

JUDGMENT : MR JUSTICE LAWRENCE COLLINS: Ch.Div : 26<sup>th</sup> March 2004.

### I Introduction

1. This case is concerned with an allegation of bribes or secret commissions. Bribery is an evil practice which threatens the foundations of any civilised society: Lord Templeman in *AG for Hong Kong v Reid* [1994] 1 AC 324, at 330. It corrupts not only the recipient but the giver of the bribe.
2. Mr Khalid, the fifth defendant, extracted from Mr and Mrs Solland and their companies (the first to fourth defendants) about £1.8 million between 1997 and 2001, which represented a 10% commission on receipts from contracts with the claimants for the luxurious refurbishment of properties in London and Qatar.
3. The proceedings against Mr and Mrs Solland and their companies have now been settled, and the issues for decision are whether Mr Khalid is accountable to the claimants, and in particular whether the claimants are entitled to an order that he holds the payments on constructive trust. That question in turn depends on whether the controversial decision in *Lister & Co v Stubbs* (1890) 45 Ch D 1 continues to have any life after the decision of the Privy Council in *AG for Hong Kong v Reid* [1994] 1 AC 324, and (if so) whether it applies in the present case.

### II The parties and their advisers

4. Sheikh Mohammed, the third claimant, holds the rank equivalent to the Deputy Prime Minister of Qatar and is Special Adviser to his brother, the Emir of Qatar. The other claimants are corporate vehicles for the holding of his property interests in England. The first claimant ("Daraydan") is incorporated in Jersey. Its shares are ultimately owned by a Jersey Trust, the Marsh Trust, of which Sheikh Mohammed is the settlor and a discretionary beneficiary. Its directors are appointed by what is now Standard Chartered Grindlays Trust Corporation (Jersey) Ltd (formerly ANZ Grindlays Trust Corporation (Jersey) Ltd) which is a Jersey company providing offshore trustee and corporate services ("SCG Jersey"). The other claimants ("Cairn", "Theebah", "Landmark" and "Northwest") are incorporated in the Isle of Man and Sheikh Mohammed is the beneficial owner of their shares.
5. Sheikh Sultan is a senior adviser to, and confidant of, Sheikh Mohammed. Sheikh Sultan is based in Qatar, and he has worked for Sheikh Mohammed since 1990, and is the director of Sheikh Mohammed's private office. He is also the chairman and chief executive officer of Qatar Industrial Services Establishment Ltd ("QIS"), a holding company set up to own and operate Sheikh Mohammed's industrial, trading and engineering concerns in Qatar. Mr Izzat Dajani, who joined QIS in January 1998, reports to Sheikh Sultan.
6. The third and fourth defendants ("Mr and Mrs Solland") are United Kingdom nationals and are resident in England. Mr Solland is of Iranian origin and has lived in the United Kingdom since 1965. Mrs Solland studied architecture and design, and has considerable experience as an interior designer and project manager. Together Mr and Mrs Solland own and control the second defendant, Solland Interiors Ltd ("Interiors"), an English company which carried on business as a design and refurbishment company from South Audley Street, in Mayfair, London W1.
7. The first defendant, Solland International Ltd ("International"), is a BVI company which was incorporated on the instructions of Mr Solland in September 1997 and has its administration and bank account in Zurich. International's shares are owned by an off-shore trust, the Ramat Gan Trust (also set up on the instructions of Mr Solland), of which Mr and Mrs Solland (and their son) are discretionary beneficiaries. International's board of directors is provided by Sinitus Treuhand AG ("Sinitus"), a Swiss company which provides professional services to off-shore companies. Two of its directors are Mr Ueli Werthmueller (who has been a director of International since 1997) and Mr Urs Meisterhans (who joined Sinitus in July 1999 and has been a director of International since November 2001). Mr Werthmueller was to give evidence in the trial, but was not well enough to attend, and Mr Meisterhans gave evidence instead.
8. The fifth defendant ("Mr Khalid") is a United Kingdom national of Syrian origin, who was resident in England at all relevant times until January/February 1998 and who then divided his time between

England and Qatar whilst working for Sheikh Mohammed and his companies until his dismissal or suspension in July 2002.

9. The sixth defendant ("Mrs Al-Attiya") is Mr Khalid's sister and the seventh defendant ("Mr Al-Attiya") is his nephew. Both are resident in Qatar.
10. Mr Malcolm Melbourne ("Mr Melbourne") is an accountant, whose firm (Jayson Newman) audited the accounts of Interiors. Mr Martin Paisner ("Mr Paisner") is a solicitor, and a senior partner of what is now Berwin Leighton Paisner, and he advised Mr and Mrs Solland in relation to their personal affairs, and advised on the incorporation of International. He introduced them to Mr Stuart Gerber ("Mr Gerber"), an accountant and a partner in BDO Stoy Hayward, when the Inland Revenue began to raise questions on the relationship between Interiors and International.

### **III Contracts with the claimants, the payments to Mr Khalid, and these proceedings**

11. In January 1997, after discussions between (in particular) Mrs Solland, Sheikh Mohammed, Sheikh Sultan, and Mr Khalid, Cairns and Interiors entered into what became the first of several contracts between the claimants and Interiors and International for the refurbishment of properties owned by the claimants in England and in Qatar. It was followed by other contracts, under which more than £20 million was paid by the claimants to Interiors or International. The most substantial contracts related to the refurbishment of Lombard House, Curzon Street, which Daraydan bought in 1997 for £14 million for the use of Sheikh Mohammed and his family as a private residence on their visits to London. Although originally built as a private residence it had been converted for use by a bank (ultimately National Westminster Bank), and required substantial stripping out and renovation for reversion to private use.
12. Between January 1997 and June 2000, the following contracts ("the Contracts") were entered into between the claimants and Interiors or International in relation to the following properties (together with the amounts paid to Interiors or International):
  - (a) On about January 17, 1997, a refurbishment contract between Cairn and Interiors for 27 Grosvenor Hill Court (the "Grosvenor Hill Court contract"): £632,737.
  - (b) On November 11, 1997, a written refurbishment and furnishing contract between Northwest and Interiors for 28 Charles Street (the "28 Charles Street contract"): £390,000.
  - (c) On January 21, 1998, a written contract for design services and strip-out work between Daraydan and International for Lombard House, Lombard Street (the "Lombard House Phase 1 contract"): £936,670.
  - (d) In July 1998, a refurbishment contract between Theebah and International for 46 Green Street (the "46 Green Street Contract"): £92,237.
  - (e) In July 1998, an agreement (evidenced by letter dated July 2, 1998) between Sheikh Mohammed and International) for design services in relation to a farmhouse in Al-Shahaniya, Qatar, (the "Qatar Farmhouse Design Contract"): £127,200.
  - (f) In March 1999, a written contract for the refurbishment and furnishing of 28A Charles Street between Landmark and International ("the 28A Charles Street Contract"): £486,566.
  - (g) March 5, 1999: a written contract for the refurbishment of Lombard House between Daraydan and International (the "Lombard House Main Contract"): £12,670,161.
  - (h) July 26, 1999: a written contract for the supply of goods and furnishings to Lombard House between Daraydan and International (the "Lombard House Supply of Goods Contract"): £3,910,237.
  - (i) June 16, 2000: a written contract for the supply of goods and refurbishment to a farmhouse in Al-Shahaniya, Qatar between Sheikh Mohammed and International (the "Qatar Farmhouse Main Contract"): £1,153,991.
13. Mr and Mrs Solland procured the payment by Interiors or International to Mr Khalid (or his nominees) of 10% of payments made by the claimants to Interiors and International, and between January 31, 1997 and October 22, 2001 about £1.8 million was paid to him by Interiors or International, or to Mrs Al-Attiya or to Mr Al-Attiya on his instructions.

