Lloyds Trust Company (Channel Islands) Ltd v Carlos Fragoso and Olinda Alberto Baguanji Fragoso and Aida Fragoso and Osvaldo Fragoso and Raquel Fragoso and Advocate Ashley David Hoy (representing the interests of the minor, unborn and unascertained beneficiaries). and The Government of Mozambique and HM Attorney General

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Le Cornu, Morgan
Judgment Date:	31 October 2013
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Text

[2013] JRC 211

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and**Jurats Le Cornu**and**Morgan.

Between

IN THE MATTER OF THE REPRESENTATION OF LLOYDS TSB OFFSHORE TRUST COMPANY LIMITED

AND IN THE MATTER OF THE REX TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984 AS AMENDED.

Between
Lloyds Trust Company (Channel Islands) Limited
Representor
and
Carlos Fragoso
First Respondent

and

Olinda Alberto Baguanji Fragoso
Second Respondent

and

Aida Fragoso
Third Respondent

and

Osvaldo Fragoso
Fourth Respondent

and

Raquel Fragoso
Fifth Respondent

and

Advocate Ashley David Hoy (representing the interests of the minor, unborn and unascertained beneficiaries).
Sixth Respondent

and

The Government of Mozambique
Seventh Respondent
Her Majesty's Attorney General
Partie Publique

Advocate D. R. Wilson **for the Representor**.

Advocate A. D. Hoy **appeared in person**.

Advocate G. S. Robinson **for the Seventh Respondent**.

Advocate M. T. Jowitt **for the Eighth Respondent**.

Authorities

Federal Republic of Brazil et al -v- Durant International et al [2012] JRC 211 .

Attorney General for Hong Kong -v- Reid [1993] UKPC 2 .

Sinclair Investments (UK) Ltd -v- Versailles Trade Finance Ltd & Ors [2011] EWCA Civ 347 .

Lister -v- Stubbs [1890] 45 Ch 1 .

FHR European Ventures LLP & Ors -v- Ramsey Neil Mankarious & Ors [2013] EWCA Civ 17 .

Grimaldi v Chameleon Mining NL (No 2) [2012] FCAFC 6 .

State of Qatar v Al Thani [1999] JLR 118 .

Trust — declaration sought that the trust fund is held by the representor as constructive trustee for the Government of Mozambique.

THE COMMISSIONER:

1 The representor, formerly known as Lloyds TSB Offshore Trust Limited, ("Lloyds TSB") is the trustee of the Jersey law governed discretionary trust known as the Rex Trust ("the Trust"). The settlor of the Trust is the first respondent, Mr Carlos Fragoso ("Mr Fragoso") and the class of beneficiaries comprises his wife, who is the second respondent, and his three children, who are the third, fourth and fifth respondents. Mr Hoy has been appointed to represent the minor, unborn and unascertained beneficiaries of the Trust. The trust fund is currently valued at some £402,000.

2 Lloyds TSB has reason to believe that the property held within the Trust is comprised of the proceeds of crime, namely bribes paid to Mr Fragoso by an English company, Mabey & Johnson, a UK construction company, in return for the award of civil engineering contracts in Mozambique where it transpires he held public office.

3 The Trust was established in Jersey on 15th February, 1999. Mr Fragoso described himself as a civil engineer and informed Lloyds TSB that the funds settled into the Trust were the proceeds of civil engineering consultancy contracts which he had worked on over the last

twenty years, predominantly in the United States, Swaziland and South Africa. He did not disclose that he held public office in Mozambique.

