DARRELL E LEE v JOE LEE (ABU 13 of 2002S)

COURT OF APPEAL — CIVIL JURISDICTION

REDDY P, SMELLIE and PENLINGTON JJA

22, 29 November 2002

[2002] FJCA 18

Practice and procedure — appeal — cross-appeal against judgment — clean-hands doctrine — specific performance — whether Appellant is entitled to equitable relief — embezzlement of moneys.

Darrell E Lee (Appellant) and Joe Lee (Respondent) were business partners and entered into an agreement involving a 60%–40% relationship in an investment. This relationship broke down and ended. Appellant sought specific performance. The High Court refused the specific performance. Appellant sought appeal while the Respondent cross-appealed the findings of the judge on the ground that he misapplied the clean-hands doctrine.

Held — (1) As between the parties the Appellant was not taking advantage of his own wrong to acquire something that he was not entitled to as against the Respondent. The close nexus which is required existed between the original embezzlement in the mid-1970s and the purchases in Fiji in 1984. Nor is it apparent from the record that the moneys in question and in particular the bail bond money, which provided the recovery of costs for the Appellant which he was able to use to satisfy his obligations under the December 1990 agreement, was in fact stolen money.

(2) The fact that for some 4 or 5 years the Respondent acknowledged the agreement and only suggested that it was not binding when the parties fell out in or about 1995 is compelling proof by way of subsequent conduct of an existing binding arrangement. The parties intended to enter into a contract and the court should endeavour to make the contract work despite any omissions or ambiguities.

Appeal allowed.

Cross-appeal failed.

Cases referred to

Australian Broadcasting Corporation v XIVTH Commonwealth Games Ltd (1988) 18 NSWLR 540; *Campbell Discount Co Ltd v Bridge* [1961] 2 WLR 596, cited.

Attorney-General for Hong Kong v Reid [1994] 1 AC 324; [1994] 1 NZLR 1; [1994] 1 All ER 1; [1993] 3 WLR 1143; *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433; *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1987) 15 NSWLR 552; *Lister & Co v Stubbs* (1890) 45 Ch D 1; *Republic Molding Corporation v BW Photo Utilities* (1963) 319 F (2d) 347, considered.

Appellant in person

P. Knight for the Respondent

Judgment

Reddy P, Smellie and Penlington JJA.

Introduction

The litigants are not related. They were once it seems amicable business partners and/or attorney and client. They are both United States citizens with property and other interests in Fiji.

This judgment concerns an appeal and cross-appeal. The Appellant seeks to overturn a High Court decision refusing him specific performance. The Respondent cross-appeals against findings in the judgment that the Appellant would have been entitled to specific performance of the contract between the parties were it not that the first instance judge applied the "*clean hands*" doctrine and denied the Appellant the equitable relief he seeks.

Background

In or about 1983 one Harold Wosepka (HW) was convicted in the United States District Court at Tacoma in the State of Washington on some 29 counts of embezzlement and fraud. He was sentenced to 10 years in imprisonment and ordered to make reparation of US$2.5 million dollars. The offending had apparently commenced in or about 1975 when as a Federal Agent HW had misused public funds which he was to administer on behalf of the State and applied them to his own benefit. Upon conviction however, he appealed. The appeal was upheld and he was tried and convicted a second time. He appealed the second conviction and was granted bail on deposit of the sum of US$500,000 with court. While his appeal was pending (if not actually being heard) he died in December 1990 of a cancerous tumour of the brain.

In 1982 HW had purchased the property known as Pacific Harbour (now Estates Management Services Limited — EMSL) for F$600,000. The Respondent was a close associate of HW throughout and also acquired interests in Fiji. In addition it appears that the Respondent was registered as the owner of all the shares (with the exception of one or two nominally held) in EMSL. He held them in all probability as trustee for HW or interests nominated by him.

The Appellant first met HW in 1984 and commenced to act for him in relation to his interests in Fiji and in particular the Pacific Harbour venture. It was not however, until 1986 or 1987 that he met the Respondent for the first time. The meeting took place in Fiji and in subsequent years there were further meetings.

