



JUDGMENT

**Richardson Anthony Arthur (Appellant) v The
Attorney General of the Turks & Caicos Islands
(Respondent)**

From the Court of Appeal of the Turks & Caicos Islands

before

**Lord Hope
Lord Wilson
Lord Sumption
Lord Carnwath
Sir Terence Etherton**

**JUDGMENT DELIVERED BY
SIR TERENCE ETHERTON
ON**

16 August 2012

Heard on 28 June 2012

Appellant

Ariel R Misick QC
Akierra M D Missick
(Instructed by Sharpe
Pritchard)

Respondent

David Phillips QC
Patrick Patterson
(Instructed by Edwards
Wildman Palmer UK LLP)

SIR TERENCE ETHERTON:

1. This is an appeal by the defendant, Richardson Anthony Arthur, from the decision of the Court of Appeal of the Turks and Caicos Islands dismissing his appeal from Martin J, who refused to strike out those parts of the writ and statement of claim which advance a cause of action for “knowing receipt”.

2. The central issue on the appeal is whether the Torrens system of land registration, as enacted in the Turks and Caicos Islands’ Registered Land Ordinance (“the RLO”), precludes a claim that the registered proprietor of land is a constructive trustee of the land by virtue of his knowledge that the transfer was in breach of trust or fiduciary duty.

The claim

3. The claim is brought on behalf of the Crown by the respondent, the Attorney General of the Turks and Caicos Islands. It relates to land at Long Beach, Providenciales, Turks and Caicos Islands (“the Property”), which was formerly Crown land. The Crown’s claim, as conveniently summarised by Ground JA in the Court of Appeal, is that the Property was sold by the Crown on favourable terms to the appellant, who then immediately sold it on to the developer of a neighbouring luxury commercial property development for a very substantial profit, the appellant having been given inside information and the opportunity to purchase the Property by Mr McAllister Hanchell, the then Minister for Natural Resources (“the Minister”), for corrupt reasons.

4. The factual and legal basis for the claim is set out in the statement of claim and further and better particulars of the statement of claim. The following is a sufficient, but much simplified, summary.

5. Following approval by the Minister, the Property was leased in April 2007 to the appellant for the purpose of enabling him to build a dwelling house. The lease, known as a residential Conditional Purchase Lease (“the Lease”), imposed on the appellant an obligation to build a house and contained a covenant by him to use the Property for residential purposes only. It granted him the right to acquire the freehold of the Property, in the event that he had complied with the covenants and obligations in the Lease, for a heavily discounted sum of \$50,000.

6. On 27 July 2007, before the appellant had begun the construction of a house, the Minister approved the purchase by the appellant of the freehold of the Property for only \$12,500. On 24 September 2007 the appellant contracted to sell the Property to 172 Limited, a development company, for \$1,350,000. On 30 January 2008 the appellant acquired the freehold of the Property and paid the Crown \$50,000. It is common ground, although not expressly pleaded, that he was registered as proprietor of the Property on 4 February 2008. On 20 March 2008 the appellant transferred the Property to 172 Limited for \$1,350,000. It forms part of a proposed luxury property development comprising a number of villas and condominiums proposed for Long Bay Beach on Providenciales.

7. It is alleged that the transfer of the Property from the Crown to the appellant was at a price which was significantly below its true market value, even allowing for the discount to which the appellant was entitled as a “Belonger”, that is a person having a connection with the Turks and Caicos Islands by birth or family. It is alleged that the transfer was fraudulent and/or corrupt and/or in breach of trust; and, in particular, that the Minister was in breach of his fiduciary duties, including duties of loyalty, fidelity and good faith, in approving the appellant’s application for the Lease and the sale of the freehold of the Property to the appellant. It is further alleged that the appellant, in entering into the Lease and in acquiring the freehold, knew of the breaches of duty by the Minister, and that it is unconscionable of the appellant to retain the Property and/or the money received by him from the sale of the Property to 172 Limited. It is further alleged that, in the circumstances, the appellant held the Property and the proceeds of sale on constructive trust for the respondent on the basis of knowing receipt.