4 In 2010, it came to the notice of Lloyds TSB that Mabey & Johnson had been convicted in England of paying bribes in Ghana and Jamaica, in order to obtain construction contracts. The opening statement of prosecution counsel revealed the following:–

> (i) In 2007 to 2008 Mabey & Johnson was involved in proceedings brought by it against former employees in the Chancery Division of the High Court in England and Wales. The Company's claim was for breach of contract arising out of the alleged taking of secret profits.
>
> (ii) In the course of a defence served by the former employees in those proceedings allegations were made of a widespread practice by Mabey & Johnson of making payments by way of bribes to foreign officials in order to obtain contracts in the countries where those officials operated.
>
> (iii) As a result of the information disclosed by one of the former employees, Mabey & Johnson commenced an investigation which was carried out by its lawyers, Herbert Smith. That investigation revealed the following, as far as the company's activities in Mozambique were concerned:–
>
> > (a) Between 1995 and 1999 Mabey & Johnson received sales revenues worth around £6m from contracts in Mozambique.
> >
> > (b) Mr Fragoso was national director of the National Directorate of Roads and Bridges in Mozambique. Subsequently he appears to have been chairman of National Roads Administration.
> >
> > (c) Representatives of Mabey & Johnson met with Mr Fragoso and another and discussed the extension of a contract for spare parts in Mozambique.
> >
> > (d) An export agent's commission card for Mozambique in the name of “C Fragoso” covering the period 23 rd August, 1997, to 10 th April, 2000, was discovered.
> >
> > (e) Between 14 th October, 1997, and 10 th March, 2000, a total of £286,978.54 was paid by Mabey & Johnson into a Swiss bank account relating to Mr Fragoso.
>
> (iv) As a result of the findings of the Herbert Smith investigation, Mabey & Johnson self-reported to the Serious Fraud Office in London. The SFO began its own investigation which culminated in proceedings against the company. It pleaded guilty at Southwark Crown Court on 25th September, 2009, and was ordered to pay £6.6M in fines.
>
> (v) The matters relating to Mabey & Johnson's activities in Mozambique did not form

the basis of any charge to which the company pleaded guilty but in the opening statement of the prosecution this was said:– “For the purposes of illustrating the pervasive historical picture, the Company accepts and admits that in four other jurisdictions — Angola, Bangladesh, *Madagascar and Mozambique — corrupt payments were made direct to elected or appointed public officials.”*

5 In the light of this information, Lloyds TSB submitted a Suspicious Activity Report to the Jersey Financial Crimes Unit at the beginning of May, 2010.

6 Lloyds TSB informed Mr Fragoso of its concerns and required him to provide evidence as to the source of the funds, and specifically, that the funds were not the proceeds of crime. Without going into the detail of correspondence, he has failed to do so. On 17 th December, 2011, Mr Fragoso e-mailed Lloyds TSB requesting that the existence of the Trust should not be disclosed to his wife and children, whatever the future of the Trust.

7 Lloyds TSB issued its representation on 8 th November, 2012. Service was effected on his family and on 19 th May, 2013, the Court received an e-mail from Mr Fragoso's wife and two of his children (the third child Raquel is a minor), stating that they were not aware of the existence of the Trust, had no part at all in its establishment and expressed no interest in it. Neither they nor Mr Fragoso appeared in the proceedings.

8 Both Lloyds TSB and the Government of Mozambique seek an order that the trust fund, net of costs, be paid to the Government of Mozambique. Mr Hoy, for the minor, unborn and unascertained beneficiaries, having considered the evidence filed by the Government of Mozambique, to which we refer below, submitted that the only proper and cogent argument that could be put on behalf of the minor unborn and unascertained beneficiaries in the circumstances is that the beneficiaries named in the Trust can have no beneficial entitlement to assets which are the proceeds of crime. The taint of criminality was sufficient to deprive those he represented of any beneficial entitlement to the funds held by Lloyds TSB.

9 The Government of Mozambique have been able to obtain further documents from the Mozambique National Roads Administration (ANE) of which Mr Fragoso was formerly the director and also from Mabey & Johnson, through their solicitors.

10 In a letter dated 7 th August, 2013, Atnasio Mugunhe, the Director-General of the ANE, confirmed that Mr Fragoso had served as National Director in the National Directorate of Roads and Bridges (“DNEP”) — which was ANE's predecessor organisation — from August 1997 to July 1999. Between July 1999 and November 2003 Mr Fragoso was President of the Board of Directors of ANE.