14. The claimants were informed of these payments by a letter sent by Sinitus (to which I shall refer below) on May 15, 2002, and after correspondence between solicitors, proceedings were commenced by the claimants.
15. In these proceedings the claimants claimed against all the defendants an account of all secret commissions, an order for restitution of the secret commissions, a declaration that they were received on resulting or constructive trust and that the claimants were entitled to trace, an account of profits, and damages for deceit or conspiracy to defraud. Daraydan also sought a declaration that the Lombard House contracts were void or voidable, and had had been validly avoided and/or rescinded, or they were void or unenforceable for illegality or public policy.
16. In the course of the trial I heard substantial oral evidence, from (in particular) Mr and Mrs Solland, Sheikh Sultan, Mr Dajani, Mr Paisner, Mr Melbourne, Mr Gerber, and Mr Meisterhans. Written evidence from Sheikh Mohammed and the directors of Daraydan, and from Mr Werthmueller, was admitted without objection. The evidence of the directors of Daraydan, and of Sheikh Mohammed, was that they knew nothing of the commission payments until they were disclosed in the letter from Sinitus of May 2002. Following the trial, a compromise was arrived at between the claimants and Interiors, International and Mr and Mrs Solland.
17. Mr Khalid ceased to take an active role in these proceedings as from about October 2003. He failed to comply with directions for the service of evidence and did not attend the trial. His solicitors came off the record on November 20, 2003. A worldwide freezing order has been made in England, and freezing orders have been made in aid of these proceedings in Jersey and the Isle of Man. I was told that substantial sums in his foreign bank accounts have been frozen. Mrs Al-Attiya and Mr Al-Attiya did not acknowledge service, and default judgments have been entered against them.
18. By CPR Rule 39.3 the court may proceed with a trial in the absence of a party, but if a defendant does not attend, it may strike out his defence. By CPR 39PD 2.2, in the absence of the defendant the claimant may prove the claim at trial and obtain a judgment on the claim and for costs. In this case the claimants have elected to proceed with the trial rather than apply to strike out Mr Khalid's defence. Their principal reason is that they wish to have a reasoned judgment, since in some foreign countries it may be difficult to enforce a default judgment given without reasons.
19. Consequently I must satisfy myself that the claimants have proved their case against Mr Khalid. In so doing I will take account of Mr Khalid's defences, and also the evidence presented at the trial not only by the claimants, but also by the first to fourth defendants, and their cross-examination. If the claims against the first to fourth defendants had not been settled, I would have made detailed findings on the credibility of the witnesses where the facts were in dispute. I shall not do so in this judgment except in so far as it is necessary to deal with the claims against Mr Khalid. I found that all the witnesses who gave oral evidence were helpful, and gave truthful and frank evidence, with the exception of Mr and Mrs Solland and Mr Meisterhans. In many important respects they gave evasive and untruthful evidence, tailored to meet the defences and inconsistent with common sense and the documents.

#### **IV The claims against Mr Khalid**

20. The claimants seek against Mr Khalid: (a) an account of all secret commissions, monies and other benefits received by him in connection with the Contracts; (b) an order for restitution as money had and received of all secret commissions, monies and other benefits received in connection with the Contracts; (c) a declaration that all such secret commissions, monies and benefits were received by him on resulting or constructive trust for the relevant claimant and that the relevant claimant is entitled to trace into such commissions, monies and other benefits all assets acquired by or representing such monies; and an order for delivery up of all such monies or assets; and (d) damages for deceit or conspiracy to defraud by reason of his corrupt agreement with the first to fourth defendants that he would be paid a secret commission on all sums paid under the Contracts. The claimants seek restitutionary remedies against Mr Khalid because they wish to trace the proceeds of the bribes in the hands of recipients.
21. Mr Khalid's defences are these:

- (a) the claim against him was compromised by Mr Dajani, in return for him providing a witness statement for use against the first to fourth defendants, or that the agreement amounted to a forbearance on behalf of the claimants to sue him, for which good consideration was given, or that he acted to his detriment in reliance on the statement of Mr Dajani that no action would be taken against him, so that the claimants are estopped from bringing any claims against him;
- (b) he did not act as an agent/representative of any of the claimants or owe them any fiduciary duties. In particular, he denies that (i) he was employed by Sheikh Mohammed or any of the corporate claimants, or owes them any fiduciary duties; (ii) he negotiated any of the contracts, although he admits that in respect of some of the contracts he was instructed by Sheikh Sultan to liaise with the Sollands and to inspect and approve works for payment.
22. He says that he was unaware of the existence of Cairn or Northwest or Landmark at the time that the relevant contracts was entered into. He denies that he acted as their agent or representative or owed them any fiduciary duties, or that he negotiated the contracts. He admits that he initialled the pages of the draft contract for 28 Charles Street, but this was at Sheikh Sultan's direct instruction. He had no involvement with the negotiation and administration of the 46 Green Street contract, and did not negotiate with International in respect of a further proposed contract.
23. He denies he was employed or appointed by Daraydan as project manager for Lombard House Phase 1, and says that he was not aware that he was so identified in the contract. He denies that he acted as an agent or representative of Daraydan for the Lombard House Main Contract/Supply Contract. He denies that he assisted in the negotiation and administration of these contracts, or had any involvement in agreeing prices.
24. He denies that he assisted in negotiating the terms of the Qatar Farmhouse Design and Supply Contracts, which were negotiated by Sheikh Sultan and/or Sheikh Mohammed. He admits that, in the course of his employment, he administered the progress of the works, but he denies that he acted as Sheikh Mohammed's representative on site.
25. He accepts in relation to all of the projects that he was instructed by Sheikh Sultan to liaise with Mr and Mrs Solland and to inspect and approve certain works for payment.
26. If, contrary to his primary defence, it is found that he was employed by Sheikh Mohammed or otherwise acted for him in the capacity of an agent, he says that the relationship was governed by Qatari law, which allows an employee or agent to receive a commission from a third party contracting with his employer or principal, unless expressly forbidden by the terms of his contract of employment. He was therefore not prevented by any fiduciary duties owed to Sheikh Mohammed from receiving the commissions.
27. Mr Khalid claims that Mrs Solland made an unsolicited offer to pay him 10% of the contract price and she said that she wanted to do so in accordance with her understanding of Middle East custom, because of his participation in the performance of the Grosvenor Hill Court contract. He accepted her offer, and went on to receive similar payments in respect of the other contracts. He denies that by receiving these payments he was acting in breach of fiduciary duty or pursuant to a corrupt bargain. The payments were unsolicited and there was no further express agreement in relation to any of the other contracts.