8. It is also alleged that the appellant is liable for the tort of deceit because he made fraudulent representations in applying for the Lease and to purchase the freehold of the Property at a time when he expected and intended that he would sell the Property for an immediate and substantial gain, and not for the purpose of constructing a single residential dwelling for his own use.

9. The respondent claims the following relief in the writ and the statement of claim: a declaration that the appellant holds the Property on trust for the respondent; an order setting aside the transfer to the appellant; further or alternatively, a declaration that the appellant holds the purchase price of \$1,350,000 on trust for the respondent; further or alternatively, damages.

10. 172 Limited was registered as proprietor of the Property. The respondent no longer pursues a claim that the Property itself (as distinct from the proceeds of sale received by the appellant) is held on trust for the Crown.

11. The appellant has served a substantial Defence, further and better particulars of the Defence and an amended Defence, in which he denies all allegations of wrongdoing by him and he denies that the respondent is entitled to any of the relief claimed. In paragraph 68 of the amended Defence the appellant asserts that he was at all times a *bona fide* purchaser of the Property for value without fraud or notice of any wrongdoing, and that, on the transfer of the Property to him, he acquired the absolute title free of any interest held by the respondent. In paragraphs 68A and 2.4 of the amended Defence it is asserted that, whether or not the appellant was a *bona fide* purchaser for value of the Property, by virtue of his registration as proprietor of the Property on 4 February 2008 he took the Property free of any interest whatsoever previously vested in or held by the respondent.

The strike out application

12. On 25 January 2011 the appellant issued a summons to strike out those parts of the endorsement of the writ and the statement of claim relating to the allegation of knowing receipt, in other words everything other than those parts supporting the common law claim for damages for deceit. The basis of the summons was, as asserted in paragraphs 68A and 2.4 of the amended Defence, that, on registration of the appellant as proprietor of the Property on 4 February 2008, he took the Property free of any interest whatsoever previously vested in or held by the respondent. That is said by the appellant to be the effect of the RLO.

The Torrens system of land registration

13. Registration of title was introduced into Australia by Sir Robert Torrens in 1858. The system, which came to be known as the Torrens system and was first embodied in the South Australian Real Property Act 1858, spread to the other colonies in Australia and New Zealand and later to many other countries in the Commonwealth and elsewhere. The objective of the system was to achieve complete certainty of title. It was described by Barwick CJ in *Breskevar v Wall* (1971) 126 CLR 376, 385 as “not so much a system of registration of title but a system of title by registration”. The objective of complete certainty of title has never been achieved, as is observed in the following passage in Ruoff & Roper on Registered Conveyancing at 3.004 :

“The declared intention of the Torrens systems to have absolute and indefeasible or unimpeachable titles has never been completely attainable because there have had to be exceptions to the general rule. There are necessarily differences in the way that the system has been applied in different jurisdictions but it is generally true to say that, in certain circumstances, fraud, mistake and misdescription of property are typically exceptions to the principle of indefeasibility. There can be

other situations where a Torrens title can be upset. For example, a subsequent statute has been held to override the registration of title enactment so as to make a particular transaction void and ineffective. Jurisdictions based on the Torrens system do not have a uniform approach to adverse possession. In some cases it is completely excluded. In others, there may be either a variation of the rules that apply to unregulated land which are modified to meet the requirements of the registration of title system, or there may even be a retention of those rules.”

14. The fact that the Torrens system has been implemented in different countries with varying degrees of flexibility was emphasised by the Board in *Santiago Castillo Ltd v Quinto* [2009] UKPC 15, (2009) 74 WIR 217, when considering the provisions in the Belize Registered Land Act 1974 for rectification of the register. In holding that those provisions enabled the court to rectify the register on the facts, Lord Philips of Worth Matravers, delivering the judgment of the Board, said at paragraph [39]:

“We accept that this significantly diminishes the element of indefeasibility of registered title that is a feature of the Torrens system, but this is the manner in which the legislation of Belize has decided to balance the desirability of a simple system of land transfer with the interests of justice. The remedy of rectification lies within the discretion of the court and is subject to the protection given to the *bona fide* purchaser in possession by section 143(2). The Board does not consider that it is irrational to strike the balance in this way, particularly having regard to the fact that the Act ... makes no provision for indemnification of a person unfairly prejudiced by the operation of the system”

15. It is necessary, therefore, when considering the effect of legislation implementing the Torrens system in any particular jurisdiction, to focus on the provisions of the particular legislation in question, and to take special care when considering the relevance and usefulness of judgments in cases in other jurisdictions where the legislation, policy considerations and general principles of law may be different.