During 1990, HW was diagnosed with a brain tumour. The terminal nature of his illness lead to a meeting in Hawaii between 26 and 28 November 1990. The purpose of the meeting, according to the Respondent was to sort out the ownership of the various Pacific properties and to obtain repayment of moneys which he claimed were owing to him amounting to some US$1.25 million. By this time EMSL owned various building lots, 410 acres of Waikalou Beach Property and an active profitable business providing services and collecting rates from residents of the Pacific Harbour development. The company was however, saddled with substantial short term debt which threatened the financial viability of the company and its subsidiaries. The meeting was attended by HW, his wife Josephine, his son Rendy, the Appellant, the Respondent and Vinod Singh a Fiji citizen who had worked for the Pacific Harbour Development for a number of years.

About a fortnight later HW's condition deteriorated rapidly and he died on 13th of December 1990.

The Respondent was immediately in touch with the Appellant anxious to secure recognition of his debt and it seems nervous that the US authorities would be seeking to recover the reparation from HW's Estate and look to the Fijian assets, (in which the Respondent claimed a substantial interest), to satisfy the amount owing in whole or in part.

There were some frenetic negotiations in the second half of December 1990 between the Appellant and Respondent and HW's family. There appear to have been two pressing concerns. First the desire on the part of HW's family to secure his estate without diminution on account of the reparation owing and second, to provide funds to meet short-term liabilities in Fiji which if not satisfied could have resulted in the loss of most if not all those interests.

In broad terms the problems were overcome first by HW's family surrendering any legal interest in the Fiji properties — indeed denying that the deceased ever had any ownership of them at all — while on the other hand the Appellant and the Respondent agreed to take the Fiji interests as to 60% to the Respondent and 40% to the Appellant provided the Appellant made a substantial capital contribution of US$174,000. It seems that the Appellant was able to meet his responsibility in terms of providing the capital by recovering from the court the US$500,000 which had been deposited there when bail was granted and taking a lien over it for fees owed to him. By that means he provided the US$174,000 required of him. The business relationship between the Appellant and HW was a flexible one. The Appellant was taking a 10% interest in all the properties acquired and refrained on a number of occasions from requiring payment of his fees as they were earned. He did not always render accounts but it seems that HW acknowledged his liability for very substantial fees and on occasion paid large instalments in reduction of the same.

The upshot was an agreement entered into on about 24 or 25 December 1990 between the Appellant and the Respondent whereby in return for the Appellant coming up with the injection of capital he was to become a 40% owner in all the Fijian properties many or all of which were ultimately held through shares in a Vanuatu Company (Peninsula Investments Limited).

It seems that the 60/40 relationship between the Respondent on the one hand and Appellant on the other continued for some 4 or 5 years with the Appellant or his wife making further substantial capital contributions. About 5 years later, however, the relationship broke down and from then on the Respondent denied the written agreement of late December 1990 was binding and refused to acknowledge it. Also about that time the Appellant was removed as a Director of EMSL. Proceedings were started in the Superior Court of Washington for Thurston County by the Appellant and in the United States District Court for the District of Colorado where the Respondent lived. Ultimately the American Courts indicated that the parties should resolve their differences in this jurisdiction. It was under those circumstances that the Appellant as plaintiff commenced his action seeking specific performance of the December 1990 agreement in the High Court by issue of a writ on the 18 December 1998.

Pre-trial arrangements

There were pre-trial conferences at a time when the Appellant as plaintiff was represented by Mr Bale. It appears that an agreement was reached to split the trial and deal first with the Appellant's claim for specific performance leaving the question of an alternative claim for damages for breach of contract to be addressed at a later stage if in fact the contract was upheld but some remedy other than specific performance was found to be appropriate.

Certain pre-trial arrangements were made such as an agreed bundle of documents and issues were framed for determination as follows:

(a) Is the agreement signed by the plaintiff and the defendant dated 24–25 December 1990 binding on both parties and enforceable by either party?;

(b) If the answer to (a) is affirmative how is the plaintiff to acquire his 40% shareholding in EMSL?

Analysis of judgment under appeal

The Judge commenced by identifying the two issues referred to above and recording how in 1982 HW had purchased Pacific Harbour and was convicted in the following year, sentenced and ordered to make reparation. The judgment records the Appellant became involved late 1984 or early 1985 when HW approached him advising that he was in trouble with the criminal law and needed a lawyer to assist him with his Fiji investments. The judgment then records how the Appellant worked for HW, travelled to Fiji on a number of occasions and on several of them between 1986 and 1990 the Appellant met with the Respondent.