**V The background: Grosvenor Hill Court and the Sollands**

28. In about August 1996, Sheikh Sultan was considering the purchase of 27 Grosvenor Hill Court, a three bedroom flat in Bourdon Street, Mayfair. Sheikh Sultan decided that Sheikh Mohammed needed a representative based in England to look after his property interests there. Mr Nasser Abu Hejleh (Sheikh Sultan's deputy at QIS) recommended Mr Khalid, who was then living in Hove, and who owned and ran a restaurant in Shoreham. Sheikh Sultan decided to retain Mr Khalid for a trial period on behalf of Sheikh Mohammed to deal with the acquisition and refurbishment of Grosvenor Hill Court.
29. Sheikh Sultan first heard about the Sollands from Mr Mohammed Al Okar (Grindlays Private Bank, Doha), as they had done some interior design work for him in the past. Mr Khalid made two visits to

their showroom in October 1996 on his own. On his second visit, Mr Khalid told Mrs Solland that a flat was being purchased nearby in Mayfair and he wanted to make enquiries as to their work in interior design. About two weeks later Mr Khalid came with Sheikh Sultan. Soon after the meeting Sheikh Sultan and Mr Khalid took Mrs Solland to see the flat in Grosvenor Hill Court.

30. In a letter of October 24, 1996 Mrs Solland wrote to Mr Khalid to record that he had requested Interiors to produce an interior design scheme for the flat. Fees would be £10,500 plus VAT, and should they be successful in obtaining the contract to carry out the works, the design fee would be deducted from the final contract sum. Sheikh Sultan's evidence was that he expected Mr Khalid to negotiate this price and that Mr Khalid quoted the final price that he could obtain.
31. According to Mrs Solland, at a meeting at the flat, and in telephone conversations, Mr Khalid told Mrs Solland that when preparing the costings for the scheme she should allow for or add a 10% commission on the contracts to be paid back to him, and she confirmed that she was doing so. She also understood that the question of the payments was to be kept discreet, and consequently she at no time mentioned them to Sheikh Mohammed or to Sheikh Sultan.
32. On November 6, 1996 Mr Khalid wrote to Mrs Solland and confirmed that Interiors should proceed with the design, and enclosed his personal cheque for half of the fee. On November 9 Sheikh Sultan gave instructions to Qatar National Bank to transfer money from Sheikh Mohammed's account to Mr Khalid to cover (inter alia) the design fees which he had paid.
33. In December 1996 Mr Khalid told Mrs Solland that the client wanted her to present the scheme to him at the Dorchester Hotel. Mr Khalid took her there to meet the client who she then discovered was Sheikh Mohammed. She went through the design and the costings with him. She presented budget costings of £690,300 (exclusive of VAT) at the meeting at the Dorchester Hotel, and she also prepared alternative costings totalling £538,500 on January 6, 1997. The contract was awarded to Interiors, and signed on about January 17, 1997, on the basis of the revised costings.

#### **VI Mr Khalid's contract of employment**

34. On January 21, 1997 Mr Khalid and Sheikh Sultan signed a contract of employment appointing Mr Khalid as Properties and Administration manager in Sheikh Mohammed's Private Office. Under this contract, Mr Khalid was under the following express obligation: "Confidentiality, Trust and Honesty are the basis of the Job....Attention to details and maximum cost efficiency in all involvements". The evidence was that the private office is one part of QIS; and foreigners who work in Sheikh Mohammed's private office are employees of Sheikh Mohammed who are sponsored (and not employed) by QIS, in order to obtain a residence and work visa.

#### **VII Payments in 1997 and the receipt**

35. During January-December 1997, commissions were paid at the direction of Mr Khalid to Mrs Al-Attiya in the form of seven cheques amounting to over £60,000.
36. According to Mr and Mrs Solland, Mr Khalid initially asked to be paid in cash. Apparently on the advice of Mr Melbourne in the course of the audit of Interiors' accounts, Mr Solland sought a receipt from Mr Khalid, which Mr Solland drafted. A receipt was signed by Mr Khalid on behalf of Mrs Al-Attiya on December 16, 1997 and given to Mr Solland, which recorded that the monies were "received for services rendered in order to procure contract from overseas client in respect of property in London".

#### **VIII Lombard House and other contracts**

37. In mid-March 1997 Sheikh Mohammed decided to buy Lombard House in Curzon Street for £14 million, for his family's use during visits to London.
38. Daraydan was incorporated in Jersey on March 20, 1997, and contracts were exchanged for the sale and purchase of Lombard House on March 24, 1997. On May 21, 1997 Daraydan appointed Sheikh Sultan to be liaison in respect of property matters for Lombard House.
39. At about this time Mr Khalid told Mrs Solland that there was a lot more work on the horizon. Mr and Mrs Solland said (in a letter from their solicitors dated June 21, 2002) that during the negotiations for

the Lombard House project, Mr Khalid told them that a 10% commission would be required for the Lombard House project and that receipts would not be given.

40. Mr Khalid supplied Mrs Solland with details of the first phase of work and accommodation requirements for Lombard House, and on May 16, 1997 she quoted £50,000 for the design phase, and for phase 2 between 8% and 10% of the total cost of the project. On September 12, 1997 Mrs Solland told Mr Khalid that she would telephone him in the next couple of days to update him with their progress on the costing of the Lombard House project. At a meeting on October 2, 1997 ANZ Grindlays (the bankers to Daraydan, and Sheikh Mohammed) were informed about progress on the refurbishment of Lombard House and were told by Mr Fraser Tennant (of QIS) that "the parties who visited the premises yesterday are at the top of the list and as such the very least they will commit to the refurbishment is £9.2 million with costings being prepared for works to be undertaken at a higher standard of finish which would result in a final cost of £14 million." This was a reference to Mr and Mrs Solland.