The RLO

16. The following provisions of the RLO are relevant to this appeal.

2. In this Ordinance, except where the context otherwise requires –

...

"disposition" means any act *inter vivos* by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include an agreement to transfer, lease or charge;

...

"transfer" means the passing of land, a lease or a charge by act of the parties and not by operation of law, and also the instrument by which such passing is effected, but does not include an agreement to transfer;

...

23. Subject to the provisions of section 27 of this Ordinance, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 of this Ordinance not to require noting on the register:

Provided that-

(i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;

(ii) ...

30. Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge.

37. (1) No land, lease or charge shall be capable of being disposed of except in accordance with this Ordinance, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Ordinance shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorised: ...

38. (1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-

(a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or

(b) to see to the application of any consideration or any part thereof; or

(c) to search any register kept under the Recording of Deeds Ordinance.

(2) Where the proprietor of land, lease or a charge is a trustee he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by

reason of the fact that such disposition amounted to a breach of trust.

83. (1) A proprietor, by an instrument in the prescribed form, may transfer his land, lease or charge to any person with or without consideration.

(2) The transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument.

(3) ...

122. (1) A person acquiring land or a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words "as trustee", but the Registrar shall not enter particulars of any trust in the register.

(2) An instrument which declares or is deemed to declare any trust, or a certified copy thereof, may be deposited with the Registrar for safe custody but such instrument or copy shall not form part of the register or be deemed to be registered.

(3) Where the proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trusts, but for the purpose of any registered dealings he shall be deemed to be the absolute proprietor thereof, and no person dealing in good faith for valuable consideration shall be deemed to have notice of the trust, nor shall any breach of the trust create any right to indemnity under this Ordinance.

140. (1) Subject to the provisions of subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

141. (1) Subject to the provisions of this Ordinance and of any written law relating to the limitation of actions, any person suffering damage by reason of-

(a) any rectification of the register under this Ordinance; or

(b) any mistake or omission in the register which cannot be rectified under this Ordinance, other than a mistake or omission in a first registration; or

(c) any error in a certificate of official search issued by the Registrar or in a copy of or extract from the register or in a copy of or extract from any document or plan, certified under the provisions of this Ordinance, shall be entitled to be indemnified by the Government out of moneys provided by the Legislature.

(2) ...

Judgment of Martin J

17. Martin J dismissed the strike out application. He held that proviso (i) to section 23 of the RLO means that, if a proprietor knowingly receives property in breach of trust, registration does not protect him. It has created an exception to the general effect of registration. He held that the conclusion that a constructive trust for knowing receipt survived registration of the land in the name of the appellant is supported by (1) the exception in section 122(3) providing that a person not dealing in good faith is deemed to have notice of the trust, and (2) the exception in section 38(2) that a disposition by a trustee is defeasible if the transferee is not *bona fide*, in particular where he knows that he is benefiting from a breach of trust. Martin J distinguished various Australian cases relied upon by the appellant for their statements that a transfer to a registered proprietor is not defeasible for wrongdoing short of common law fraud on the ground that those cases concerned legislation materially different to the RLO. He said that he was unable to accept that the reasoning in *Myles and Winton v Prospect Properties Ltd v Wood* [1994-5] CILR 1, a decision of the Cayman Islands'

Court of Appeal on legislation in almost identical terms to the RLO, applies to a claim for knowing receipt.

The decision of the Court of Appeal

18. The Court of Appeal dismissed the appeal from Martin J. Ground JA delivered a detailed judgment, with which the other members of the Court, Zacca P and Mottley JA, agreed.

