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IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 541 OF 1995

BETWEEN: CORPORACION NACIONAL DEL COBRE DE CHILE

PLAINTIFF

**AND: (1) INTERGLOBAL INC.
(2) JUAN MARCELO AVENDANO SABUGAO**

DEFENDANTS

Appearances:

Mr. Graham Ritchie, of Charles Adams, Ritchie & Duckworth for the Plaintiff

No appearances on behalf of the Defendants.



REASONS

The Plaintiff ("Codelco") brought these proceedings in December 1995 to trace and recover the proceeds of frauds allegedly perpetrated by Codelco's former Chief Futures Trader, Juan Pablo Davila Silva ("Davila") along with others including his brother-in-law, the 2nd Defendant, Juan Marcelo Avendano Sabugo ("Avendano").

On Codelco's ex-parte application, the court on the 19th December, 1995, granted an injunction effectively freezing the funds held in certain accounts with Deutch

1 Sudamerikanische Bank AG; now known as Dresdner Bank Latinamerika ("Sudamero
2 Bank") in the name of Avendano and in the name of the 1st Defendant, Interglobal Inc.
3 ("Interglobal") a Cayman Islands exempt company, owned and controlled by Davila and his
4 wife, Ximena Antonieta Pradenas Villalobos ("Pradenas").
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6 Codelco contends that the accounts with Sudamero Bank (described in more detail below)
7 were used as a repository for the bribes and secret commissions which Davila and Avendano
8 received in furtherance of the frauds.
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11 Discovery proceedings under the principle established in Norwich Pharmacal Co. v.
12 Customs and Excise Commissioners [1974] A.C. 133 were brought in Cause no. 468 of
13 1995 against Sudamero Bank and in Cause no. 540 of 1995 against Morgan Grenfell (CI)
14 Ltd. The discovery in those proceedings revealed evidence which served to prove the
15 existence of two separate and distinct fraudulent schemes involving metals brokers with
16 whom Codelco traded. The first involved companies within the Metallgesellschaft Group
17 (the "MG scheme"). More will be said about this scheme later. The second involved
18 Sogemin Metals Limited (a company incorporated in England and Wales) and its
19 introducing broker, Sogemin Metals Inc. (a company incorporated in the USA). These two
20 companies are hereinafter referred to collectively, as "Sogemin" and I shall refer to that
21 scheme as the "Sogemin scheme".
22

23
24 Following the discovery of the evidence of these schemes, proceedings were brought by
25 Codelco in various jurisdictions including the United States of America, the Channel Islands

1 and Bermuda. In particular, further proceedings were brought in England against Sogemin
2 and against companies within the Metallgesellschaft Group.

3 Following the successful resolution of its action against Sogemin in England in 1999,
4 Codelco pursued its claims in this action arising from the Sogemin scheme and on the 15th
5 December 1999 obtained judgment against Interglobal following a trial of certain
6 preliminary issues on those claims. By that judgment it was declared that the balance
7 standing to the credit of an account with Sudamero Bank described as the "Interglobal
8 Account" (less the then current value of a payment described in the judgment as the "MG
9 Payment") was held by Interglobal on constructive trust for Codelco. Pursuant to that
10 judgment the sum of US\$2,635,396.83 together with accrued interest out of the Interglobal
11 account (together with such further interest as might accrue thereon up to the date of
12 payment) was ordered to be paid to Codelco. Those monies were duly paid to Codelco. It
13 was unnecessary for Codelco to pursue its claims against the 2nd Defendant Avendano,
14 because prior to the trial in respect of the Sogemin scheme, Avendano had voluntarily made
15 arrangements for his account with Sudamero Bank - referred to in the amended statement of
16 claim as the "Avendano Account" - to be closed and the proceeds transferred to Codelco.
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20 Codelco now seeks an order that the balance standing to the credit of the Interglobal
21 Account representing that payment which is referred to in Codelco's amended statement of
22 claim as the "MG Payment" is held on constructive trust for Codelco and, further, that such
23 sum together with any accrued interest; be paid forthwith by the 1st Defendant, Interglobal,
24 to Codelco together with such further interest as might accrue thereon down to the date of
25

1 payment. It is Codelco's case that the MG Payment represents what is left of the proceeds
2 of the MG Fraud referred to earlier.