#### **IX Incorporation of International**

41. From May 1997 Mr Solland had discussions with Mr Paisner about the establishment of an off-shore trust to hold interests in a company which was to be established in Dubai to do business in the Gulf. Subsequently Mr Paisner advised that the company should be incorporated in the BVI, and on September 9, 1997 International was formed in the BVI. Mr Solland claimed that Mr Paisner advised him to set up a BVI company so that it could pay the "commissions" without giving receipts and that he set up International on the basis of this advice. In fact there is no reason to believe that Mr Paisner was told anything about the payments at this stage, but he was consulted again in early 1998, when he was told that Mr Khalid was obtaining a 10% commission as "Introducer of all business undertaken by Solland International."
42. Even though Mr and Mrs Solland did not tell Mr Paisner about the true purpose of the incorporation of International, they accepted at trial that the sole purpose of the establishment of International was to be able to pay the commissions secretly. On November 12, 1997 International had its first Board Meeting in Switzerland. The minutes show that Mr Solland explained that a big contract was looming from a member of the Qatari royal family and that "*commission must be paid to intermediaries*" and that it was "*impossible for a UK company to do this*" and that the "*engagement of [International] is necessary to make possible to meet commission payments*". On January 15, 1998, Mr Solland attended a further Board Meeting of International and was asked "what commission do the intermediaries want?". He informed the Board that the "*main intermediary*" wanted 10%.
43. In November and December 1997 there was correspondence between Messrs Paisners (acting for Solland) and Messrs Berwin Leighton (who were acting for Sheikh Mohammed) on the Lombard House letter of intent and contract. One of the matters discussed was Daraydan's requirement to have a project manager to look after its interests. Mrs Solland's position was that his role should be limited to checking on progress of the works and agreeing that stage payments were in accordance with the schedule of works. On December 16 or 17, 1997 Mr Khalid's name as project manager and planning supervisor was added to the draft.
44. On January 21, 1998, the Lombard House Phase 1 contract was signed between Daraydan and International and Mr Khalid was named as project manager. Subsequently (from July 1998 to June 2000) the other Contracts were entered into, including the Lombard House Phase 2 and Lombard House Supply of Goods Contracts in 1999.
45. From January 1998 all the payments to Mr Khalid or his nominees were made by International from Switzerland, even on contracts entered into by Interiors. The first payment by International was made on January 27, 1998 into Mr Al-Attiya's account, and other amounts were paid into his account subsequently. From June 1998 payments were made into Mr Khalid's account, but in October 2000, Mr Khalid instructed Mrs Solland that future commissions should be paid to Mrs Al-Attiya's account in Doha, and she passed this on to Mr Solland who informed International on November 1, 2000. About £250,000 was then paid to her account until the last payment in October 2001.

### **X The Inland Revenue Special Compliance Office investigation**

46. In 1999 the Inland Revenue wrote to Interiors querying the status of International and investigating whether it had been incorporated overseas to evade tax in the UK. The Revenue asked why International had been set up and why the contracts were not put with Interiors. In the course of that investigation, the Sollands' advisers informed the Revenue that the offshore structure was essential to paying the agent a 10% kickback to obtain the Lombard House contract; that International had been informed off the record that unless they agreed to make the commission payments they would not be successful in the tender for the contract; and that Sheikh Mohammed might be unaware of the commission arrangements.

### **XI Disputes over payments and discovery by the claimants of the payments**

47. Between 1999 and 2001, the Sollands faced difficulties over financing the Lombard House project. There were long delays in the completion of the project and the Sollands failed to complete the Lombard House project on time. The contract required them to complete the project by June 21, 2000, but completion was in fact only accomplished more than a year later. In June 2001, Mr Khalid helped the Sollands to obtain a £500,000 loan from Sheikh Mohammed to International to help them pay their subcontractors.
48. In the Autumn of 2001, International brought an adjudication claim against Daraydan (under the Housing Grants, Construction and Regeneration Act 1996) claiming an interim payment for monies due under the Lombard House Main Contract. On December 12, 2001, the adjudicator awarded International £684,000. In January 2002, International obtained summary judgment in the Technology and Construction Court on this award which Daraydan paid in February 2002. Until May 2002, International continued to pursue Daraydan for further monies allegedly owed under the Lombard House Main Contract. On May 22, 2002, International commenced adjudication proceedings against Daraydan claiming over £8m.
49. On May 15, 2002 Mrs Judith Hamburger wrote (in her capacity of in-house legal counsel and compliance officer) on behalf of Sinitus to SCG Jersey, which managed Daraydan. The letter stated that International had received various payments from Daraydan in relation to the Lombard House contracts, and that subsequently various substantial payments (approximately £2 million) had been made from the account of International to individuals who had connections to the ultimate beneficial owner of Daraydan, and that consequently it could not be excluded that payments were channelled back to the ultimate beneficial owner. The letter suggested that these might be questionable payments since the ultimate beneficial owner was a government official.
50. On May 27, 2002 Messrs Gouldens wrote on behalf of Daraydan to the Sollands' solicitors to say that Daraydan had no knowledge of any such payments, and that it was difficult to conceive of a legitimate purpose for the payments and the clear implication was that Daraydan had been defrauded by International or was the victim of a conspiracy between International and the recipient of payments. Gouldens subsequently alleged bribery and fraud, and threatened proceedings to obtain disclosure of the names of the associated third parties and the amounts of the bribes. The Sollands' solicitors then disclosed the payments. On June 24, 2002 Daraydan avoided the Lombard House Phase 1 and Phase 2 contracts, and these proceedings were commenced on July 12, 2002.

### **XII Legal principles**

51. An agent or other fiduciary who makes a secret profit is accountable to his or her principal or cestui que trust. There have been many cases in the development of the rules for civil liability for bribery of which perhaps the most important are *Panama & South Pacific Telegraph Co v India Rubber, etc Works Co* (1875) LR 10 Ch App 515; *Hovenden & Sons v Millhoff* (1900) 83 LT 41; *Reading v R* [1949] 2 KB 232, affd [1951] AC 507; *Mahesan v Malaysia Government Officers' Co-operative Housing Society* [1979] AC 374; *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256; and *AG for Hong Kong v Reid* [1994] 1 AC 324. The following principles can be distilled from the cases.
52. An agent should not put himself in a position where his duty and interest may conflict, and if bribes are taken by an agent, the principal is deprived of the disinterested advice of the agent, to which the

principal is entitled. Any surreptitious dealing between one principal to a transaction and the agent of the other is a fraud on the other principal. For this purpose sub-agents owe the same duty not to take bribes as agents, despite the absence of privity of contract between them and the principal: see *Bowstead and Reynolds on Agency* (17<sup>th</sup> ed Reynolds, 2001), para 6-085 and *Powell & Thomas v Evans Jones & Co* [1905] 1 KB 11, at 18 (CA).