19. The Court of Appeal did not accept the appellant's two broad grounds of appeal, namely (1) under the Torrens system of land registration it is not possible to rely on the recipient's notice of a breach of trust to constitute a constructive trust; and (2) in any event, there was no pre-registration receipt of trust property for the purposes of the law of knowing receipt.

20. On the first of those grounds, the Court of Appeal again rejected the relevance of the Australian cases on which the appellant relied. They held that those cases were addressing different provisions in different legislation. They held that section 38(2) and section 122(3) of the RLO introduced special rules relating to trusts, which had no equivalent in the Australian legislation. They said that, in the case of a disposition of trust property in breach of trust to a purchaser who was not *bona fide*, the effect of sections 38(2) and 122(3) and proviso (i) to section 23 was that, although the registered title stands, "the equity will attach to the land in the hands of the registered owner with notice of the breach of trust and will be enforceable against him as a personal obligation."

21. So far as concerns the second broad ground of appeal, the Court of Appeal said that it was not entirely clear why counsel for the respondent had accepted that the proviso (i) to section 23 envisages an obligation which existed before registration, that is to say that the respondent has to establish a pre-registration constructive trust. Nevertheless, the Court addressed the argument and held that, given the pleaded history, including the grant of the Lease and the completed contract for the sale of the Property before registration, they were unable to say that it is impossible that the appellant had a sufficient interest on which a constructive trust could bite before the registration of the appellant as the freehold owner.

22. The Court of Appeal, therefore, held that registered land is capable under the RLO of being subject to a constructive trust arising from knowing receipt of trust property transferred in breach of trust or some other fiduciary duty; beyond that, the issues should be left for trial when all the facts are established.

The appeal

23. At the heart of appellant's case is the proposition that, by virtue of section 23 of the RLO, registration of the appellant as proprietor of the Property vested in him absolute ownership subject only to encumbrances shown on the Register and the overriding interests specified in section 28. The rights of the Crown were none of those. The appellant says, therefore, that he never received trust property, and for that simple reason there is no scope for any constructive trust based on receipt of trust property with notice that the transfer was in breach of trust.

24. Mr Ariel Misick QC, for the appellant, supplemented that central submission with other points. He contended that, consistently with the Torrens system, section 122 of the RLO provides for details of equitable interests arising under trusts to be kept off the register. He submitted that the words in section 122(3) - "no person dealing in good faith for valuable consideration shall be deemed to have notice of the trust" - are intended to qualify the operation of section 30 (entries on register to constitute actual notice) where a proprietor is registered "as trustee" pursuant to section 122(1). He submitted that the general principle of treating the trustee, who is the registered proprietor, as the absolute owner unencumbered by any beneficial interests is also given effect by the provisions of section 38 of the RLO, and especially the deeming provisions in section 38(2). He submitted that, in any event, section 38 and section 122 are only addressing cases where the proprietor actually is a trustee, but the Crown was not a trustee of the Property in the present case.

25. Mr Misick explained proviso (i) to section 23 as relating only to express trusts and as merely confirming what would in any event be the legal position even if the proviso had not been there, that is to say as recognising the personal duties and obligations that a registered proprietor who is a trustee owes to the beneficiaries. He emphasised that, if it had been intended that the title of a registered proprietor should be treated as encumbered or qualified by a beneficial interest under a trust, that would have been stated in an express addition to the matters specified in (a) and (b) of section 23.

26. Mr Misick said that, where land has been transferred in breach of trust and the transferee had such knowledge as would (the provisions of the RLO aside) give rise to a constructive trust, the Court would have power to order rectification of the register pursuant to section 140(1), but subject to the limitations in section 140(2). He said there could also be other personal remedies against the transferee, such as for deceit, as is alleged in the present case and will be determined at trial. He submitted that what, however, is not permitted and would be inconsistent with the Torrens system of registration is the assertion of a proprietary claim against the registered proprietor arising from equitable interests under a trust, including, in particular, a claim that would render the registered proprietor's title defeasible.