11 Mr Mugunhe's letter attaches a schedule setting out some of the contracts concluded by Mr

Fragoso in this capacity. There are some 37 contracts listed, and it is plain that they were of substantial value.

12 Angelo Matusse, the Deputy Attorney General of Mozambique, has confirmed verbally his understanding, from conversations with officials at ANE, that Mr Fragoso did not have any legitimate source of income during this period other than his salary, which was in the amount of 43,426,500 old Meticals per month, plus a monthly telephone allowance of 4,000,000 old Meticals, which at the material time was equivalent to 1,500 Euros per month.

13 The information provided by the Government of Mozambique is starkly at odds with what Mr Fragoso informed Lloyds TSB when the Trust was established and funds settled. Far from being a civil engineer, practising in a number of countries, he had been employed as a senior civil servant in Mozambique during which time he had had no other legitimate source of funds other than his salary.

14 On 4 th April, 2013, Mr Fragoso wrote to the Court accepting his position as a public officer and saying this:–

> *"3.3.10 My Rule in the contract*
>
> *a) Like DNEP, I did not follow any step of the procurement process.*
>
> *b) Like DNEP, I did not give any recommendation and I was not requested to give any advice or comment in the steps of the procurement process.*
>
> *c) I had no contact with Crown Agent or any of his officials on this issue, before, during and after the procurement process.*
>
> *d) I did not request Crown Agent or any of his officials to give any support or special treatment for Mabey & Johnson in the procurement process.* This kind of request is irresponsible when you deal with a big and reputable organization like Crown Agent.
>
> *3.3.11 Bribe payment of 267,000£*
>
> *a) Mabey & Johnson claims to have paid me a bribe of some 267,000£ for this contract.*
>
> *b) This is some 10% of the price contract while in the prosecution note you find allegation of M & JU that 5% is too much.*
>
> *c) It is hard to understand the reason of such big payment for so little role that I had in the contract and a zero role that I had in the procurement process, particularly in the time that we decided not to purchase more metallic bridges.*
>
> *d) I was not paid a bribe due to this contract.*

3.4 Origin of funds

a) To prove origin of funds after ten years or more is not an easy task. It seems that the banks are not able to give information so old like that.

b) This is a hard task that I am still carrying out but I cannot promise results and dates."

15 This denial of the receipt of any bribe from Mabey & Johnson is shown by the documentary evidence adduced by the Government of Mozambique to be untrue. In summary:–

(i) Mabey & Johnson have produced a copy of the "Export Agent's commission card" covering the period from 26 th August, 1997, to 10 th April, 2000, showing six payments to Mr Fragoso totalling £294,523.44 described as *"commission".*

(ii) Mabey & Johnson have produced copy CHAPS instructions for two of the payments to the account of Mr Fragoso at UBS in Switzerland. The first payment of £105,944.76, which was made on 12 th February, 1999, can be traced through Mr Fragoso's Swiss account with UBS to his account with Lloyds TSB in Jersey and from there to the Trust. The second payment for which there is a CHAPS instruction was made after the Trust was funded.

(iii) The statements of Mr Fragoso's account with Lloyds TSB in Jersey show that it was in receipt of £248,070.31 from his account with UBS Switzerland (which included the sum of £105,944.76) on 24 th February, 1999, and a further £246,700.38 from his account with Credit Suisse in Switzerland on 17 th May, 1999. On 11 th June, 1999, Mr Fragoso transferred £511,449.77 from his Lloyds TSB Jersey account to the Trust.

16 The commissions shown on the export card as having been paid to Mr Fragoso prior to the funding of the Trust total £153,516.71, indicating that the balance of the funds paid into the Trust were derived either from Mabey & Johnson in respect of other contracts for which no documentation has been found, or from a different source. The prosecution statement in the criminal proceedings brought against Mabey & Johnson says at paragraph 170:–

"M & J no longer has all the documentary records relating to its work in Mozambique … but the documentation it has produced shows without doubt, in our view, that Mr Fragoso was in receipt of bribes."