53. In proceedings against the payer of the bribe there is no need for the principal to prove (a) that the payer of the bribe acted with a corrupt motive; (b) that the agent's mind was actually affected by the bribe; (c) that the payer knew or suspected that the agent would conceal the payment from the principal; (d) that the principal suffered any loss or that the transaction was in some way unfair: the law is intended to operate as a deterrent against the giving of bribes, and it will be assumed that the true price of any goods bought by the principal was increased by at least the amount of the bribe, but any loss beyond the amount of the bribe itself must be proved; (e) that the bribe was given specifically in connection with a particular contract, since a bribe may also be given to an agent to influence his mind in favour of the payer generally (e.g. in connection with the granting of future contracts).
54. The agent and the third party are jointly and severally liable to account for the bribe, and each may also be liable in damages to the principal for fraud or deceit or conspiracy to injury by unlawful means. Consequently, the agent and the maker of the payment are jointly and severally liable to the principal (1) to account for the amount of the bribe as money had and received and (2) for damages for any actual loss. But the principal must now elect between the two remedies prior to final judgment being entered: *Mahesan v Malaysia Government Officers' Co-operative Housing Society* [1979] AC 374, at 383. The third party may also be liable on the basis of accessory liability in respect of breach of fiduciary duty: *Bowstead and Reynolds*, para 8-221. The principal is also able to rescind the contract with the payer of the bribe.
55. In the normal case it is not difficult to determine whether the relationship is such as to give rise to a duty to account. In the present case the Sollands and Mr Khalid have denied that he was an agent or fiduciary. It is not always easy to delimit the scope of fiduciary relationships from arm's length relationships not involving a fiduciary duty: see, e.g. Oakley, *Constructive Trusts*, 3rd ed. 1997, pp 85-99; Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 4th ed 2002, pp 156-167. Very often the definitions are circular: e.g. *Ex p Dale & Co* (1879) 11 Ch D 772, at 778: a fiduciary relationship "is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*." In *Bristol and West Building Society v Mothew* [1998] Ch 1, at 18, Millett LJ said:  
"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."
56. In *Reading v R* [1949] 2 KB 232, at 236, Asquith LJ said that there is a fiduciary relationship whenever the plaintiff entrusts a job to be performed, for instance the negotiation of a contract, and relies on the defendant to procure for the plaintiff the best terms available (approved by Lord Porter [1951] AC 507, at 516).

### XIII Conclusions on liability

57. The principal issues with regard to Mr Khalid's liability are these:
- (a) whether he acted as an agent/representative of any of the claimants or owed them any fiduciary duties, and in particular whether he was employed by Sheikh Mohammed;
  - (b) whether (if he was an employee or agent of Sheikh Mohammed) he can rely on Qatari law, and if he can, whether its effect is that an employee or agent may receive a commission from a third party

- contracting with his employer or principal, unless expressly forbidden by the terms of his contract of employment;
- (c) whether Mr Dajani compromised the claim against him, or informed him that no action would be taken against him.
58. At the trial the case for the Sollands was that Mr Khalid was employed by QIS, and not by Sheikh Mohammed, and that he was not the claimants' fiduciary because, in particular, his role and responsibilities in relation to the Contracts was very limited. Their defence was that the claimants had exaggerated his role in order to support their case. His pay was low. He acted generally as a mere messenger, and he worked at a very low level. It was accepted that he would sometimes relay specifications but issues of any importance were dealt with by others, especially Mr Dajani. Mr Khalid did not have a discretion or the position to negotiate, and he did not negotiate prices. He checked that previously authorised works had been carried out, but he was only checking execution and not approving the work. Mr Khalid was totally unqualified to be project manager and does not appear to have carried out any such role, since he appears to have been in Doha for the majority of the project. He did not have authority to bind any of the claimants.
59. Sheikh Sultan's evidence was that Mr Khalid was relied on by him to identify contractors, obtain prices from contractors and then recommend/approve the appropriate contractor. Mr Khalid was expected to consider the price and then pass on his recommendation to Sheikh Sultan or Sheikh Mohammed for the final decision. Sheikh Sultan relied on him and would send him to ask for a discount or to instruct changes. Sheikh Sultan expected Mr Khalid to negotiate with the Sollands and to try to get the best prices – while the ultimate decision would be taken by Sheikh Mohammed as to whether or not to proceed with a particular transaction, Mr Khalid should have negotiated the contract to make it as good as possible. Sheikh Sultan expected him to negotiate with the Sollands in relation to Grosvenor Hill Court, 28 Charles Street and 28A Charles Street; he was the person who had been left by the claimants to try to lower the prices. Sheikh Sultan trusted Mr Khalid to conduct the negotiations on behalf of the claimants and assumed that he in fact did so.
60. I am wholly satisfied that, on any application of the concept of fiduciary, Mr Khalid was a fiduciary who extracted very substantial payments from the Sollands and their companies in return for his influence in obtaining and carrying out the Contracts. This is demonstrated by his own admissions; by statements made by the Sollands in these proceedings and in the adjudication proceedings; and by numerous documents. It is also confirmed by the evidence of Sheikh Sultan and Mr Dajani in these proceedings, and also by the evidence of Mr Meisterhans. Although it would make no difference to his liability whether it was he who solicited the payments, or Mrs Solland who offered them, there is no reason to doubt Mrs Solland's account that it was Mr Khalid who requested the payments, and no reason whatever to think that (as he contended) that it was Mrs Solland who volunteered to make the payments.
61. Mr Khalid himself, in a witness statement made on July 4, 2002, accepted that: "I have for a number of years acted as an assistant and adviser to both...Sheikh Mohammed and...Sheikh Sultan with both whom I travel and work closely. I deal with many of their affairs on a day to day basis and have advised and assisted them in most aspects of their dealings with Grazyna Solland and companies associated with her."
62. Mrs Solland, in the adjudication proceedings, described Mr Khalid as Sheikh Mohammed's representative, and as project manager for his projects in Qatar and for Stage 1 of the Lombard House project, and asserted that he gave her instructions and design briefs; and that he gave design instructions in relation to 28A Charles Street. In correspondence shortly before these proceedings were commenced, the Sollands' then solicitors described Mr Khalid as having negotiated the Lombard House contract, and as the agent of Sheikh Mohammed and Sheikh Sultan, and a representative of Daraydan.
63. The documents show that the Sollands and their advisers and associates thought that they would not have obtained the Contracts without making the payments to Mr Khalid. Mr Gerber was told on December 14, 2000 that they "*otherwise would not get the contract.*" The notes taken by the Inland