27. The appellant relies, in support of that analysis on Australian cases, including *Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd* [1998] 3 V.R. 133, *Breskvar v Wall* (1971) 126 CLR 376 and *LHK Nominees Pty Ltd v Kenworthy* [2002] WASC 291, the New Zealand case *Assets Company Limited v Roihi* [1905] AC 176 (PC), various English cases, including *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 particularly in relation to section 74 of the Land Registration Act 1925, and the Cayman Islands' case *Myles v Prospect Properties Ltd*. He says that the Court of Appeal misunderstood and misapplied the Australian cases.

28. Mr Misick submitted that, whereas a title obtained by fraud is defeasible under the Australian legislative regime, a title obtained by fraud is not defeasible under the RLO but is subject to rectification in accordance with section 140. If the respondent is correct, he said, there would be an anomaly in that there would be express provision in the RLO for the defeasibility of a title transferred in breach of trust but no general provision for divesting for dishonesty save by rectification of the register. He submitted that, in all the circumstances, insofar as section 38(2) and section 122(3) appear to contemplate any divesting of title, they are to be regarded as merely cross-referring to the power of rectification in section 140.

29. Mr Misick advanced a short argument to rebut the respondent's further or alternative analysis that trust property was received by the appellant, giving rise to a constructive trust, when the equitable interest in the Property passed progressively from exchange of contracts until finally and in full on completion of the contract of sale. Mr Misick said that analysis was fundamentally flawed because the combined effect of sections 37 and 83 of the RLO and the definition of "transfer" in section 2 is that land can only be transferred by registration of the transferee as proprietor and so there can be no passing of any equitable interest prior to such registration.

Discussion

30. Notwithstanding the able arguments of Mr Misick the Board considers that the approach and decisions of both Martin J and the Court of Appeal were correct.

31. A defendant incurs an equitable liability for knowing receipt when he or she acts unconscionably by receiving and retaining trust property with the knowledge that it was transferred in breach of trust. Liability for knowing receipt can also be incurred when property is transferred in breach of a fiduciary duty other than a breach of trust. An obvious example would be the transfer of a company's property in breach of the directors' fiduciary duties, a director not being a trustee of the company's assets. That is also the basis of the claim in the present case since it is not alleged that the Property was held by or for the Crown on trust, but rather that the Minister acted in breach of fiduciary duty to the Crown in authorising the transfer to the appellant.

32. The essential requirements of knowing receipt were stated by Hoffmann LJ in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700, as follows:

“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.”

33. There has been debate in England and Wales and elsewhere about the nature of the recipient’s state of knowledge necessary to give rise to equitable liability for knowing receipt of trust property transferred in breach of trust. In the present case both parties accept that the correct test is that stated by Nourse LJ in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 455, namely that the defendant’s state of knowledge must be such as to make it unconscionable for the defendant to retain the benefit of the receipt. Mr Misick accepted that such unconscionable conduct can properly be described as equitable fraud.

34. When considering relief for the consequences of knowing receipt it is necessary 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 103, 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. As Sir Robert Megarry V-C said in *Re Montagu’s Settlement Trusts* [1987] 1 Ch 264, 285:

“The equitable doctrine of tracing and the imposition of a constructive trust by reason of the knowing receipt of trust property are governed by different rules and must be kept distinct. Tracing is primarily a means of determining the rights of property, whereas the imposition of a constructive trust creates personal obligations that go beyond mere property rights. ”

35. In the present case the respondent is pursuing both a proprietary interest by tracing into the proceeds of the sale by the appellant to 172 Limited and a personal remedy against the respondent as constructive trustee.

36. The difference between notice (actual, constructive or imputed) of an equitable interest, on the one hand, and knowledge such as to give rise to personal liability for

knowing receipt, on the other hand, is important and reflects the difference between a proprietary remedy and the imposition of personal duties as a constructive trustee. Notice is relevant to priority as between competing property interests. Knowledge, in the knowing receipt sense, means not merely notice, but, in accordance with *Akindele*, such knowledge as to make the recipient's conduct unconscionable and to give rise to equitable fraud. As Sir Robert Megarry V-C said in *Re Montagu's Settlement at 272-3*:

“It should also be remembered that the doctrines of purchaser without notice and constructive trusts are concerned with matters which differ in important respects. The former is concerned with the question whether a person takes property subject to or free from some equity. The latter is concerned with whether or not a person is to have imposed upon him the personal burdens and obligations of trusteeship. I do not see why one of the touchstones for determining the burdens on property should be the same as that for deciding whether to impose a personal obligation on a man. The cold calculus of constructive and imputed notice does not seem to me to be an appropriate instrument for deciding whether a man's conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee.”

