

Dispute Resolution  
Case Law Update  
Rosling King LLP



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The Court of Appeal has dismissed an appeal arising from a High Court decision, which held that the Defendants dishonestly assisted a director of the Claimant company to breach his duty under section 175 of the Companies Act 2006 and misapply money belonging to the Claimant.

The Court of Appeal dismissed the appeal; save that the previous Judge's conclusion to award equitable compensation to the Claimant was reversed in part, from £1.25million to £750,000, further to the Judge concluding that the dishonest assistance by the Appellants in the misapplication of the funds did not cause the additional loss of £500,000 awarded to the Respondent by the Judge at first instance.

### Background and First Instance Decision

Mr Abdulkadir Aydin ("Mr Aydin"), the First Defendant, was the 100% shareholder and sole director of Goldtrail Travel Limited ("Goldtrail"), the Claimant company (and Respondent on appeal), a holiday tour operator specialising in flights and holidays to Turkey.

Goldtrail purchased seats on flights from a Turkish airline, Onur Air ("Onur"), the Third Defendant, and from a Swedish airline, Viking. The Second Defendant, Black Pearl Investments Limited ("Black Pearl") had an indirect 40% interest in Viking.

Mr Aydin sold 50% of his shares in Goldtrail to Black Pearl. The parties entered into a Share Purchase Agreement, which contained a commitment by Goldtrail to purchase seats on flights from Viking for a five year period. In addition, Viking entered into a brokerage agreement with Morning Light Limited ("MLL") a Seychelles company, also owned by Mr Aydin, which provided for Viking to pay £1.4million to MLL, as commission in respect of Goldtrail's five year seat commitment. This agreement required Goldtrail to pay a deposit of £250,000 to Viking. Goldtrail also entered into a separate seat purchase agreement with another company, FOAL which provided for Goldtrail to make payment of a deposit of £500,000. Goldtrail then paid an extra £500,000 to Viking, which was described by Black Pearl as an advance deposit for seats (the "Extra Payment"). In total, Goldtrail had paid out £1.25million in deposits and these are referred to collectively herein as (the "Black Pearl Deposits").

Mr Aydin then sold his remaining 50% share in Goldtrail to Onur, unbeknown to both Black Pearl and Onur. Onur also entered into a brokerage agreement with MLL which provided for MLL to receive £3.64million as commission in respect of Goldtrail's commitment to purchase seats from Onur for four years. The £3.64million was made up of a £1million payment from Onur to Mr Aydin and a further £2.64million payment from Onur to MLL, after Goldtrail had paid £2.65million to Onur (the "Onur Payments").

Shortly thereafter, Goldtrail went into administration and subsequently liquidation. The liquidators brought proceedings against Mr Aydin and the other Defendants alleging the misapplication of Goldtrail's money by Mr Aydin, causing it to be transferred to Viking and Onur to enable them to make payments due to Mr Aydin himself, or to MLL. It was further alleged that Mr Aydin, as director of Goldtrail, was in breach of his fiduciary duty and section

175 of the Companies Act 2006 to avoid conflicts of interest, by arranging for commission to be paid to him, via MLL, and not to Goldtrail. In addition, the liquidators alleged that the Defendants assisted Mr Aydin in both the misapplication of Goldtrail's money and in breach of his duties as director.

The Judge held that Mr Aydin owed a fiduciary duty not to misapply Goldtrail's funds and that this duty was breached when Goldtrail paid out the deposits totalling £1.25million, being the Black Pearl Deposits and £2.65million, being the Onur Payments. The Judge referred to these payments as a mechanism whereby Goldtrail funded part of the consideration due to Mr Aydin and were not true deposits.

It was further held that Mr Aydin was in breach of his duty under section 175 of the Companies Act 2006, by diverting to himself, via MLL, £1.4million which would otherwise have been due to Goldtrail as a consequence of their agreement to purchase seats on flights from Viking as one of the Black Pearl Deposits.

The Judge held that the Defendants dishonestly assisted Mr Aydin in breaching his duty under section 175 of the Companies Act 2006 and in misapplying £1.25 million of Goldtrail's money, being the Black Pearl Deposits, which found its way to Mr Aydin, via MLL.

#### Judgment on Appeal

The appeal concerned only the Black Pearl Deposits. The pertinent issues on appeal were whether the previous Judge had erred in her findings of fact in relation to her conclusion that Mr Aydin had deprived Goldtrail of an opportunity, and that even if there had been such opportunity, the Judge had been wrong to conclude that this was worth £1.4million.

The Appellants believed that they should not have been found to be dishonest assisters as they did not have sufficient legal knowledge in respect of a claim against Mr Aydin in breach of section 175 of the Companies Act 2006. In respect of the misapplication findings, the Appellants contested that the Judge was wrong to conclude that they had not intended to repay the Black Pearl Deposits and contested that equitable compensation of £500,000 to Goldtrail should not have been awarded in respect of the Extra Payment.

The Court of Appeal held that the previous Judge had been right to conclude that there had been an opportunity whereby Goldtrail was deprived by Mr Aydin and upheld that Goldtrail had lost commission of £1.4million for which the Appellants would now be liable to compensate. The Court of Appeal ruled that the Appellants' relevant dishonesty had been in allowing Mr Aydin to divert Goldtrail's opportunity and Goldtrail's property to himself, via MLL.

The Court of Appeal was satisfied that the previous Judge was right to make a finding that the Appellants had never intended to repay the Black Pearl Deposits, but that the previous Judge was wrong to have held that the Appellants should compensate Goldtrail for the Extra Payment. Goldtrail had already recovered that money from Viking and the dishonest assistance of Mr Aydin's misapplication did not cause a loss of £500,000 to Goldtrail, which the Judge had awarded as part of the equitable compensation.

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The Court of Appeal therefore dismissed the appeal, but reversed part of the Judge's decision in the misapplication claim, by reducing the award for equitable compensation to Goldtrail by £500,000, from £1.25million to £750,000, in respect of the Extra Payment.

#### Commentary

This case provides a reminder that a finding of dishonest assistance will be made on findings of fact. It follows that where a finding of dishonest assistance is made in relation to the misapplication of funds, the misapplication must be found to cause a loss to the party in question, in order for equitable compensation to be awarded.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.