Revenue of a meeting record Mr Gerber as saying that *"it was essential to obtaining the contract to pay the clients agent a 10% kickback."* (February 7, 2001). The BDO Stoy Hayward draft report to the Inland Revenue said that *"International were informed, albeit totally off the record that unless they agreed to make such payments they would not be successful in the tender for the contract"* (July 31, 2001). In evidence Mr and Mrs Solland accepted that it was probable or very possible that if the payments had not been made, they would not have got the Contracts. Mr Paisner described Mr Khalid (in a handwritten note plainly made following a discussion with his clients) as *"the introducer of all business undertaken by Solland International."* The records of Interiors were altered by Mrs Harris, on the instructions of Mr Solland, to change the record of the commissions in the purchase ledger from *"payments on account"* to an expense connected to services provided by Mrs Al-Attiya to *"procure contract."*

64. Mr Meisterhans gave evidence that Mr Khalid was responsible for International getting the Lombard House contract, and that Mr Khalid was the person to ring up when difficulties arose, because the person who received the commission was clearly the person who controlled the entire contract. The International Board Minutes show that commission was paid by International because of competition from other sources: e.g. minutes of November 12, 1997 (*"Commission must be paid to intermediaries"*); and it was paid to Mr Khalid who was presented as an individual of influence, e.g. minutes dated March 24, 1999: *"Mr Steifel suggests writing a letter to Mr Khaled [sic] to help to solve the problems with Mr Dajani. International would explain why we believe Mr Dajani behaves unreasonable [sic] and we will ask Mr Khaled to help to stop this"*.
65. Mr Khalid introduced the prospect of the Lombard House project to the Sollands. Sheikh Sultan accepted that Mr Khalid was not involved in the negotiation of the Phase 1 Lombard House Contract, but was clear that he was involved in bringing proposals and sketches to Sheikh Mohammed and presenting Mrs Solland to Sheikh Mohammed in Doha. Mr Khalid was the liaison for Lombard House; anything that related to the planning of phase 1 of the project needed to go through him.
66. Jackson Rowe Associates, construction consultants acting for International in the Lombard House adjudication proceedings, described Mr Khalid as a commercial manager who managed various properties reporting to Sheikh Sultan and as project manager for stage 1 and the client's (i.e. Daraydan's) representative for stage 2, and in their report claimed that changes were agreed with (among others) Mr Khalid.
67. It is clear from the documents that Mr Khalid: (a) negotiated and entered into agreements with the Sollands and initialled and approved contracts to be entered into with the Sollands - in particular the Grosvenor Hill Court Contract and the 28 Charles Street Contract; (b) approved invoices for payment which had been raised by the Sollands; (c) authorised the Sollands to carry out additional work; (d) approved payment schedules produced by the Sollands; (e) received invoices sent by the Sollands on behalf of the claimants or was copied in on them; and (f) received designs from the Sollands which he was to approve or in relation to which he was to obtain approval.
68. Mr Khalid's written contract of employment was with Sheikh Mohammed and it was a term of that contract that he reported to Sheikh Sultan. On January 21, 1997 Mr Khalid entered into the written contract of employment, under which *"Confidentiality, Trust and Honesty are the basis of the Job....Attention to details and maximum cost efficiency in all involvements"*. Although Sheikh Sultan signed as the *"employer"*, I am satisfied that, as a matter of construction and having regard to the factual matrix (namely that Mr Khalid had been working for Sheikh Mohammed and had been receiving payments from him), Sheikh Mohammed was Mr Khalid's employer.
69. Sheikh Sultan and Sheikh Mohammed were Directors of each of the Manx companies. Sheikh Sultan was a specially appointed representative of Daraydan in respect of Lombard House (as a result of a request communicated to the board of directors of Daraydan by Sheikh Mohammed). I accept the claimants' submission that as a result of being employed by Sheikh Mohammed (or by reason of the duties that he owed to Sheikh Mohammed as an employee of QIS or as a result of the functions that he in fact performed), Mr Khalid also owed duties to the Isle of Man companies (Cairn, Northwest, Landmark and Theebah) of which Sheikh Mohammed is the beneficial owner, and to Daraydan, either directly or as a sub-agent.

70. Mr Khalid accepts that he did not inform Sheikh Mohammed or Sheikh Sultan, or any of the corporate claimants about the payments (and Mr and Mrs Solland abandoned any suggestion that either Sheikh Mohammed or Sheikh Sultan was aware of the payments, although Mr Meisterhans persisted in the allegation).
71. I reject Mr Khalid's defence of release, or forbearance to sue, or estoppel. Mr Dajani's evidence was that he never made the oral agreement with Mr Khalid not to sue him, as alleged by Mr Khalid, and Mr Khalid has not availed himself of his opportunity to cross-examine Mr Dajani (nor did the first to fourth defendants). I have no reason to doubt Mr Dajani's written evidence.
72. Nor is Mr Khalid's defence based on Qatari law an impediment to judgment. First, I accept the claimant's submission that for the most part Mr Khalid's duties were governed by English law: the oral and written contracts entered into with Sheikh Mohammed were when he was an English resident for a contract of employment or of agency in England and were consequently governed by English law, and his relationship with Daraydan as a project manager was on a contract expressly governed by English law. If Qatari law governed any aspect of the relationship, Mr Khalid did not adduce any expert evidence, and even the expert retained by the Sollands, Mr Siddiqui, accepted that Mr Khalid would be subject to duties of confidentiality, trust and honesty under Qatari law, and that an employee who defrauded his employer by taking secret commissions would be committing a criminal offence (although Mr Siddiqui's opinion was that the contract of employment was not valid, because it was not in Arabic). It is not therefore necessary to decide whether in any event English public policy would come into play to disapply any foreign custom which validated what would in English law be regarded as corrupt practices.

#### **XIV Conspiracy**

73. Mr Khalid was fraudulently misappropriating 10% of the monies paid by his employers by getting them to pay him £1.8m through the defendants which they would never have agreed to do. He has expressly admitted in his witness statement (and implicitly in his Defence) that he did not tell the claimants about these payments. Sheikhs Mohammed and Sultan and the Directors of Daraydan were ignorant of these payments and that they would never have agreed to them.
74. The Sollands (a) knew that Mr Khalid was defrauding the claimants by keeping these payments secret from them, and (b) by their actions they helped him to carry out this fraud. The minutes of International confirm that the commission payments were built into the price. Mr and Mrs Solland did not persist in their allegation that Sheikh Mohammed knew of the payments (although Mr Meisterhans did make that suggestion), but at trial, Mr and Mrs Solland and Mr Meisterhans confirmed that they knew that Daraydan was ignorant of the commissions and that they specifically did not disclose them to Daraydan.