37. The recipient's personal liability to account as a constructive trustee by virtue of knowing receipt means that the recipient is subject to custodial duties which are the same as those voluntarily assumed by express trustees: see “*Remedies for Knowing Receipt*” by Charles Mitchell and Stephen Watterson in *Constructive and Resulting Trusts* (ed. Charles Mitchell, 2010). The recipient's core duty is to restore the misapplied trust property.

38. Although the claims to personal and proprietary relief are separate, the appellant in the present case seeks to defeat them both by the same argument resting on the provisions of the RLO which, he asserts, have the effect that the appellant never received any trust property since any trust was eliminated at the moment of registration. The respondent has not sought to argue that, even if the proprietary claim is barred by the provisions of the RLO, the personal claim can nevertheless be advanced. Both sides appear to have proceeded on the assumption that knowing receipt claims, even though for personal relief, are properly viewed as a vindication of pre-existing property rights and are parasitic on those property rights and so are inappropriate against a purchaser who takes free from the prior trust interests by virtue of the Torrens system in question: see “*Knowing Receipt and Registered Land*” by Matthew Conaglen and Amy Goymour in *Constructive and Resulting Trusts* (op cit).

39. It is common ground that the strike out application and this appeal turn on whether liability as a constructive trustee for knowing receipt falls within proviso (i)

to section 23 of the RLO. Although neither the Crown nor the Minister held the Property as a trustee, both sides referred to other provisions of the RLO concerning the legislative treatment of beneficial interests under a trust and to dispositions of trust property as colouring the meaning of the proviso.

40. The Board does not accept the appellant's central argument that the provisions of the RLO preclude any submission that the registered transferee proprietor's title can be encumbered by the proprietary rights of the beneficiaries, and indeed be defeasible, when the transfer has been in breach of trust. In the Board's view, it is clear that the RLO makes express provision for that to be the case where a person has been registered as proprietor of property transferred in breach of trust and the registered proprietor has dealt in bad faith. That is what section 38(2) and section 122(3) say. Knowing receipt in the *Akindele* sense is, as Mr Misick accepted, not merely absence of notice but unconscionable conduct amounting to equitable fraud. It is a classic example of lack of *bona fides*.

41. Mr Misick sought to limit the absence of good faith provision in section 122(3) to a gloss on the notice provisions of section 30, and to limit the provisions for defeasibility for lack of *bona fides* in section 38(2) to the power of the Court to rectify under section 140(1). It is not necessary to imply such limitations, however, in order to give coherence and practical effect to the RLO. It is true that, interpreted in accordance with the ordinary meaning of their language, those provisions weaken the ultimate objective of the Torrens system of land registration, but, as the Board observed in *Santiago Castillo*, it is a matter for the legislature to determine as a matter of policy the proper balance between the desirability of a simple system of land transfer and the interests of justice. There is nothing irrational in the legislature striking that balance by allowing defeasance and rectification for equitable fraud, that is to say somewhere between mere notice (including constructive and imputed notice), on the one hand, and dishonesty, on the other hand.

42. The conclusion that section 38(2) and section 122(3) of the RLO are to be given their ordinary meaning is supported, rather than undermined, by Mr Misick's acceptance (indeed, assertion) that the court's power to order rectification of the register for fraud pursuant to section 140(1) is not limited to dishonesty (as the Court of Appeal considered) but extends to cases where the registration has been obtained by equitable fraud. If the Court can order rectification in such a case so as to give effect to the beneficial interests in the property transferred in breach of trust, there is nothing incoherent or impracticable in provisions which expressly provide that in the same situation the registered proprietor takes subject to those interests. There is nothing incoherent or impracticable in a scheme which permits a right to trace into the proceeds of a subsequent sale by the wrongdoer to an innocent purchaser in good faith and without knowledge of the equitable fraud of the transferor even though section 140(2) provides that there is no right to rectification against that innocent purchaser. Indeed, it is the contrary that would be strange: that the effect of a quick sale by the

wrongdoer would relieve the wrongdoer both of a proprietary claim and a personal claim as constructive trustee. The Board cannot see that the right of indemnity by the Government in the circumstances specified in section 141, which would not in any event assist the Crown in the present case, takes the debate any further.