Scott J recorded in his judgment that the Appellant had said, and was not challenged, that HW had told him that the Respondent's main involvement "was to have all the agreements in his name". The judge's understanding of the evidence was that the Appellant was aware that this was because the Fijian investments had been purchased with the embezzled money and HW was anxious to avoid any tracing to them by the United States authorities. The Appellant before us, insisted that while he had his suspicions, he did not actually know where the money had come from and had not said at the trial that he did. The judgment then traces the events of 1990 fairly closely and examines the evidence of both litigants reaching the conclusion that broadly the testimony of the Appellant was to be preferred to that of the Respondent. This despite the fact the Appellant had acknowledged in his submissions that he drew up the documents signed by HW's family declaring that he had never had an interest in the Pacific Harbour Investments, knowing they were false. In the final paragraph of his judgment Scott J recorded:

If the circumstances placed before the Court had not so plainly arisen from dishonest dealings then I should have had no hesitation in upholding the agreement and declaring it to be legally enforceable. In my view it was plainly intended to be a solemn and binding agreement between the parties and was accepted as such and acted upon as such. Whether it was intended to be followed by a transfer of shares from the defendant to the Plaintiff or to a Plaintiff's nominee I do not know. How the agreement could remain "strictly confidential" and yet be publicly implemented is not at all clear. Because, however, I am not prepared to give the High Court of Fiji's approval to this agreement or the transactions which preceded it or followed it I decline to go any further towards answering the questions posed.

The positions taken on the appeal and cross-appeal

The Appellant had two major points to make.

First he complained that at the end of the trial he wished to call further evidence on the issue of whether he personally had unclean hands in relation to the transaction he entered into with the Respondent. The background to this was that at the end of the Appellant's evidence as plaintiff in the court below, the judge had asked to see counsel in chambers where he had expressed his concern on the public policy aspects of the case. At 69 of the record the date then being early in April 2001 the following appears:

Case for plaintiff:
(after discussion).
(In Chambers both counsel present)
Court: I am concerned about public policy aspects of this case but am prepared to help to resolve the dispute if some means can be found.

The case was then adjourned to the 30, 31 July 2001 for continuation. When the case resumed on the 30 July 2001 Mr Bale sought leave to withdraw which was granted and thereafter the Appellant conducted his own case. Whether the judge's concern expressed to counsel in chambers in April was fully conveyed to the Appellant (or at all) is not clear. None the less the Appellant's recollection is that by the end of the evidence at a time when the case was to be adjourned to enable the parties to prepare and file submissions the Appellant was aware that the judge was still concerned about public policy issues. He was unable to say what precisely the judge had said on the topic. But the record shows that he did indicate he wished to call further evidence. It does not say what the nature of the evidence was but the Appellant says he wished to rebut any suggestion of wrongdoing on his part in relation to his agreement with the Respondent, the issue only having been raised after his evidence was completed. The Respondent, however, objected and the judge upheld the objection. Submissions were ordered to be filed in a September and October 2001. The case was adjourned to 4 December 2001 for the hearing of final oral submissions.

Mr Knight was asked to assist the court with his recollection of what, if anything, the judge had said regarding the public policy issue towards the end of the case and the relationship of any such comment to the Appellant's application to call further evidence. Mr Knight was unable to help us with any specific recollection, but properly he acknowledged that his clear understanding was that the judge was concerned about the public policy issues and apparently wanted them addressed in submissions. That is borne out in His Lordship's judgment in two paragraphs, (pp 11 and 12 of the record) reading as follows:

> *In a postscript to his written submission the Plaintiff admitted and apologised for preparing a false document.* (We interpolate that this was the document in which HW's family declared that he never had any interest in Fiji assets). *He asserted that he had only become involved with Wosepka years after he had committed his crime. For the Court to decline to interfere now would effectively be to reward the defendant since he would be allowed to retain his 100% shareholding in the properties despite the Plaintiff's entitlement.*
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> *I was, frankly, disappointed not to receive some assistance from Mr Knight, as the sole remaining counsel, on this point after Mr Bale had withdrawn. The Defence made no submissions on these difficulties at all and my own research did not prove enlightening. I must confess that I found it a difficult problem to resolve.*