17 As Commissioner Page noted in *Federal Republic of Brazil et al -v- Durant International et al* [2012] JRC 211 at para 226:–

"As to the inferences of fact drawn from positive evidence of other facts (as opposed to silence), there is in principle nothing impermissible or, as Mr Steenson suggested, "dangerous" about relying on such a process of reasoning where the evidence warrants it. The process is an established

feature of litigation in this Court — as in English law and practice — and a common one in cases of fraud where direct evidence can be hard to come by."

18 It is true that it is not possible to trace all of the funds within the Trust back to Mabey & Johnson, but we find that, on the balance of probabilities, all of the funds within the Trust represent bribes received by Mr Fragoso in his role as a public officer for Mozambique for the following reasons:–

(i) Mr Fragoso lied to Lloyds TSB both as to his occupation and the source of the funds when the Trust was established.

(ii) There is clear documentary evidence of bribes being paid by Mabey & Johnson to Mr Fragoso and of those bribes being settled into the Trust.

(iii) Mr Fragoso attempted to stop his family being informed of the existence of the Trust, but when they were informed, they denied any knowledge of it and have not asserted any interest in it.

(iv) Mr Fragoso has lied in his correspondence with the Court by denying any receipt of bribes from Mabey & Johnson.

(v) Mr Fragoso has failed to produce any evidence as to the source of the remaining funds within the Trust which cannot be traced back to Mabey & Johnson, notwithstanding that he has had very considerable time in which to do so. He has not even proffered an explanation as to why those remaining funds may have been derived from a legitimate source.

(vi) Given the above and that his only legitimate source of income during the material period was his salary, it is reasonable to infer that all of the monies paid offshore into the Trust were derived from his abuse of his position as a public officer of Mozambique, whether through contracts with Mabey & Johnson or otherwise.

19 Lloyds TSB and the Government of Mozambique seek a declaration that the trust fund is now held by Lloyds TSB as constructive trustee for the Government of Mozambique and this on the authority of the decision of the Privy Council in *Attorney General for Hong Kong -v- Reid* [1993] UKPC 2. That case involved an appeal from a decision of the Court of Appeal of New Zealand. The judgment of the Court was delivered by Lord Templeman, who said this:–

"When a bribe is offered and accepted in money or in kind, the money or property constituting the bribe belongs in law to the recipient. Money paid to the false fiduciary belongs to him. The legal estate in freehold property conveyed to the false fiduciary by way of bribe vests in him. Equity however which acts in personam insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. The provider of a bribe cannot recover it because he committed a criminal offence when he paid the bribe. 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. In the present case, as soon as Mr. Reid received a bribe in breach of the duties he owed to the Government of Hong Kong, he became a debtor in equity to the Crown for the amount of that bribe. So much is admitted. But if the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe. As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was ***received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.*** Two objections have been raised to this analysis. First it is said that if the fiduciary is in equity a debtor to the person injured, he cannot also be a trustee of the bribe. But there is no reason why equity should not provide two remedies, so long as they do not result in double recovery. If the property representing the bribe exceeds the original bribe in value, the fiduciary cannot retain the benefit of the increase in value which he obtained solely as a result of his breach of duty. Secondly, it is said that if the false fiduciary holds property representing the bribe in trust for the person injured, and if the false fiduciary is or becomes insolvent, the unsecured creditors of the false fiduciary will be deprived of their right to share in the proceeds of that property. But the unsecured creditors cannot be in a better position than their debtor. The authorities show that property acquired by a trustee innocently but in breach of trust and the property from time to time representing the same belong in equity to the cestui que trust and not to the trustee personally whether he is solvent or insolvent. 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 is solvent or insolvent.

When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases 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 increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty."