43. Proviso (i) to section 23 qualifies the core provision of the RLO that, save in the case of a voluntary transfer, the registration of a person as proprietor with absolute title vests in that person the absolute ownership of the land, free from all other interests and claims, subject only to encumbrances, conditions and restrictions shown on the register and the overriding interests specified in section 28. On its face, it appears as a qualification of, or detraction from, the absolute terms of section 23 rather than a mere declaration of what would be the law in any event. Proviso (i) must be interpreted in the light of the legislative scheme as a whole. In the light of the proper meaning and effect of sections 38(2) and 122(3), there is no difficulty in giving to the words “any duty or obligation to which he is subject as a trustee” a meaning which embraces the duties of a constructive trustee for knowing receipt. Those duties, as we have said, include a primary duty to restore the trust property as well as a personal duty to account.

44. Furthermore, irrespective of the proper meaning and effect of sections 38(2) and 122(3) of the RLO, the Board sees no reason in principle why proviso (i) to section 23 should be impliedly limited to exclude the duties and obligations to which the transferee would be subject as constructive trustee for knowing receipt. The expression “any duty or obligation to which he is subject as trustee” is quite general and refers to the personal obligations of the registered proprietor as trustee whether or not the transferee is registered as trustee and even though beneficial interests under a trust are excluded from the register. The constructive trust for knowing receipt is imposed as a matter of law at the moment of receipt. On the appellant’s case, the Property was received at the moment of his registration as proprietor. At that moment, all the essential requirements summarised by Hoffmann LJ in *El Ajou* were satisfied: there was a disposal of property in breach of fiduciary duty; the property was traceable as representing the property of the Crown; and the appellant had the requisite knowledge.

45. Furthermore, once it is accepted, as the appellant does, that the register can be rectified against the wrongdoer under section 140(1) to correct the registration procured by the transferee’s equitable fraud arising from knowing receipt, there is no reason to treat as necessarily excluded by implication from proviso (i) the personal obligations of the registered proprietor as constructive trustee, including the obligation to restore the property and to account.

46. The Board agrees with the Court of Appeal that the Australian cases relied upon by the appellant are of no real assistance on the proper meaning and effect of the

RLO. They turn on their particular facts, the type of notice recognised by the applicable law as sufficient to give rise to a constructive trust for knowing receipt, and the particular provisions of the Australian legislation under consideration in those cases, including the meaning of fraud in that legislation. The legislation under consideration in those cases contained no equivalent to proviso (i) to section 23 of the RLO and the good faith provisions in section 38(2) and 122(3). The same is equally true of the New Zealand legislation under consideration in *Assets Company Limited v Roihi* and the provisions of the Land Registration Act 1925 of England and Wales considered in *Williams & Glyn's Bank Ltd v Boland*.

47. As we have said, Mr Misick relied upon the decision in *Myles v Prospect Properties Limited*, a decision of the Court of Appeal of the Cayman Islands. In that case the respondents claimed against Prospect Properties specific performance of contracts for the sale of land, which the company had, subsequent to the contracts, charged to the appellant, who was a director of the company and had notice of the contracts. The resolution of the issue turned on the application of the Cayman Islands' Registered Land Law (Revised) ("the CIRLL"). The respondents did not register any caution to protect their rights under the contracts for the sale of land as they could have done under the CIRLL. So far as relevant, the CIRLL contains the same provisions as the RLO. The Judge at first instance and the Court of Appeal in *Myles* decided that the respondents' right under their contracts of sale had priority over the appellant's charges, but for different reasons. Schofield J, at first instance, held that the respondents had priority because, among other things, Prospect Properties and the appellant committed a breach of trust in creating the charges and the appellant was not a *bona fide* purchaser for value and so could not rely on section 38(2) for an indefeasible title. The Court of Appeal dismissed the appeal on the grounds, among others, that, on the facts, the appellant had not given valuable consideration for his charges which were, therefore, subordinated by section 27 of the CIRLL to the prior equitable interests of the respondents; and, in any event, the respondent could not assert an indefeasible title under section 23 since a chargee was only a person entitled to security and was not to be treated as a proprietor with absolute title, and considerations of equity and good conscience, which were imported by section 164 of the CIRLL, dictated that the respondents' interests should have priority. Those considerations were specific to the facts of that case and have no application here.