Although there is uncertainty as to precisely what happened when the court adjourned at the end of the taking of the evidence there can be no doubt in view of the recollection of the Appellant, Respondent's counsel and the judges' comments in the two paragraphs quoted immediately above, that at that point of time the public policy/clean hands issues were very much alive. Nor can there be any dispute that it was only after the plaintiff had completed his evidence and the judge had seen counsel in chambers in April 2001 that he brought out clearly those concerns. In the circumstances we are unable to escape the conclusion that there was an element (albeit quite unconscious) of unfairness to the Appellant in the way the matter unfolded. As at the end of taking of evidence the possibility existed that the Appellant would fail on a ground which he was unaware of at the time that he gave his evidence and in respect of which at the end of day, he was denied the opportunity to respond to on oath. The issue it seems was not addressed in the submissions filed by either the Appellant or counsel for the Respondent. When the judge decided that he proposed to refuse the relief sought on the clean hands ground it is clear in our view, that at that stage he should have

reconvened and advised the parties of his tentative conclusion and given the Appellant in particular, an opportunity to call further evidence in rebuttal if he wished to.

Our holding in that regard, standing on its own, would not have been sufficient to overturn the decision in the court below, but it would have resulted in us sending the matter back to the judge with a direction that he hear the Appellant's further evidence on the point and give him the opportunity either in person or through counsel, to make submissions on it.

The Appellant's second major point, however, was that the judge had misapplied the "*clean hands*" doctrine that his conduct in the matter was not such that he should have been denied equitable relief. In particular he advanced the proposition, and supported it with authority, that there must be a close nexus between the matter of clean hands and the transaction in question. The Appellant further argued that the issue had to be raised as a defence and that he should be denied relief only if it could be shown that as between himself and the Respondent he was seeking to take advantage of his own wrong. And he repeated the submission he made in the court below that for the court to refuse him relief would be to reward the Respondent who was equally, if not more involved than himself in seeking to keep the Fiji assets clear of any claim by the United States Authorities.

Although Mr Knight properly acknowledged in his submissions that for the clean hands doctrine to apply "an immediate and necessary relation between the relief sought and the delinquent behaviour in question was required," Counsel none the less submitted that there was a basis for the learned judge to deal with the matter in a way he did. But it was not a submission pressed with much enthusiasm. On the other hand, however, Mr Knight relied more on a submission that he made in 1.7 of his prepared submissions reading as follows:

> *It is submitted that the learned Judge was justified in refusing to order the equitable relief sought on the grounds that the property which was the subject, "in part", of the Agreement was directly or indirectly the proceeds of crime, that some of the documents on which the parties relied were false and that it would not be appropriate to give the Agreement the High Court's seal of approval. Such a conclusion does not deprive the Appellant of any remedy. He can sue the company to whom he advanced the money for its return.*

Having disposed of the clean hands matter very shortly Mr Knight's submissions then moved on to advance the 5 grounds of his cross-appeal, all of them seeking to overturn findings of the learned Judge based upon the evidence he had heard and the documents admitted as evidence in the record. We shall return to consider the cross-appeal later in this judgment.

The course of the hearing on appeal

When the case was called at 9.30 am on Friday 22 November it was indicated to the Appellant and Respondent that the court wished to hear from the parties on the clean hands issue first. The morning was timetabled to enable each side to present their arguments in an hour and a quarter with 10 minutes to reply by the Appellant.

At the end of the clean hands submissions the court took a short adjournment and then returned with a minute which the President read and distributed to the parties immediately before the luncheon adjournment.

The minute reads as follows:

Having considered the record and heard argument on the clean hands issue we are satisfied that the learned judge in the Court below had good grounds for raising and considering the public policy aspects of the case.

We have reservations however, as to whether he had adopted the appropriate course procedurally for dealing with his concern. An alternative, which as presently advised, we consider may have been more appropriate, (assuming Scott J's factual findings in favour of the appellant are sustained), would have been to order specific performance, but then to address the public policy issue by:

(1) Refusing to order cost either way and leaving the parties each to bear their own burden in relation to the litigation.

(2) Directing the Registrar to send the copy of the judgment to the American Ambassador to Fiji and making it clear in the judgment that the Ambassador could view the whole record and take copies of that if he wished.