3
4 Codelco did not pursue its claims in relation to the MG Payment at the trial of preliminary
5 issues which led to this court's judgment of 15th December 1999 in respect of the Sogemin
6 scheme. This was because of the ongoing proceedings in England against Metallgesellschaft
7 AG ("MGAG") and Metallgesellschaft Limited ("MG Ltd."), companies within the
8 Metallgesellschaft Group, (the "MG Group") and an individual by the name of Wolfgang
9 Becker ("Becker") arising out of the MG scheme. Those proceedings are described as the
10 "MG Proceedings". The MG Proceedings were settled only in July last year. As a result of
11 that settlement, Codelco is now in a position to progress these proceedings and pursue its
12 claims in the action relating to the MG scheme and the MG Payment.

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15 On the 30th January 2002, Codelco obtained directions from this court as to the identification
16 and trial of certain preliminary issues (the "Preliminary Issues") relating to the MG scheme
17 and the MG Payment. By that order, Codelco also obtained directions relating, *inter alia*, to
18 the evidence to be relied on at the trial of the Preliminary Issues.

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21 **The Preliminary Issues**

22 The three Preliminary Issues fall for the court's consideration now. They are:

- 23 i) Whether pursuant to Codelco's claims regarding the MG Payment, the balance
24 standing to the credit of the Interglobal Account is held on constructive trust for
25 Codelco;

- 1 ii) Whether pursuant to Codelco's claims regarding the MG Payment and its
2 consequences, the Interglobal Account is subject to a charge in equity in
3 Codelco's favour in the sum of the MG Payment and interest thereon;
4 iii) Whether Interglobal is liable to Codelco in equity or at common law, in the
5 amount of the MG Payment.
6

7
8 Before I deal with the legal principles arising from these Preliminary Issues, I set out in
9 more detail below the relevant factual background to these proceedings and the evidence on
10 which Codelco relies.

11

12 **The Factual Background**

13 Codelco is a state-owned legal entity incorporated under the laws of Chile. Codelco is
14 engaged principally in the mining, refining and sale of copper (and also to a lesser degree of
15 gold and silver), being one of the largest copper producers in the world. It is the largest and
16 is regarded as the most important company in Chile .
17

18

19 Codelco began trading in futures in the late 1970s when its transactions were designed to
20 minimise its risk of losses in relation to physical sales of copper and bullion against adverse
21 movements in the market price of those commodities – a traditional practice used by metals
22 producers known as "hedging". In early 1986, a Futures Department was established, and in
23 April 1989, Davila was appointed Chief of the Futures Department. In this post, Davila was
24 responsible for all of Codelco's metals futures operations in accordance with the marketing
25 policies approved by Codelco's Board of Directors and its Senior Executives. Most, if not

1 all, of the trades with which Codelco is concerned in these proceedings were carried out in
2 accordance with the customs, practices and Rules of the London Metals Exchange.
3 Accordingly they were governed by English law.