48. Mr Misick, however, relied upon the following observation of Zacca P at page 10, in relation to the equivalent provision to section 122(3) of the RLO:

“Assuming that there was a breach of trust on the part of Prospect Properties, the charge would be indefeasible, even if the appellant was aware of such breach of trust, provided the appellant was a purchaser for valuable consideration.”

49. The Court of Appeal in the present case did not comment on *Myles*, possibly because its facts were so different in material respects from the present case. Martin J did comment on it, including expressing disagreement with the statement of Zacca P quoted above. If and insofar as the Cayman Islands' Court of Appeal, and Zacca P in particular, intended to state in *Myles* that it is irrelevant to the application of provisions equivalent to section 38(2) and section 122(3) of the RLO whether or not the transferee was *bona fide*, then the Board respectfully cannot agree. That would be contrary to the express terms of those provisions, and inconsistent with a perfectly rational policy regarding the effect of equitable fraud in the overall scheme of the legislation.

50. We turn finally to the respondent's further or alternative argument that, prior to registration of the transfer to the appellant, he became a constructive trustee of the equitable interest in the Property under the contract for the sale of the Property at the latest by the time the contract was completed and the purchase price was paid. Relatively little time was devoted to oral submissions on this argument. Like the Court of Appeal we are perplexed as to why the respondent wishes to pursue it. The point is academic on the facts of the present case and the express terms of the RLO. For the reasons we have given, it is not necessary for the respondent to run this further or alternative argument in order to establish (on the pleaded facts) both a proprietary and a personal claim against the appellant as constructive trustee by virtue of knowing receipt. The need to advance such an argument may, however, be necessary where the Torrens system has been given legislative effect in different terms to those of the RLO, especially proviso (i) to section 23.

51. The further argument raises two legal points of contention. The first is whether, as Mr Misick contended, the combined effect of sections 37 and 83 of the RLO precludes even an equitable interest passing to the purchaser under a completed contract for the sale of land before registration. The second is whether, even if an equitable interest does pass, the transfer of such an interest, that is to say something short of a legal interest which can only pass on registration, is a receipt capable of giving rise to a constructive trust for knowing receipt. We were not referred to any authority or any academic commentary bearing on either point.

52. Mr Misick's submission on the first point reflects the wide language of section 37(1). The point is not, however, clear. As Mr David Phillips QC for the respondent pointed out, it is possible to interpret section 83(1) and (2) as dealing merely with the passing of the legal interest on registration, and to interpret both section 37 and section 83 as not precluding the passing of the entire equitable interest at the latest on completion of the contract for sale and payment of the purchase price. There is no doubt that, under the land registration legislation of England and Wales, which admittedly has quite different language to that of the RLO, equitable interests can pass and be created by dispositions off the register.

53. On the second point, academic opinion has left open the possibility of a successful argument that a constructive trust can arise, prior to registration, on the transfer of an equitable interest under a completed contract for the sale of registered land: “*Knowing Receipt and Registered Land*” by Matthew Conaglen and Amy Goymour (op cit) at p. 169-170.

54. The potential importance of both points goes well beyond the facts of the present case and the particular provisions of the RLO. They may be of relevance in many countries which have adopted the Torrens system. They are best left to a case where the facts and the particular legislation require them to be resolved.

Conclusion

55. For those reasons the Board humbly advises Her Majesty that the appeal should be dismissed and the appellant must pay the costs of the appeal to the Board.