(3) Leaving the United States authorities themselves to decide whether to employ the remedies which apply in this jurisdiction for example those employed in the Reid case to which we made reference earlier, to endeavour to trace any embezzled money into the Fiji assets and obtain orders for surrender of the same.

(4) This course would cause any potential sequestration to fall on both parties, and would have been sufficient in our view to indicate that the Courts of this jurisdiction will not turn a blind eye to fraud.

The course outlined in (3) above is the one we will probably adopt on the public policy issues. The parties would be wise to reflect on this over the lunch adjournment. A note of what I have just said on behalf of the Court will be available from the Registrar when we rise. We will hear the parties briefly at 2:15 p.m. on this minute and then hear Mr Knight on the cross-appeal.

The authority referred to in para 3 of the minute is Attorney-General for *Hong Kong v Reid* a decision of the Judicial Committee of the Privy Council delivered in November 1993 and variously reported in [1994] 1 AC 324; [1994] 1 NZLR 1; [1994] 1 All ER 1; [1993] 3 WLR 1143. A copy of that case had been made available to both parties before the issue of the minute.

When the court resumed at 2.15 pm the Appellant advised that he accepted that the *Reid* authority was directly in point and also acknowledge that the course which the court had tentatively suggested was the more appropriate and would be acceptable to him. Mr Knight understandably could not take instructions as his client was at the time in the United States and counsel did not feel able to assist further.

The court then embarked upon a hearing of Respondents cross-appeal.

Problems with the clean hands approach

We observe first that Scott J received no help on the issue from counsel or the Appellant and he confessed that he found the problem difficult to resolve and his own researches "did not prove enlightening".

As Mr Knight recognized, however, in his submissions before us it is well established that there has to be an "an immediate and necessary" relationship between plaintiff's conduct and any advantage derived from it. Mr Knight cited various passages from the 5th edition of Spry, Equitable Remedies some of which support that proposition. The edition available to court is the 3rd edition and p 240 the following appears. "The 'immediate and necessary relation', that is, the fact that the plaintiff seeks to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief, has thus been insisted on in many situations".

The Appellant helpfully referred us to the judgment of Young J in the Equity Division of the Supreme Court of New South Wales in the case of *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1987) 15 NSWLR 552. This judgment contains an in depth examination of the authorities upon which the clean hands doctrine is based. The decision was also the subject of comment at pp 854 and 855 of the Australian Law Journal, Vol 63, December 1989,. The opening two paragraphs of the comment read:

> *The maxim, "he who comes into equity must come with clean hands", underwent a searching examination by Young J., sitting in the Equity Division of the Supreme Court of New South Wales, in the case of FAI Insurances Ltd. v Pioneer Concrete Services Ltd (judgment delivered 7 May 1987, but reported later in* (1989) (sic) 15 NSWLR 552). *The learned Judge came to the conclusion, as will be seen below, that the maxim had only a limited application, which he carefully defined.*
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> *It is true that the "clean hands" maxim has, to adapt the language used by the brilliant Sir Charles Harman LJ with reference to recourse to equitable principles in common law courts (see Campbell Discount Co Ltd v Bridge* [1961] 1 QB 445; [1961] 2 All ER 97; [1961] 2 WLR 596 at 605),
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> > *"been too often bandied about … as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion.*

At 557 of the report between lines (e) and (f) Young J said "… it is clear that the key question is, how close a nexus must there be to the matter of clean hands and the transaction being impugned by the plaintiff" and little later on the same page at line (g) he observed " …the maxim 'He who comes to equity must come with clean hands' is closely related to the maxim 'He who seeks equity must do equity' and that both derive from the ecclesiastical law which in turn derived from the Roman law".

The judge then examines all the leading authorities and considers the commentaries in such leading texts as Spry and Snell's Principles of Equity. At 561 the judge quotes from a decision of the United States Court of Appeals 9th Circuit namely *Republic Molding Corporation v BW Photo Utilities* (1963) 319 F (2d) 347, where it was said at 349:

> *What is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts, or that the manner of dirtying renders inequitable the assertion of such rights against the defendant.*

On the same page the judge sums up his conclusions between lines F and G as follows:

> *I have gone through such a lengthy history and examination of the rule because, it seems to me, with great respect, that the submissions of the defendants are too shallow, but yet have the temptation to induce a judge (who has, after all, some characteristics common with jurors), by appeal to the emotions, to think that these matters should be left to the trial to be ventilated. However, the more one examines the rule in its application in the cases, the more one can see that it is only if the right being sought to be vindicated by the plaintiff in a court of equity, is one which if protected, would mean the plaintiff was taking advantage of his own wrong, that the court will either debar him from relief or perhaps say he is not a proper plaintiff in a representative suit.*

In this case, as foreshadowed in our minute, we are of the view that on the limited information before him the judge in this case also took a "too shallow" a view of the matter. As between the parties the Appellant was not in our view taking advantage of his own wrong to acquire something that he was not entitled to as against the Respondent. And we are unable to see that the close nexus which is

required, existed between the original embezzlement in the mid-1970s and the purchases in Fiji in 1984. Nor is it apparent from the record that the moneys in question and in particular the bail bond money, which provided the recovery of costs for the Appellant which he was able to use to satisfy his obligations under the December 1990 agreement, was in fact stolen money. It may or may not have been. We do not understand the judge to have made a definite finding in that regard. Indeed he acknowledged that he had only been told "a small part of the story". Our own consideration of the record leads us to the position which the Appellant claimed was his, namely that suspicions are aroused but adequate proof of the source of the moneys used is absent.

Constructive trust approach preferred

On the other hand we adhere to the view tentatively expressed in our minute that the Attorney-General for *Hong Kong v Reid* (above) shows how employing equitable principles the United States Government can if it sees fit, endeavour to a trace embezzled moneys through to the Fiji assets in question. To state the obvious, however, it will of course be necessary for there to be proof on the balance of probabilities that in fact the moneys in question were the proceeds of HW's criminal offending. Furthermore it may be necessary to established knowledge on the part of both the Appellant and the Respondent before relief can be granted. But those are matters for the future.

The brief facts of the *Reid* case are that a New Zealand practitioner took employment as a Crown prosecutor in Hong Kong and advanced through the ranks to the status of Assistant Director of Public Prosecutions. During the course of his career he accepted bribes to delay or thwart criminal investigations or prosecutions and used the proceeds of those bribes to invest in property in New Zealand. The Hong Kong Government placed caveats on the properties which Reid than sought to have removed. English authority [*Lister & Co v Stubbs* (1890) 45 Ch D 1; [1886–90] All ER Rep 797] was followed at first instance and before the Court of Appeal in New Zealand resulting in the case for the Attorney-General for Hong Kong being rejected. Before the privy council on appeal, however, in a judgment delivered by Lord Templeman heading a strong court which included Lord Goff of Chieveley *Lister* was overruled. The essence of the decision is contained in the head note number two of the New Zealand report reading as follows:

> *When a bribe was offered and accepted in money or in kind, the money or property constituting the bribe belonged in law to the recipient. Equity however, which acted in personam, insisted that it was unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed. As soon as the bribe had been received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured. If the property representing the bribe exceeded the original bribe in value, the fiduciary could not retain the benefit of the increase in value which he obtained solely as a result of his breach of duty. Property acquired by a trustee as a result of a criminal breach of trust, and the property from time to time representing the same, must also belong in equity to his cestui que trust and not to the trustee whether he was solvent or insolvent. If the property representing the bribe decreased in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increased in value, the fiduciary was not entitled to any surplus in excess of the initial value of the bribe because he was not allowed by any means to make a profit out of breach of duty.*

In all circumstances then we are of the view that the course we suggested in our minute is the one which should be followed. The United States authorities should be left to decide whether or not they wish to embark upon litigation in this jurisdiction to seek to establish that the investments in Fiji are held in trust because they were purchased with stolen money.

Specific performance: Implementation

It follows from what we have said above that the judge's decision to refuse specific performance to the Appellant must be set aside.

The Appellant is entitled to an order for specific performance.

The judge in the court below expressed reservations as to how specific performance would be implemented. With respect since the High Court is a court of original jurisdiction we do not see a great difficulty about that. But before indicating how the matter can be resolved we should address the cross-appeal.