4
5 Codelco deals with a large number of futures brokers, principally located in London and
6 New York. As the Chief of its Futures Department and its principal futures trader, Davila
7 had the power to decide which futures trades should be made, for what quantities, and at
8 what prices, and with which brokers. His mandate was, however, subject to specified
9 purposes and limits which were imposed by his superiors.
10

11
12 The affidavit evidence of Mr. David O'Sullivan, sworn on behalf of Codelco, establishes
13 that Davila, under his contract of employment, was obliged to devote his activities
14 exclusively to the task and matters for which he was responsible. He was also expressly
15 required to abstain from engaging in matters in which his activities could reasonably be
16 regarded as being in conflict with the interests of Codelco.
17

18
19 Arising from these contractual duties, Davila owed fiduciary duties to Codelco to act *bona*
20 *fide* in Codelco's interests, not to place himself in a position where his personal interests
21 might conflict with the interests of Codelco and not to receive any secret commissions or
22 bribes or make any secret profits. This is pleaded by Codelco in paragraphs 4, 5 and 6 of its
23 amended statement of claim.
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1 On the 21st January, 1994, Davila revealed to Codelco's senior management that he had
2 been hiding and concealing from them the true scope and effect of his futures trading, that
3 he had traded well beyond the limits which had been previously established and that as a
4 result, unrealised losses of millions of US Dollars had been incurred without Codelco's
5 knowledge. Codelco's auditors, Ernst & Young, have quantified Codelco's losses through
6 Davila's futures speculation between 1st January, 1993, and 21st January, 1994, at
7 US\$178,249,799.
8
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10 **The Evidence relating to the Interglobal Account**

11 During the course of the criminal investigation in Chile, which followed the revelation of
12 Codelco's losses; the bank accounts of Davila and his wife, Pradenas, were reviewed. It was
13 discovered that certain suspicious payments were made in 1990 and 1991 by telex transfer to
14 Davila's US Dollar Account at Banco de Santiago in Chile, from then unidentified accounts
15 held with Sudamero Bank. I shall describe these payments as the "Sudamerikanische
16 Payments". This discovery prompted the application by Codelco to this court under the
17 Norwich Pharmacal principle requiring Sudamero Bank to disclose information regarding
18 the provenance of the Sudamerikanische Payments. An order was made by the court on 3rd
19 November, 1995 in Cause 468 of 1995 (as varied by a further order of 1st December, 1995
20 made pursuant to an application to the court by Sudamero Bank under Section 4 of the
21 Confidential Relationships (Preservation) Law (1995 Revision) and which is reported at
22 [1996] CILR 1). Pursuant to these orders, Mr. Gunter Backer on behalf of Sudamero Bank
23 swore an affidavit on 6th December, 1995.
24
25

1 Mr. Backer's affidavit revealed, *inter alia*, that:

2 i) Davila and his wife, Pradenas, held a joint account at Sudamero Bank ("the
3 Davila Joint Account) (an account which had originally been opened in
4 Davila's sole name (the "First Davila Account"));

5
6 ii) They jointly owned and controlled the 1st Defendant, Interglobal, which also
7 held an account at Sudamero Bank, (Interglobal Account);
8

9
10 Mr. Backer's affidavit further revealed that the Sudamerikanische Payments represented a
11 proportion of the proceeds of a payment of US\$1.5 million received by Davila in January
12 1990 from MGAG; a metals broker within the MG Group with whom Davila traded. This is
13 the MG Payment, the subject of this trial.

14
15 It is Codelco's case that it knew nothing of the MG Payment until this was disclosed in Mr.
16 Backer's affidavit. Codelco knows of no legitimate basis upon which Davila could have
17 received the MG Payment. Codelco pleads at paragraph 12 of its amended statement of
18 claim, that the MG Payment was not made for any *bona fide* commercial purpose. It is
19 Codelco's case that it was (or was the proceeds of) a secret commission or bribe or other
20 secret payment made with the intention that Davila would receive and accept it secretly;
21 without the knowledge or consent of Codelco; in breach of his fiduciary and contractual
22 duties. Moreover, that the payment was for the purpose of inducing Davila, in breach of his
23 fiduciary and contractual duties; to procure Codelco to enter into metal futures contracts and
24 options with entities in the MG Group in terms detrimental to Codelco.
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Davila's principal contact in the MG Group and with whom he conducted all of his metal futures trading in the name of Codelco was Becker. Becker at the material times, worked with MG Commodity Group (which was then a subsidiary of MGAG) and resided in Hamburg, Germany. Codelco knows of no reason why Davila should have been paid direct by any entity within the MG Group or indeed by any other broker with whom Davila traded in Codelco's name. It is Codelco's contention, that the MG Payment represented Davila's share of commissions or other secret profits or bribes generated by reason of his having traded with the MG Group in Codelco's name.