20 The English Court of Appeal in *Sinclair Investments (UK) Ltd -v- Versailles Trade Finance Ltd & Ors* [2011] EWCA Civ 347 has declined to follow *Reid* applying the Court of Appeal decision in *Lister -v- Stubbs* [1890] 45 Ch 1. Whether the Jersey Court should follow *Reid* or *Sinclair* was raised in *Brazil* where Page, Commissioner, said this:–

"183. As to the law in relation to bribes, Mr Steenson submitted that *Sinclair* , ***in which the English Court of Appeal declined to follow*** *Reid* ***and***

held that there is normally no proprietary claim to a bribe by the party to whose detriment it has been paid, was the sounder of the two decisions and the more appropriate one for Jersey law to follow.

184. Were it necessary for us to decide the point we would have been inclined to agree with Mr Baker and would have applied *Reid* , ***this court not being constrained in the way that Lord Neuberger M.R. and the other members of the court in*** *Sinclair* ***evidently felt bound by a long line of authority including five Court of Appeal decisions. Moreover, the composition of the court in*** *Reid* ***(Lords Templeman, Goff, Lowry and Lloyd, and Sir Thomas Eichelbaum) reflected a notable breadth of jurisprudential experience. As Lawrence Collins J., later a Justice of the Supreme Court, put it in*** *Daraydan holdings & Ors.* V Solland International Ltd. [2005] Ch. 199 ***(a pre-*** *Sinclair* ***decision), in declaring that he would have followed*** *Reid* ***had he not been able to distinguish*** *Lister v Stubbs*, ***"There are powerful policy reasons for ensuring that a fiduciary does not retain gains acquired in violation of fiduciary duty .." (para. 86)***.

185. But the dichotomy posted by these two decisions has no bearing on the present case. In both *Sinclair* ***and*** *Reid* ***the bribe came from a source other than the victim's assets."***

21 In the case before us, the bribes have come from Mabey & Johnson, or at any rate a source other than Mozambique.

22 *Sinclair* has been considered more recently by the English Court of Appeal in *FHR European Ventures LLP & Ors -v- Ramsey Neil Mankarious & Ors* [2013] EWCA Civ 17, a case in which an agent acting for purchasers of a hotel negotiated a secret commission from the seller. There was no challenge to the basic principle that a fiduciary is not entitled to profit from a breach of his fiduciary duty. The only issue before the Court was whether the purchasers' remedy against the agent is a personal remedy or a proprietary one. *Sinclair* was described as ***"a highly controversial decision"*** made on facts which in this area of law were ***"highly unusual"***, but as a matter of judicial hierarchy, the Court of Appeal was bound to accept the decision in *Sinclair* and the conclusion in that case that *Lister* was correctly decided; whether or not *Sinclair* and *Lister* were correctly decided would be a matter for the Supreme Court.

23 Pill LJ, described Lord Neuberger's analysis in *Sinclair* as follows:–

"Lord Neuberger's analysis in paragraphs [88] and [89] of *Sinclair Investments* ***divides into three broad categories the situations in which a fiduciary obtains a benefit in breach of fiduciary duty.*** The first category ("Category 1") is where the benefit is or was an asset — belonging beneficially to the principal (most obviously where the fiduciary has gained the benefit by misappropriating or misapplying the principal's property). The second ***category ("Category 2") is where the benefit has been obtained by the fiduciary by***

taking an advantage of an opportunity which was properly that of the principal. The third category ("Category 3") is all other cases. According to the analysis and conclusion of Lord Neuberger, the situations in Categories 1 and 2 give rise to a constructive trust, but those in Category 3 do not. The issue in the present case arises out of the difficulty of ascertaining the borderline between Category 2 and Category 3."

