



23 March 2015

PRESS SUMMARY

Central Bank of Ecuador and others (Appellants) v Conticorp SA and others (Respondents) **[2015] UKPC 11**

On appeal from the Court of Appeal of the Commonwealth of the Bahamas

JUSTICES: Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath, Lord Toulson

BACKGROUND TO THE APPEALS

This case concerns three transactions (“the GDR transactions”) by which, in effect, the Second Appellant (“IAMF”) transferred to the First Respondent (“Conticorp”) a portfolio of loans and interests in various companies having a face value in excess of US\$190 million in return for Global Depository Receipts (“GDRs”) and shares in Grupo Financial Conticorp (“GFC”) which ultimately proved to be worthless.

IAMF was a mutual fund, the beneficial interests in which were subscribed by BCO Curacao, using monies raised from Ecuadorian depositors. BCO Curacao was owned by Banco Continental SA, which was the principal subsidiary of GFC, which was owned by Conticorp. All these companies were ultimately under the control of the Ortega Trujillo family, which includes the Second, Third and Fourth Respondents. IAMF’s sole director and investment adviser was Mr Taylor, but he acted on the instructions of the Respondents in entering into the GDR transactions and did not exercise independent judgment about what was in the interests of IAMF.

The GDR transactions took place in December 1995, January 1996 and March 1996, during which time Banco Continental and GFC were in serious financial difficulty and Banco Continental was taking substantial loans from the First Appellant, the Central Bank of Ecuador (“Central Bank”).

IAMF claims damages from the Respondents for dishonestly procuring or assisting Mr Taylor to commit what IAMF alleges were breaches of fiduciary duty toward IAMF. The courts below accepted the Respondent’s submissions as to the probity of the GDR transactions and found that they were entered into as part of a debt to equity plan (or Structural Reorganisation Plan) which had been agreed, or were at least reasonably believed to have been agreed, by the Respondents with Dr Intriago, the Superintendent of Banks, in the context of obtaining financial support from the Central Bank of Ecuador.

JUDGMENT

The Judicial Committee of the Privy Council humbly advises Her Majesty that the IAMF’s appeal be allowed. Lord Mance gives the judgment of the Board, holding that **[176]**:

- (1) The Respondents are jointly and severally liable for dishonestly procuring and assisting Mr Taylor’s entering into the three GDR transactions in breach of his fiduciary duty to IAMF;
- (2) IAMF is entitled to recover from the Respondents the face value of the loans and shares transferred or surrendered to Conticorp pursuant to those transactions which value the Board calculates, subject to correction by the parties within 21 days, as US\$190.7 million.

REASONS FOR THE JUDGMENT

Mr Taylor’s breaches of fiduciary duty

Mr Taylor breached his fiduciary duty by entering into each of the three transactions on the instructions of the Respondents, without exercising any independent judgment as to what was in the best interests of IAMF [45-49] and [119].

The Respondents dishonest assistance

In determining whether the Respondents dishonestly procured or assisted Mr Taylor to commit such breaches of fiduciary duty, it is necessary to ask whether they believed or could honestly have had believed that the GDRs or GFC shares received from Conticorp were worth at least what the Respondents arranged for IAMF to pay for them [51-55]. The courts below erred in failing to address that critical question [56]. They also erred in other respects [46-50 and 57-63], which included treating all three transactions as involving a debt for equity swap [61-62] and failing to address the reasons relied on as showing why the transactions could not honestly have been believed to have been in IAMF's interests [63]. The present proceedings fall within the limited category of cases in which it is open for the Board to review concurrent findings and conclusions of the courts below, and, after doing so, to conclude in this case that the decisions below should be reversed [3, 165 and 176]. More particularly:

- (1) The courts below failed to identify the distinction between a conventional debt to equity plan, under which IAMF's transfers of its loan portfolio and other assets would have given it equity in the company to which such transfers were made, and the GDR transactions [121].
- (2) The Respondents could not honestly have believed that the GDR transactions were part of a Structural Reorganisation Plan approved by Dr Intriago on behalf of the Ecuadorian authorities. Among other considerations: (a) the first transaction took place before any such plan could have been agreed, and (b) the suggested plan did not refer to the third transaction, which was already agreed before any intention to enter into it was disclosed [131-151].
- (3) The judge's contrary findings are unsustainable on analysis of the cross-examination of Dr Intriago on which the judge relied, the capitalisation to which such cross-examination related, the differences between Dr Intriago's recommendations to the Ecuadorian authorities and the Respondents' Structural Reorganisation Program, and the inherent probabilities [137-144].
- (4) The transactions were entered into at times when there was no realistic prospect of IAMF reselling or making any profit out of acquiring GDRs or shares in respect of GFC, and there was no sensible commercial purpose for IAMF to enter into any of three transactions at the times or the prices at which they were entered into [128-130 and 145-146]. When they were entered into, Banco Continental and BCO Curacao were in substantial and increasing financial difficulties, and such purported financial justifications as were put forward at the relevant times were unrealistic and known to be out of date [124-127].
- (5) No independent or impartial consideration was given to IAMF's interests before it entered into any of the three transactions [126]. The effect of the transactions was to shift from Conticorp to IAMF the risk that Banco Continental and BCO Curacao would fail, while giving Conticorp the benefit of IAMF's valuable assets. [128-129] and [152-160].

The damages recoverable by IAMF

The GDRs were either not re-saleable or rapidly ceased to be re-saleable, and were subsequently cancelled. The events are properly regarded as the consequence of the dishonest assistance, since they were precisely the risks to which IAMF was wrongly exposed by the Respondents' actions in procuring or assisting the entry into of the three transactions [172].

There is in the circumstances no requirement that IAMF should be able to return the GDRs or GFC shares received, in order to be able to recover any damages [174]. IAMF is entitled to recover from the Respondents the face value of the loans and shares transferred or surrendered to Conticorp which, subject to correction by the parties, the Board calculates to be US\$190.7 million [175].

References in square brackets are to paragraphs in the judgment. This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for the decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html