Cross-appeal: Grounds 1 and 2

Ground 1 was stated in Mr Knight's submissions (para 2.3) as follows:

> *It is submitted that the Agreement (pp 142–144 of the record) is not enforceable or binding on the parties as they did not by the Agreement intend to enter into a contractual relationship which would be binding on them.*

Ground 2 is a somewhat similar and is recorded in para 2.9 as follows:

> *it is submitted that the Agreement is not enforceable as it was uncertain and vague as to its terms.*

In the final paragraph of his judgment quoted earlier Scott J expressed a firm view in respect of these two grounds as follows:

> *In my view it was plainly intended to be a solemn and binding agreement between the parties and was accepted as such and acted upon as such.*

We are in no doubt that the learned judge was correct in this holding. In this respect on these two grounds of appeal as with others discussed hereunder we have derived considerable help from the decision of the Court of Appeal of New Zealand in *Electricity Corporation of New Zealand v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433. There the court was considering the question of whether a document called a written heads of agreement was valid and binding. The judgment of a strong majority consisting of Richardson P, Keith, Blanchard and McGrath JJ was delivered by Blanchard J.

In paras 50–67 of the judgment the principles to be applied in such a case are comprehensively set out.

First the judgment spelt out the overall approach in para 58 as follows:

> *The court has an entirely neutral approach when determining whether the parties intended to enter into a contract. Having decided that they had that intention, however, the Court's attitude will change. It will then do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities.*

Second in paras 53 and 54 the court looked at the prerequisites for formation of the contract identifying first an intention to be immediately bound and second an agreement expressed or to be found by implication in respect of the essential terms. In para 54 the court said:

> *Whether the parties intended to enter into a contract and whether they have succeeded in doing so are questions to be determined objectively. In considering whether the negotiating parties have actually formed a contract, it is permissible to look beyond the*

words of their "agreement" to the background circumstances from which it arose — the matrix of facts. This can include statements the parties made orally or in writing in the course of their negotiations and drafts of the intended contractual document.

In para 56 the court said:

> It is also permissible when considering contract formation … to look at subsequent conduct of the parties towards one another, including what they have said to each other after the date of the alleged contract (*Australian Broadcasting Corporation v XIVTH Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 550).

In our view the agreement clearly shows an intention to be bound immediately because substantial sums were to be paid in order to preserve the Fiji Assets. And the essential agreement was that in return for the Appellant providing a substantial capital sum to save the venture he was to become a 40% shareholder. Furthermore the background circumstances known in both parties namely the death of HW, the desire of his family not to be seen as having an interest in the Fiji Assets and the necessity for a substantial cash injection to save those assets were all factors relevant to the agreement reached. Finally the fact that for some 4 or 5 years the Respondent acknowledged the agreement and only suggested that it was not binding when the parties fell out in or about 1995 is compelling proof by way of subsequent conduct of an existing binding arrangement. So here the parties intended to enter into a contract and the court should, as set out in para 58 of the New Zealand Court of Appeal's judgment and recognised in the authorities generally, endeavour to make the contract work despite any omissions or ambiguities. The only ambiguity or uncertainty that Mr Knight could point to concerns the penultimate paragraph of the agreement on pp 141 and 144 of the record:

> *This written recitation is meant to be no more than a skeleton of the relationship to be developed between the two parties which will be fleshed out in private, personal face to face meetings in the future.*

Mr Knight's contention was that paragraph made it clear that no binding agreement had been reached. The balance of the document, however, is entirely consistent with there being a binding agreement. Accordingly in order to make the contract work it is appropriate to regard the provision quoted above as referring to future business developments between the parties and not qualifying the express obligations undertaken by both of them in the balance of the agreement.

Cross-appeal: Grounds 3 and 5

Ground 3 as set out in para 2.13 of Mr Knight's submissions reads as follows:

> *It is submitted that the Agreement is not enforceable as there was no consideration for the acquisition by the Appellant of any shares, moving from the Appellant to the Respondent.*

While Ground 5 recorded at para 2.24 reads:

> *It is submitted that if the Agreement is an effective agreement (which is not admitted), then the Appellant is in breach of the Agreement by failing to make a fresh capital contribution of US$174,000.00 from his own funds as required by the Agreement and cannot therefore enforce the Agreement.*

These two grounds were not in our view pressed with much conviction by Mr Knight. Neither of them can succeed in view of the trial judges finding that on the question of whether there was consideration and the payment of the

US$174,000, he preferred the evidence of the Appellant to that of the Respondent. The Appellant's evidence was that the US$174,000, that he caused to be contributed was his money as of right and that was the consideration that he made available to become a 40% shareholder. It is so that the Appellant claimed to be a 20% shareholder anyway in the Fiji properties by virtue of his earlier arrangements with HW. He insisted, however, that was not the basis upon which he claimed to become a 40% shareholder but rather that the consideration for his entitlement was his cash contribution. The law of course does not concern itself with the adequacy of consideration and since the judge found that the money was paid these two grounds of appeal are rejected.