As mentioned earlier, Codelco has now obtained a settlement of the MG Proceedings. Dr. Ralph Stadtmuller, the solicitor and head of the Legal Department of Solvadis ag, one of the companies in what was called the MG Group, has deposed an affidavit on behalf of MGAG, MG Ltd. and Becker, for the purpose of the trial of these Preliminary Issues. In that affidavit, Dr. Stadtmuller confirms that a settlement has been reached with Codelco. He further confirms that neither MGAG, MG Ltd. nor Becker maintain any claim to the MG Payment. As part of the settlement of the MG Proceedings, those entities and Becker have assigned to Codelco, such claims as they may have to the MG Payment.

It is beyond doubt that Davila, as Chief of the Futures Department, owed a fiduciary duty to Codelco to ensure that his interests and the interests of Codelco, as his employer, did not conflict. I so held at the earlier trial of preliminary issues in December 1999 relating to the Sogemin scheme.

1 The evidence of Mr. Backer establishes to my satisfaction, that the accounts with Sudamero
2 Bank were set up as a repository for the substantial payments which Davila received. It is
3 an irresistible inference that Davila received those payments as an incentive to cause
4 Codelco to enter into futures contracts through their employees including Becker, with
5 members of the MG Group.
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7
8 The evidence establishes that the existence of the accounts in the Cayman Islands was
9 unknown to Codelco while Davila was head of its Futures Department. Moreover,
10 notwithstanding his revelation to Codelco on 21st January, 1994, Davila attempted to
11 conceal these accounts from the investigators in Chile. As part of the criminal investigation
12 in Chile, Davila had been questioned in detail about his assets and financial affairs and had
13 failed to disclose his interest in Interglobal or the existence of the bank accounts in his, his
14 wife's and Interglobal's names.
15

16
17 When Davila was given the opportunity to explain the Sudamerikanische Payments into his
18 Dollar Account at Banco de Santiago in Chile, his explanation that these represented the
19 proceeds of investments which he had made with Drexel Burnham (a now defunct
20 investment brokerage firm), when tested by investigation, proved to be false. Evidence in
21 the case reveals that he presented documentation of investments with that firm which never
22 took place. The documentation were forgeries. Davila's attempt to deceive the Chilean
23 authorities in this way lends considerable support to Codelco's contention that the MG
24 Payment was not made for any bona fide or commercial purpose.
25

1 Following criminal proceedings in Chile, Davila was found guilty of, *inter alia*, fraud
2 against the State and the crime of presentation of false documents in a criminal proceeding.
3 The latter relates to his production of the fabricated Drexel Burnham documentation. Davila
4 was sentenced to a total of 8 years imprisonment and was ordered to pay US\$186,183,060 in
5 damages to Codelco.
6

7
8 I am satisfied that the evidence before me establishes the following, namely:
9

- 10 i) That Davila, as Codelco's agent and Chief of its Futures Department, owed
11 fiduciary duties to Codelco to act *bona fide* and in its best interests;
12
- 13 ii) He was obliged not to act, so as to place himself in a position in which his
14 personal interests might conflict with the interests of Codelco; and not to
15 receive any secret commissions or bribes or make a secret profit or receive
16 any other secret payment from any third party with whom he was dealing, or
17 might deal, on behalf of or in the course of his dealings for Codelco;
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- 19
20 iii) That Davila did not procure the opening of the First Davila Account, or the
21 conversion of the First Davila Account into the Davila Joint Account or the
22 incorporation of Interglobal or the opening of the Interglobal Account for any
23 *bona fide* commercial purpose;
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Thus, in relation to his receipt of the MG payments, Davila breached his fiduciary and contractual duties owed to Codelco referred to in (i) above.

vii) The foregoing findings of fact notwithstanding, for reasons of law to be explained below, it matters not to the result, whether I conclude as to whether the receipts of payments were specifically bribes, secret commissions or other secret payments.