24 On the facts of that case, it was found that it fell within Category 2, giving rise to a constructive trust. At paragraph 116, Pill LJ said that the case:–

> ***"…throws into clear relief, however, the very considerable difficulties inherent in the analysis in*** *Sinclair Investments* ***and the decision in*** *Lister* ***in marking the borderline between cases in Category 2 and those in Category 3.*** This has made the law more complex and uncertain and dependent on very fine factual distinctions. If the law is to be made simpler and more coherent, but *Sinclair Investments* ***and*** *Lister* ***correctly represent the law, then that suggests a need to revisit the very many longstanding decisions in Category 2 cases and to provide an overhaul of this entire area of the law of constructive trusts in order to provide a coherent and logical legal framework.*** If that can be done at all by the courts, rather than Parliament, it can only be accomplished by the Supreme Court. That indicates a need for informed debate and ultimately determination by the Supreme Court: (1) whether *Sinclair Investments* ***was right to decide that*** *Lister* ***is to be preferred to*** *Reid* ; ***(2) in terms of constructive trusts and proprietary relief for breach of fiduciary duty, what are the principles to distinguish opportunity cases within Category 2 and those within Category 3; (3) what is the true jurisprudential nature of the constructive trust in this (and by necessary other) areas of the law, including whether it is — or should be — an institutional trust at all or something else.*** In considering those matters, there are important issues of policy, and the relative importance of different policies, to assess, including deterring fraud and corruption; the ability to strip the fiduciary of all benefits, including increases in the value of benefits, acquired by breach of duty, and vehicles or third parties through which those benefits have been channelled; the importance attached to the protection of those to whom fiduciary duties are owed; and the position of other creditors on the fiduciary's insolvency who may be prejudiced by a constructive trust or proprietary relief in favour of the fiduciary's principal but who, in the absence of such a trust and relief, would benefit from increases in value of assets acquired by the fiduciary's fraud, corruption or wrongdoing. It will also be necessary to bear in mind the international perspective applying to this area of trust law and equity, to which I have referred earlier in this judgment."

25 At paragraph 80, Pill LJ observed that the full Federal Court of Australia in *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 has refused to follow the decisions in *Sinclair* and *Lister*, giving important policy and other reasons for preferring the decision and reasoning in *Reid*. Moreover, he observed that the law in England and Wales now differs

on this matter, not only from Australia but also New Zealand, Singapore, Canada and some jurisdictions in the United States. He added:–

> ***"It also has to be borne in mind that, in addition to the United Kingdom's overseas territories and crown dependencies, there are many current and former Commonwealth countries for which the final court of appeal is the Privy Council, which gave the decision in*** *Reid* ***and to which other countries look to provide a lead on specialist areas such as trust law and equity."***

26 In *Reid*, the courts of New Zealand had been similarly constrained by a number of precedents of the New Zealand, English and other common law courts, which established a settled principle of law inconsistent with the Privy Council's analysis, but that settled principle was open to review by the Privy Council. It analysed that case law and in particular, the decision in *Lister* (upon which *Sinclair* was based) as follows:–

> ***"It has always been assumed and asserted that the law on the subject of bribes was definitively settled by the decision of the Court of Appeal in*** *Lister & Co. v Stubbs* [1890] 45 Ch.D. 1 .
>
> ***In that case the plaintiffs*** , *Lister & Co.*, ***employed the defendant, Stubbs, as their servant to purchase goods for the firm.*** Stubbs, on behalf of the firm, bought goods from*Varley & Co.****and received from****Varley & Co.****bribes amounting to £5,541.*** The bribes were invested by Stubbs in freehold properties and investments. His masters, the firm*Lister & Co.*, ***sought and failed to obtain an interlocutory injunction restraining Stubbs from disposing of these assets pending the trial of the action in which they sought inter alia £5,541 and damages.*** In the court of Appeal the first judgment was given by Cotton LJ, who had been party to the decision in*Metropolitan Bank v Heiron* (1880) 5 Ex.D. 319. ***He was powerfully supported by the judgment of Lindley LJ and by the equally powerful concurrence of Bowen LJ.*** Cotton LJ said at page 12 that the bribe could not be said to be the money of the plaintiffs. He seemed to be reluctant to grant an interlocutory judgment which would provide security for a debt before that debt had been established. Lindley LJ said at page 15 that the relationship between the plaintiffs, *Lister & Co.*, ***as mastersand the defendant, Stubbs, as servant who had betrayed his trust and received a bribe:–***
>
> > ***'…is that of debtor and creditor; it is not that of trustee and cestui que trust.*** We are asked to hold that it is — which would involve consequences which, I confess, startle me. One consequence, of course, would be that, if Stubbs were to become bankrupt, this property acquired by him with the money paid to him by Messrs. Varley would be withdrawn from the mass of his creditors and be handed over bodily to *Lister & Co.* ***Can that be right?*** Another consequence would be that, if the appellants are right , *Lister & Co.****could compel Stubbs to account to them, not only***