#### **XV Remedies: constructive trust and *Lister & Co v Stubbs***

75. In *Lister & Co v Stubbs* (1890) 45 Ch D 1 it was alleged by the plaintiffs that their foreman had received secret commissions which he had invested in land and other investments. They sought interlocutory relief to prevent him dealing with the land and requiring him to bring the other investments into court. The injunction was refused. It was held that the injunction should be refused because the money was not that of the plaintiffs so as to make the defendant a trustee, but was money to which the plaintiffs would be entitled to claim in the action, i.e. "a debt due from the Defendant to the Plaintiffs in consequence of the corrupt bargain which he entered into" but (a) the money which he had received under that bargain could not be treated as being money of the Plaintiffs "before any judgment or decree in the action had been made" (at 12-13, per Cotton LJ) (b) the relation between them was that of debtor and creditor, and not that of trustee and cestui que trust (at 15, per Lindley LJ). Lindley LJ said (at page 14) that he was influenced by two considerations: (a) firstly, the "startling consequence" that if the claimants were entitled to a proprietary remedy, the property acquired by the defendant with the bribe money would be withdrawn from the mass of the defendant's creditors on the defendant's bankruptcy; and (b) secondly, the fact that the claimants would be entitled not only to an account of the money plus interest, but also to all profits made by the defendant using the money, for example if he had set himself up in business: he did not think that this could be right.

76. The decision was followed in *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11. *Lister & Co v Stubbs* is no longer good law on the availability of interlocutory relief in debt claims since the development of the *Mareva* jurisdiction: *Mercedes Benz AG v Leiduck* [1996] AC 284, at 300 (P.C.).
77. It has been held by the Privy Council that *Lister & Co v Stubbs* was wrongly decided: *AG for Hong Kong v Reid* [1994] 1 AC 324, in which the Board consisted of Lord Templeman, Lord Goff of Chieveley, Lord Lowry, Lord Lloyd of Berwick and Sir Thomas Eichelbaum. Lord Templeman said (at 336):  
"The decision in *Lister & Co 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 constructive trust for the person injured."
78. Those who have supported *Lister & Co v Stubbs* rely on the policy that proprietary restitution is only justified where there has been a subtraction from the claimant's ownership or where the claimant has a proprietary basis for the claim. The general creditors have given value, and there is no reason why the agent's principal should have a preferred position. The policy against bribery is sufficiently vindicated through a personal remedy. Thus, according to Professor Goode, proprietary remedies should only be available where the defendant receives gains which derive from the claimant's property, or where they stem from activity which the defendant was under an equitable obligation to undertake (if at all) for the plaintiff: the decision in *Lister & Co v Stubbs* was correct, because the bribe resulted from conduct in which the defendant should not have engaged at all: Goode, *Property and Unjust Enrichment*, in *Essays on the Law of Restitution*, ed. Burrows 1991, 215 at 230-231; *Proprietary Restitutionary Claims*, in *Restitution: Past, Present and Future*, ed Cornish et al, 1998, 63, at 69. So also Professor Birks considers that proprietary restitution is only justified where the claimant has a proprietary base to his claim, i.e. where the defendant's breach of duty consists of misapplication of property belonging to the claimant; but in the case of bribery, the money paid to the agent comes from the third party, and not from the principal: Birks, *Introduction to the Law of Restitution*, 1989, at 386. See also Virgo, *Principles of the Law of Restitution*, 1999, p 543; Burrows, *Law of Restitution*, 2nd ed 2002, p 500; Tettenborn, *Law of Restitution in England and Ireland*, 2nd ed. 1996, pp 231-233.
79. But the Privy Council preferred the views of Sir Peter Millett (as he then was), *Bribes and Secret Commissions* [1993] Restitution LR 7, at 20, that  
"[The fiduciary] must not place himself in a position where his interest may conflict with his duty. If he has done so, equity insists on treating him as having acted in accordance with his duty; he will not be allowed to say that he preferred his own interest to that of his principal. He must not obtain a profit for himself out of his fiduciary position. If he has done so, equity insists on treating him as having obtained it for his principal; he will not be allowed to say that he obtained it for himself. He must not accept a bribe. If he has done so, equity insists on treating it as a legitimate payment intended for the benefit of the principal; he will not be allowed to say that it was a bribe."
80. The decision of the Privy Council is regarded as black-letter law by *Bowstead and Reynolds*, para 6-082. It is also treated as representing the law by Lewin, *Trusts* (17th ed. Mowbray et al, 2000), para 20-34, and by Snell, *Equity* (30th ed. McGhee, 2000), para 9-53. Goff and Jones, *Law of Restitution* (6th ed. 2002), para 33-025, prefer *AG for Hong Kong v Reid* but consider that *Lister & Co v Stubbs* is a decision which is still technically binding.
81. *AG for Hong Kong v Reid* has been preferred at first instance to *Lister & Co v Stubbs* by Laddie J in *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289, 412-413 (a breach of confidence case) and by Toulson J (obiter) in *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643. But Sir Richard Scott VC in *Att Gen v Blake* [1997] Ch 84, 96 and the Court of Appeal in *Halifax Building Society v Thomas* [1996] Ch 217, 229 treated *Lister & Co v Stubbs* as still binding, although neither of those cases was a case involving bribery of an agent.
82. The House of Lords forcefully re-affirmed the rules of stare decisis in *Davis v Johnson* [1979] AC 264, but nothing was said about the decisions both in the Court of Appeal (e.g. *Doughty v Turner*

*Manufacturing Co Ltd* [1964] 1 QB 518; *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 QB 210) and at first instance which suggest that both a judge of first instance and the Court of Appeal are free to follow decisions of the Privy Council on common law principles which depart, after full argument, from earlier decisions of the Court of Appeal.

