL to which he was not only a director but also a stranger to the trust and thus intermeddling with trust property. Although it remains to be seen how these issues will be decided on full trial, it is not altogether clear what is the basis of a constructive trust on the profits made by Mr Cushnie, which were then handed over to the receivers of VTFL. Unless the court is ready to accept a remedial constructive trust to reverse an unjust enrichment made by Mr Cushnie, the imposition of an institutional constructive trust requires a clear explanation of the cause of action leading to such an imposition. Furthermore, although Arden L.J. referred to Mr Cushnie as a stranger to the trust, that is his intermeddling with the trust property held by VTFL, Mr Cushnie's liability as a stranger would only be personal. Intermeddling with trust property would only attract personal liability simply because the person who intermeddles, such as Mr Cushnie, would not have acquired any title to the trust property.

### Conclusion

The question in contemporary commercial law is not whether equitable doctrines and remedies *\*I.C.C.L.R. 484* have any role to play in regulating commercial conduct. Rather the question is the extent to which the equitable doctrines of fiduciary relationship and the constructive trust should be applied without disturbing the expected entitlements of other parties involved in commercial dealings. It is the rights of creditors that are most notably at risk by the imposition of such doctrines. As illustrated in *Sinclair Investments*, the motive for the imposition of a fiduciary relationship is plainly to take advantage of the proprietary remedies which avail themselves in cases of breach of such a relationship. However, how far the law should go in availing proprietary remedies to one party at the cost of defeating the rights of other creditors is a question which needs to be treated cautiously. The Court of Appeal in *Sinclair Investments* has made it quite clear that fiduciary relationships in a commercial transaction will be found on the basis of a duty of loyalty which one party has given to another. Where such a duty of loyalty is found, the claimant can take advantage of the imposition of a constructive trust on the profits made by the fiduciary.

As to the imposition of a constructive trust in cases of the personal fraud of an individual, the law is less settled. In *Sinclair Investments* the Court of Appeal took the view that there was no binding authority to reject the proposition that a constructive trust could not be imposed on grounds of a personal fraud. However, until now at least, the approach of English law to constructive trusts has been to impose such a trust on grounds which have been well defined. Personal fraud which results in some unjust enrichment in the hands of the fraudster is generally not a ground for the imposition of a constructive trust. The only possibility for the imposition of trust in such a case is along the lines of a remedial constructive trust identified earlier. Such a trust would be imposed to reverse an unjust enrichment, thereby effecting restitution. In *Sinclair Investments* the Court of Appeal did not elaborate as to the theoretical basis for the imposition of a constructive trust on grounds of personal fraud simply because it did not have to decide that issue. It did, however, conclude that personal fraud could possibly lead to the imposition of such a trust. It remains to be seen how this matter develops in the courts and its wider significance in the context of insolvency.

I.C.C.L.R. 2005, 16(12), 479-484

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[1.](#)

P. D. Finn, *Fiduciary Obligations* (Sydney Law Book Co., 1977), p.1.

[2.](#)

[2005] EWCA Civ 722.

[3.](#)

R. Pearce and J. Stevens, *The Law of Trusts and Equitable Obligations* (3rd ed., Butterworths, London, 2002), p.738.

[4.](#)

[1995] 2 A.C. 706.

[5.](#)

*ibid.*, at 728. This statement echoing the opinion of Asquith L.J. in *Reading v Att-Gen* [1949] 2 K.B. 232 where his Lordship explained that, "a fiduciary relationship exists (a) whenever the plaintiff entrusts to the defendant property ... and relies on the defendant to deal with such property for the benefit of the plaintiff or purposes authorised by him, and not to do otherwise, and (b) whenever the plaintiff entrusts to the defendant a job to be performed ... and relies on the defendant to procure for the plaintiff the best terms available ..."; at 236.

[6.](#)

[1998] Ch. 1.

[7.](#)

*ibid.*, at 18.

[8.](#)

See G. Moffat, *Trust Law: Text and Materials* (3rd ed., Butterworths, London, 1999), p.617.

[9.](#)

n.6 above, at 16.

[10.](#)

(1881) 7 Q.B.D. 374.

[11.](#)

*ibid.*, at 382.

[12.](#)

P. Millett, "Equity's Place in the Law of Commerce" (1998) 14 L.Q.R. 214 at 217.

[13.](#)

*Snell's Equity* (31st ed., London, Sweet & Maxwell, 2004), p.149.

[14.](#)

See, for example, P. Birks, *The Frontiers of Liability* Vol.2 (1994), p.218.

[15.](#)

(1989) 61 D.L.R. (4th) 14.

[16.](#)

*Guinness Plc v Saunders* [1990] 2 A.C. 663.

[17.](#)

n.2 above, at [14].

[18.](#)

n.6 above.

[19.](#)

*ibid.*, at 18.



[20.](#)

n.2 above, at [22].

[21.](#)

[1996] A.C. 669.

[22.](#)

*ibid.*, at 705.

[23.](#)

*ibid.*, at 715.

[24.](#)

[1996] Ch. 217.

[25.](#)

n.21 above.

[26.](#)

[1998] 3 All E.R. 812.

[27.](#)

*ibid.*, at 827.

[28.](#)

See, for example, *Hunter Engineering Co v Syncrude Canada Ltd* (1989) 57 D.L.R. (4th) 321.