The Relevant Principles of Law

The Creation of a Constructive Trust

Turning now to deal with the first Preliminary Issue. In light of my findings of fact and for the reasons which I will now explain, Codelco is entitled to a declaration that the balance standing to the credit of the Interglobal Account (representing the balance of the MG Payment) is held by Interglobal on constructive trust for it.

Where a fiduciary accepts bribes and other illicit payments as an incentive for his breach of duty, he not only becomes a debtor for the amount of the bribes to the person to whom the duty was owed; he also holds the bribes and any property acquired therewith on constructive trust for that person. This is clear from the Privy Council decision in *Attorney General of Hong Kong v. Reid* (1994) 1 A.C. 324. That was a case involving a corrupt public prosecutor in Hong Kong (the first respondent Reid) who accepted payments by way of bribes in return for which he would obstruct the prosecution of certain criminals. Reid

1 acquired properties in New Zealand which could only have been acquired from the bribes.
2 The Attorney General for Hong Kong lodged caveats against the title to the properties but
3 when he applied to the High Court of New Zealand to renew the caveats, the judge refused,
4 holding that the Crown had no equitable or legal interest in the properties. The Court of
5 Appeal, applying the English Court of Appeal decision *Lister & Co. v. Stubbs* [1890] 45
6 Ch.D., 1, C.A., dismissed the Attorney General's appeal. The Attorney General appealed to
7 the Privy Council. The Privy Council held, allowing the appeal, that a gift accepted by a
8 person in a fiduciary position as an incentive for his breach of duty constituted a bribe and,
9 although in law the legal interest in the bribe belonged to the fiduciary, in equity he not only
10 became a debtor for the amount of the bribe for the person to whom the duty was owed; he
11 also held the bribe and any property acquired therewith on constructive trust for that person.
12

13
14 Lord Templeton, who delivered the judgment of the Privy Council, had this to say beginning
15 at page 330g:-

16 *"A bribe is a gift accepted by a fiduciary as an inducement to him to*
17 *betray his trust. A secret benefit, which may or may not constitute a*
18 *bribe, is a benefit which the fiduciary derives from trust property or*
19 *obtains from knowledge which he acquires in the course of acting as*
20 *a fiduciary. A fiduciary is not always accountable for a secret benefit*
21 *but he is undoubtedly accountable for a secret benefit which consists*
22 *of a bribe. In addition a person who provides the bribe and the*
23 *fiduciary who accepts the bribe may each be guilty of a criminal*
24 *offence. In the present case the first respondent was clearly guilty of*
25 *a criminal offence.*

Bribery is an evil practice which threatens the foundations of any
civilised society. In particular bribery of policemen and prosecutors
brings the administration of justice into disrepute. Where bribes are
accepted by a trustee, servant, agent or other fiduciary, loss and
damage are caused to the beneficiaries, master or principal whose
interests have been betrayed. The amount of loss or damage resulting
from the acceptance of a bribe may or may not be quantifiable. In the
present case the amount of harm caused to the administration of

1 *justice in Hong Kong by the first respondent in return for bribes*
2 *cannot be quantified.*