83. In *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405, 415 Lord Parker CJ, sitting as a judge of first instance, said that he would if necessary follow *The Wagon Mound* [1961] AC 388 rather than *Re Polemis* [1921] 3 KB 560:
- "... I should say, in case the matter goes further, that I would follow, sitting as a trial judge, the decision in the *Wagon Mound* case; or rather, more accurately, I would treat myself, in the light of the arguments in that case, able to follow other decisions of the Court of Appeal, prior to the *Polemis* case, rather than the *Polemis* case itself. As I have said, that case has been criticised by individual members of the House of Lords, although followed by the Court of Appeal in *Thurogood v Van Den Berghs & Jurgens, Ltd*. I should treat myself as at liberty to do that, and for my part I would do so the more readily because I think it is important that the common law, and the development of the common law, should be homogeneous in the various sections of the Commonwealth. I think it would be lamentable if a court sitting here had to say that while the common law in the Commonwealth and Scotland has been developed in a particular way, yet we in this country, and sitting in these courts, are going to proceed in a different way."
84. In *I Congreso del Partido* [1978] QB 500, at 519, Robert Goff J said that he agreed with every word in that passage, and would have followed *The Philippine Admiral* [1977] AC 373 (PC) (denying sovereign immunity to state trading ships) in preference to *The Porto Alexandre* [1920] P 30 had he not already been relieved from the binding authority of *The Porto Alexandre* by the then recent decision of the Court of Appeal in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, on the commercial exception to sovereign immunity.
85. The system of precedent would be shown in a most unfavourable light if a litigant in such a case were forced by the doctrine of binding precedent to go to the House of Lords (perhaps through a leap-frog appeal under the Administration of Justice Act 1969, section 12) in order to have the decision of the Privy Council affirmed. That would be particularly so where the decision of the Privy Council is recent, where it was a decision on the English common law, where the Board consisted mainly of serving Law Lords, and where the decision had been made after full argument on the correctness of the earlier decision.
86. Accordingly, if this case were not distinguishable from *Lister & Co v Stubbs*, I would have applied *AG for Hong Kong v Reid*. There are powerful policy reasons for ensuring that a fiduciary does not retain gains acquired in violation of fiduciary duty, and I do not consider that it should make any difference whether the fiduciary is insolvent. There is no injustice to the creditors in their not sharing in an asset for which the fiduciary has not given value, and which the fiduciary should not have had.
87. But even if I were bound by *Lister & Co v Stubbs*, in my judgment there are two very significant differences between this case and that decision which in any event justify the restitutionary remedy. First, the facts of this case make it a case where there is a proprietary basis for the claim and where the bribe derives directly from the claimants' property. This is not a case where the price is presumed (for the purposes of the personal remedy) to have been increased by the amount of the bribe. Rather it is a case where the evidence is that the price was actually increased by the amount of the bribe, and where the bribe was paid out of the money paid by the claimants for what they thought was the price. These factors make the claim one for the restitution of money extracted from the claimants.
88. Secondly (and independently), the portion representing the bribe was paid as a result of a fraudulent misrepresentation of the Sollands, to which Mr Khalid was a party, that the true price was the invoice price, when in fact the price had been inflated to pay the bribes. I do not consider that *Halifax Building Society v Thomas* [1996] Ch 217 rules out a proprietary claim to the proceeds of fraud. In that case the defendant fraudulently obtained a loan from the building society, and it sought a declaration that it could keep the proceeds of sale as against the Crown's competing claim to confiscate the surplus in execution of a criminal confiscation order. The Court of Appeal refused to make the declaration on the grounds that the fraudster was not a fiduciary, that there was no universal principle that wherever

there was a personal fraud the fraudster would become a trustee for the defrauded party, and that the building society had, with knowledge of the fraud, affirmed the mortgage, and was therefore only a secured creditor. The decision is controversial: see e.g. Goff & Jones, para 36-017; Burrows, p 476; Virgo, pp 494-6. But in the present case Mr Khalid was a fiduciary, and the claimants had not affirmed any of the Contracts, and had rescinded the only contracts still to be performed.

89. The overwhelming evidence in this case is that the prices charged to the claimants by Interiors and International had been increased to cover the 10% commission payments, and that Mr Khalid was paid his commission from the money received by Interiors and International from the claimants.
90. From the outset the commission payments were directly built into the prices. This appears clearly from admissions made by the Sollands and their advisers, and from the board minutes of International. Thus according to the Sollands' Further Information, Mrs Solland was asked by Mr Khalid to "add 10% to the budgets" she was preparing for 27 Grosvenor Hill Court, and Mrs Solland said in a witness statement that she was told by Mr Khalid to "allow for a 10% commission payment on the contracts to be paid back." A draft chronology of commission payments prepared by Berwin Leighton Paisner following a meeting with Mr Solland (and which must have reflected his instructions) states that Mr Khalid told Mrs Solland that she was "to build in a 10%" and that later, after International became the contracting party, "enough was built into estimates for International to pay 10% commissions."
91. International's board minutes record that the percentage difference between the prices charged by International to the claimants and the price at which Interiors could operate reflected (inter alia) the commission payments. Thus, on January 15, 1998, it was recorded that Interiors could work at approximately a 20% discount to the prices quoted to the client in respect of the Lombard House contract. But this left very little room for International, as Mr Khalid wanted 10%, there might be others who required an additional 5%, and the client also wanted a discount. On May 7, 1998, it was recorded in respect of the Farmhouse contract that: "Interiors must operate at 30% discount to this budget. Client will bargain. Commissions must be covered." The board minutes for November 10, 1998 record the concern when it was learned that Daraydan had found out the tender price of one of its main contractor candidates: "International has a problem. It does not want to disclose its profit to client. Commission is included."
92. There was an attempt by Mr and Mrs Solland in the witness box to resile from those admissions, but the documents and their previous admissions (all obviously made on advice) speak with one voice, and I am satisfied that they reflect the true position.
93. There are clear admissions from the Sollands that the commission payments were a direct kickback to Mr Khalid of 10% of all payments under the contracts. According to the draft chronology prepared by Berwin Leighton Paisner on behalf of the Sollands: "The Grosvenor Hill project was completed during this time and each time payments were made under the contract, 10% was paid out." Notes taken by the Inland Revenue of a meeting with Mr Gerber record that Mr Gerber told them that "it was essential to obtaining the contract to pay the clients agent a 10% kickback." The draft BDO Stoy Hayward report states that "the terms of such commissions were 10% of all net receipts from Daraydan. These were to be paid to a specified account...immediately on receipt of monies by International from Daraydan."
94. Finally, Mr Khalid was party (with the Solland and their companies) to a conspiracy to defraud the claimants by falsely representing that the true price was the figure including the commission, when in fact the true price was the price before the commission. The claimants thought that they were paying the price to the Sollands when in fact they were paying Mr Khalid out of their own money.
95. For these reasons I consider that the claimants are entitled to judgment against Mr Khalid and to the proprietary remedy which they seek.

Mr Anthony Peto and Mr Tom Weisselberg (instructed by Jones Day) for the Claimants.

Mr Edward Bannister QC and Mr Sharif Shivji (instructed by Clifford Harris & Co) for the First, Second, Third and Fourth Defendants.

The Fifth, Sixth and Seventh Defendants made no appearance