Cross-appeal: Ground 4

Ground 4 is stated as follows in para 2.17 of Mr Knight's submissions:

> *It is submitted that the Appellant is not entitled to an order for specific performance of the Agreement as prior to the signing of the Agreement, the Appellant misrepresented to the Respondent that he was the owner of 20% of the issued capital of the companies referred to therein.*

The contention here is that whether innocently or fraudulently the Appellant misrepresented to the Respondent before the 24/25 December 1990 agreement was entered into that he already owned 20% of the assets.

The alleged misrepresentation was pleaded in the statement of claim and denied in the statement of defence.

The Appellant did claim in evidence that he was a 20% owner but said the Respondent did not accept that. Furthermore the Appellant said the 20% claim had nothing to do with the December 1990 agreement. Rather it was his ability to provide the $174,000 cash injection more or less immediately that secured his 40% interest.

The Respondent in his evidence said that the Appellant provided no evidence that he owned 20% on account of outstanding fees, but that he the Respondent, none the less accepted the Appellant's statement as true.

Mr Knight endeavoured to persuade us that the documentary evidence showed that no fees were owing. But a perusal of the Appellant's letter to HW in March 1990 (pp 91–4 inclusive of the record) and the cheques on p 124 of the record suggests on the balance of probabilities that $192,000 was owing at the date of HW's death.

Although Scott J made no express finding on the misrepresentation allegation his conclusion that the agreement would have been enforceable were it not for the public policy issue must mean that he accepted the Appellant's evidence, either that he was in fact entitled to 20% or alternatively if that was not so, nevertheless the Respondent was not induced to enter the agreement by that representation.

The conclusion just expressed is buttressed by the judge's finding that on issues of credibility he preferred the Appellant's evidence to that of the Respondent. As a result ground 4 of the cross-appeal fails.

Decision

The decision of this court on the appeal and cross-appeal is as follows:

(1) The appeal succeeds and the Appellant is entitled to a decree of specific performance.

(2) The cross-appeal fails.

(3) As the Appellant appeared for himself on the appeal and no order of cost was made in the Court below there will be no order for costs in favour of the Appellant in this court but reasonable disbursements incurred by

the Appellant in the preparation of the record and filing fees as fixed by the registrar are recoverable by Appellant against the Respondent.

Implementation of the specific performance decree

In addition to the above orders this court now orders

(4) The case be remitted to the High Court at Suva.

(5) That the Respondent forthwith take all necessary steps to implement the provision of clauses I and II of the agreement of 24/25 December 1990 as they appear on pp 139 and 142 of the record, in so far as they relate to companies registered, or assets situated, in this jurisdiction.

(6) If the order in (5) above has not been implemented by the 20th December 2002 then the Appellant may submit to the Registrar of the High Court at Suva all necessary share transfers and resolutions for inclusion in the minutes of the various companies concerned, serving a copy of the same on the Respondent's solicitors, Cromptons of Suva.

(7) The Respondent will then have until the 20th of January 2003 to raise any objection in writing to the share transfers or other documentation submitted by the Appellant.

Any such objection in writing will be referred by the Registrar of the High Court in Suva to the President of this court who will settle the final form of all documents.

(8) The registrar will then sign all documents on behalf of the Respondent and deliver them to the registrar of companies.

(9) In the event that documents are delivered pursuant to order (8) above to the registrar of companies then the said registrar of companies is directed to action the same forthwith so that the Appellant will become a 40% shareholder of all companies in this jurisdiction subject to this litigation and a director of each of them.

Reference to the United States Ambassador to Fiji

(10) The Registrar of the High Court is to personally deliver a copy of this judgment to the United States of America Ambassador to Fiji and the said Ambassador is to be afforded the opportunity by himself or by his duly appointed agent to view the entire record of these proceedings and obtain copies of all or any items on the file should he so wish.

Appeal allowed.

Cross-appeal failed.