3 *When a bribe is offered and accepted in money or in kind, the money*
4 *or property constituting the bribe belongs in law to the recipient.*
5 *Money paid to the false fiduciary belongs to him. The legal estate in*
6 *freehold property conveyed to the false fiduciary by way of bribe vests*
7 *in him. Equity, however, which acts in personam, insists that it is*
8 *unconscionable for a fiduciary to obtain and retain a benefit in*
9 *breach of duty. The provider of a bribe cannot recover it because he*
10 *committed a criminal offence when he paid the bribe. The false*
11 *fiduciary who received the bribe in breach of duty must pay and*
12 *account for the bribe to the person to whom that duty was owed. In*
13 *the present case, as soon as the first respondent received a bribe in*
14 *breach of the duties he owed to the Government of Hong Kong, he*
15 *became a debtor in equity to the Crown for the amount of that bribe.*
16 *So much is admitted. But if the bribe consists of property which*
17 *increases in value or if a cash bribe is invested advantageously, the*
18 *false fiduciary will receive a benefit from his breach of duty unless he*
19 *is accountable not only for the original amount or value of the bribe*
20 *but also for the increased value of the property representing the*
21 *bribe. As soon as the bribe was received it should have been paid or*
22 *transferred instantaneously to the person who suffered from the breach of*
23 *duty. Equity considers as done that which ought to have been done.*
24 *As soon as the bribe was received, whether in cash or in kind, the*
25 *false fiduciary held the bribe on a constructive trust for the person*
 injured.”

16 And then later at page 331h;

17 *“When a bribe is accepted by a fiduciary in breach of his duty then he*
18 *holds that bribe in trust for the person to whom the duty was owed. If*
19 *the property representing the bribe decreases in value the fiduciary*
20 *must pay the difference between that value and the initial amount of*
21 *the bribe because he should not have accepted the bribe or incurred*
22 *the risk of loss. If the property increases in value, the fiduciary is not*
23 *entitled to any surplus in excess of the initial value of the bribe*
24 *because he is not allowed by any means to make a profit out of a*
25 *breach of duty.”*

22 Their Lordships considered and disapproved of the decision of the English Court of
23 Appeal in *Lister & Co. v. Stubbs (supra)* which had been regarded as authoritative on
24 the principle it asserted. This was that a fiduciary who had obtained a bribe in
25 breach of his fiduciary position, was to be regarded as being, in relation to his
 principal, in the relationship of debtor and creditor in respect of the amount of the
 bribe; not in a relationship of trustee and cestui que trust. At pages 336f to 338d they
 stated:

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“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 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.

The decisions of the Court of Appeal in Metropolitan Bank v. Heiron, 5 Ex.D. 319, and Lister & Co. v. Stubbs, 45 Ch.D. 1, are inconsistent with earlier authorities which were not cited. Although over 100 years has passed since Lister & Co. v. Stubbs, no one can be allowed to say that he has ordered his affairs in reliance on the two decisions of the Court of Appeal now in question. Thus no harm can result if those decisions are not followed.

The decision in Lister & Co. v. Stubbs was followed in Powell & Thomas v. Evans Jones & Co. [1905] 1 K.B. 11 and Attorney-General v. Goddard (1929) 98 L.J.K.B. 743. In Regal (Hastings) Ltd. v. Gulliver (Note) [1967] 2 A.C. 134 shares intended to be acquired by directors at par to avoid them giving a guarantee of the obligations under a lease were sold at a profit and the directors were held to be liable to the company for the proceeds of sale, applying Keech v. Sandford, Sel.Cas.Ch. 61.

In Reading v. Attorney-General [1951] A.C. 507, the Crown confiscated thousands of pounds paid to an army sergeant who had abused his official position to enable drugs to be imported. The Crown was allowed to keep the confiscated moneys to avoid circuity of action.

Finally in Islamic Republic of Iran Shipping Lines v. Denby [1987] 1 Lloyd's Rep. 367 Leggatt J. followed Lister & Co. v. Stubbs, 45 Cd.D.1, as indeed he was bound to do.