> ***for the money with interest, but for all the profit which he might have made by embarking in trade with it.*** Can that be right?'
>
> ***For the reasons which have already been advanced their Lordships would respectfully answer both these questions in the affirmative.*** If a trustee mistakenly invests moneys which he ought to pay over to his cestui que trust and then becomes bankrupt, the monies together with any profit which has accrued from the investment are withdrawn from the unsecured creditors as soon as the mistake is discovered. A fortiori if a trustee commits a crime by accepting a bribe which he ought to pay over to his cestui que trust, the bribe and any profit made therefrom should be withdrawn from the unsecured creditors as soon as the crime is discovered.
>
> ***The decision in*** *Lister v Stubbs* ***is not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it and that equity regards as done that which ought to be done.*** From these principles it would appear to follow that the bribe and the property from time to time representing the bribe are held on a constructive trust for the person injured. A fiduciary remains personally liable for the amount of the bribe if, in the event, the value of the property then recovered by the injured person proved to be less than that amount."

27 It is only decisions of the Privy Council on appeals from this jurisdiction that formally bind this Court. As Bailhache, then Bailiff, said in *State of Qatar v Al Thani* [1999] JLR 118 at page 126:–

> ***"The court is not bound by the decisions of the Judicial Committee of the Privy Council sitting on appeal from some other jurisdiction.*** Authority for that proposition stems not only from the conclusion at which we have arrived ***having regard to the nature of the doctrine of precedent in Jersey but also, and more succinctly, from the judgment of the Court of Appeal in*** *Hall v Att.* Gen . ***(4) where Gloster, JA stated*** (1996 JLR at 148):
>
> > ***'The appellant now contends that*** *Kong* ***Cheuk Kwan, as a decision of the Privy Council, is binding upon this court.*** We reject that submission. The decisions of the Privy Council, in so far as they decide the law of Jersey, are of course binding on all Jersey courts. But a decision of the Privy Council which decides the law of Hong Kong, New Zealand or any other country is not binding. Such decisions are persuasive, but the degree of persuasiveness will depend on the similarity of the point of issue between the law of Jersey and the law of the country from which the appeal is being brought.'
>
> ***We would respectfully add that the degree of persuasiveness may also depend upon social and policy considerations particular to this***

jurisdiction."

28 It seems to us that the decision of the Privy Council in *Reid*, unconstrained as it was by precedent and in particular *Lister*, is of the highest degree of persuasiveness and should be accorded greater weight than a decision of the English Court of Appeal, which found itself constrained by precedent which it said made the law more complex and uncertain and dependent upon very fine factual distinctions. Furthermore, there are important reasons of policy for this Court to follow *Reid*, namely the need to deter fraud and corruption and to have the ability to strip fiduciaries who have channelled their illicit funds through this jurisdiction of all benefits.

29 We therefore declare that Lloyds TSB is holding the trust fund of the Trust net of any costs that we may order to be paid out of those funds, upon constructive trust for the Government of Mozambique. That declaration having been made, these funds no longer represent the proceeds of crime and Mr Jowitt, for the Attorney General, whose assistance on this matter is much appreciated, has confirmed that there is no bar to the same being paid to the Government of Mozambique.