The authorities which followed Lister & Co. v. Stubbs do not cast any new light on that decision. Their Lordships are more impressed with the decision of Lai Kew Chai J. in Sumitomo Bank Ltd. v. Kartika Ratna Thahir [1993] 1 S.L.R. 735. In that case General Thahir who was at one time general assistant to the president director of the Indonesian state enterprise named Pertamina opened 17 bank accounts in Singapore and deposited DM.54m. in those accounts. The money was said to be bribes paid by two German contractors tendering for the construction of steel works in West Java. General Thahir having died, the moneys were claimed by his widow, by the estate of the deceased general and by Pertamina. After considering in detail all the relevant authorities Lai Kew Chai J. determined

1 robustly, at p. 810, that *Lister & Co. v. Stubbs* 45 Ch.D. 1, was wrong
2 and that its “undesirable and unjust consequences should not be
3 imported and perpetuated as part of” the law of Singapore. Their
4 Lordships are also much indebted for the fruits of research and the
5 careful discussion of the present topic in the address entitled “Bribes
6 and Secret Commissions” [1993] R.L.R. 7 delivered by Sir Peter
7 Millett to a meeting of the Society of Public Teachers of Law at
8 Oxford in 1993. The following passage, at p. 20, elegantly sums up
9 the views of Sir Peter Millett:

10 “[The fiduciary] must not place himself in a position where his
11 interest may conflict with his duty. If he has done so, equity insists on
12 treating him as having acted in accordance with his duty; he will not
13 be allowed to say that he preferred his own interest to that of his
14 principal. He must not obtain a profit for himself out of his fiduciary
15 position. If he has done so, equity insists on treating him as having
16 obtained it for his principal; he will not be allowed to say that he
17 obtained it for himself. He must not accept a bribe. If he has done so,
18 equity insists on treating it as a legitimate payment intended for the
19 benefit of the principal; he will not be allowed to say that it was a
20 bribe.”

21 The conclusions reached by *Lai Kew Chai J. in Sumitomo Bank Ltd.*
22 *v. Kartika Ratna Thahir* [1993] 1 S.L.R. 735 and the views expressed
23 by Sir Peter Millett were influenced by the decision of the House of
24 Lords in *Phipps v. Boardman* [1967] 2 A.C. 46 which demonstrates
25 the strictness with which equity regards the conduct of a fiduciary and
the extent to which equity is willing to impose a constructive trust on
property obtained by a fiduciary by virtue of his office. In that case a
solicitor acting for trustees rescued the interests of the trust in a
private company by negotiating for a takeover bid in which he himself
took an interest. He acted in good faith throughout and the
information which the solicitor obtained about the company in the
takeover bid could never have been used by the trustees. Nevertheless
the solicitor was held to be a constructive trustee by a majority in the
House of Lords because the solicitor obtained the information which
satisfied him that the purchase of the shares in the takeover company
would be a good investment and the opportunity of acquiring the
shares as a result of acting for certain purposes on behalf of the
trustees; see per Lord Cohen, at p. 103. If a fiduciary acting honestly
and in good faith and making a profit which his principal could not
make for himself becomes a constructive trustee of that profit then it
seems to their Lordships that a fiduciary acting dishonestly and
criminally who accepts a bribe and thereby causes loss and damage
to his principal must also be a constructive trustee and must not be
allowed by any means to make any profit from his wrongdoing..”

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The foregoing statements of principle are an inevitable outcome of the development of the modern law on fiduciary relationships. As their Lordships observed, the strictness of the principles is the result of the importance which equity attaches to the fiduciary duties and the extent to which equity will operate to prevent a fiduciary from benefiting from his fraud or even from an abuse of his fiduciary position by which he acts in conflict with the duties owed to his principal.

Coming as they do from a decision of the Privy Council on matters of direct relevance, their pronouncements are binding on this Court and I adopt them.

They dictate the results which arise from Davila's status as a fiduciary of Codelco as its Chief Futures Trader on the basis that the receipts of payments were bribes; as I conclude the evidence leads to the irresistible inference that they must have been.

Codelco has suffered the very substantial losses cited above as the result of Davila's unauthorised and fraudulent trading activity. I have concluded that the MG Payment represented a "bribe" within the meaning so ascribed in the case of *Attorney General of Hong Kong v. Reid (infra)* - being a payment to persuade Davila to cause Codelco to enter into futures contracts or options with members of the MG Group in terms detrimental to Codelco. This is as opposed to representing a secret profit or commission paid to Davila to persuade him to cause Codelco to enter into legitimate dealings with members of the MG Group on terms that might not have necessarily resulted in any kind of loss to Codelco.

1 Nonetheless, for the purpose of granting the relief sought by Codelco in these proceedings, I
2 accept the submissions made by Mr. Ritchie on behalf of Codelco and I am satisfied that it
3 matters not whether the MG Payment represented a bribe or some kind of secret profit or
4 commission.

5 Davila, as a fiduciary (as I have so held), was not entitled, without the consent of his
6 principal, to use his position to receive any secret profit or commission for himself. Thus,
7 any profit or commission so obtained by Davila is held on constructive trust for Codelco, his
8 principal. Paragraph 32-118 Chitty on Contracts, 28th Edition, Vol. 2. Moreover, it matters
9 not whether the fiduciary's principal has suffered any loss as the result of the fiduciary's
10 actions.
11

12 This was already an established principle from the state of the modern law of equity on
13 fiduciary relationships which preceded the Reid case. As recognised by their Lordships
14 (*supra* at 338A.) a fiduciary will not be allowed to benefit from a gain or advantage
15 obtained by virtue of having acted in a manner in conflict with or not in accordance with the
16 terms of his fiduciary duties. This will be the outcome even if the fiduciary acts in good
17 faith: *Phipps v. Boardman* (1967) 2 A.C. 46. If the fiduciary has obtained a profit out of
18 his fiduciary position, equity insists on treating him as having obtained it for his principal.
19 At page 124 in his speech which has come to be most often cited for the equitable principle
20 that a person in a fiduciary position is not allowed to put himself in a position where his
21 interests and duty conflict (notwithstanding his dissent on the factual outcome) Lord Upjohn
22 referred to the statement of Lord Cranworth L.C. in the earlier case of *Aberdeen Railway v*
23 *Blaikie* 2 Eq. Rep 1281 for the history of the principle:
24

25

1 Interglobal Account together with all interest earned thereon down to the date of payment
2 shall be paid to Codelco.

3

4 In light of my decision on the first Preliminary Issue which grants Codelco all the relief it
5 requires, it is unnecessary for me to make any determination in relation to the second or
6 third Preliminary Issues.

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9 The costs of Codelco, of and occasioned by the trial of the Preliminary Issues, are to be paid
10 by the 1st Defendant, Interglobal, such costs to be taxed if not agreed.

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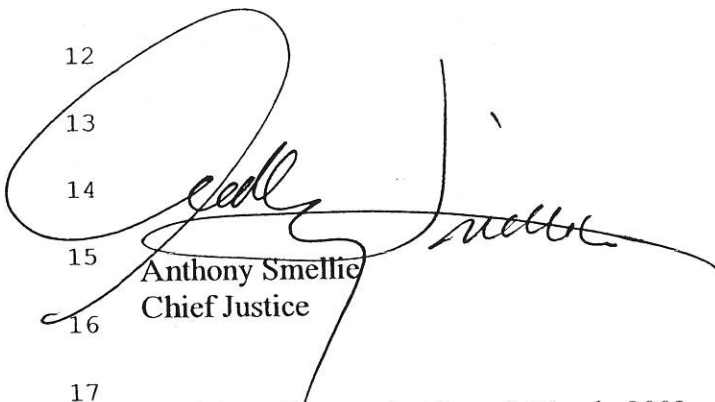
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Anthony Smellie
Chief Justice



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Decision given on 1st day of March, 2002.

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Written reasons delivered on 23rd May 2002.

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