

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. T-068 OF 1998

BETWEEN	THERMO PLASTICS (JA.) LIMITED (In Receivership)	PLAINTIFF
A N D	JEAN-MARIE DESLUME	FIRST DEFENDANT
A N D	WASHINGTON TRUST LTD.	SECOND DEFENDANT

Mr. Michael Hylton Q.C., and Miss Hilary Reid for Plaintiff.

Mr. Donald Scharschmidt Q.C., and Anthony Levy for First Defendant.

Miss Debra Newland for Second Defendant.

HEARD: 16th and 17th June, 1999

F.A. SMITH, J.

By Notice of Motion dated 28th May, 1998 the plaintiff seeks judgment in default or in the alternative summary judgment against the Defendants pursuant to Section 79(1) of the Civil Procedure Code Law.

The judgment sought as per the Minute of Judgment attached to the Notice is as follows:

1. Against the First and Second Defendants for:

A Declaration that the Plaintiff is the beneficial owner of of properties known as 8 Upper Carmel Way and being the land comprised in Certificates of Title registered at Volume 1188 Folio 20 and Volume 1193 Folio 600 of the Register Book of Titles.

2. Against the First Defendant for:

- (a) The sums of \$11,386,340, \$1,765,750 and \$245,360 as moneys had and received and damages to be assessed.
- (b) An account in respect of any profit derived directly or indirectly as a result of his breach of fiduciary duty.
- (c) An order that within fourteen (14) days of being requested to do so, the First Defendant do execute a transfer of the said properties to the Plaintiff or to its order.

- (d) An order that the Registrar of the Supreme Court do execute the said transfer if the First Defendant fails to do so.
- (e) An order that the First Defendant pay the costs of transferring the said properties.
- (f) An order that the First Defendant forthwith deliver up possession of the said properties to the Plaintiff.
- (g) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act.
- (h) Costs to be taxed or agreed.

The Writ of Summons dated 27th April, 1998 was accompanied by a Statement of Claim. In its Statement of Claim the plaintiff avers:

1. The Plaintiff is a company incorporated under the Companies Act. On March 1, 1998, Mr. Richard Downer was appointed Receiver and Manager of the Plaintiff pursuant to a Debenture date the 19th July, 1997.
2. The First Defendant was at all material times a director and employee of the Plaintiff and received a salary for his services as President of the Plaintiff.
3. The Second Defendant is a company incorporated under the Companies Act.
4. The First Defendant owed a fiduciary duty to the Plaintiff including but not limited to a duty to:
 - (a) act in its best interest;
 - (b) act in good faith;
 - (c) not enter into contracts and/or agreements which were not in its best interests;
 - (d) exercise his powers as director for proper purposes only;
 - (e) not misuse the Plaintiff's assets;
 - (f) not place himself in a position where there would, or alternatively could be a conflict of interest between his duty to the Plaintiff and his personal interests;
 - (g) ensure that the Plaintiff carried on its business in accordance with its Articles of Association and the Companies Act.

5. In breach of his said fiduciary duty the First Defendant caused and/or allowed the Plaintiff to enter into the transfer more particularly described below, and into the transactions described in paragraphs 11 to 13 hereof.

PARTICULARS

- (a) Up to April 9, 1995, the Plaintiff was the registered proprietor of the properties comprised in Certificates of Title registered at Volume 1193: Folio 600 and Volume 1188 Folio 20 of the Register Book of Titles ("The Properties").
 - (b) The Properties are known as 8 Upper Carmel Way, Cherry Gardens in the parish of Saint Andrew, and at all material times a substantial dwelling house was erected thereon. The Properties are, and were, at all material times, worth not less than \$30 million dollars.
 - (c) By an instrument in writing dated the 10th day of April, 1995 the Properties were transferred from the Plaintiff to the First Defendant, purportedly by way of gift. The transfer was signed on behalf of the Plaintiff by Ernest George Goodin, and, purportedly by Thomas Desulme.
 - (d) The Plaintiff was at the material time suffering substantial losses and was insolvent.
 - (e) Despite the substantial value of the Properties they were transferred to the First Defendant with no benefit accruing to the Plaintiff from its disposal and in circumstances which were not in the best interests of the Plaintiff.
6. The said transfer was a sham and unenforceable in that inter alia:
- (a) it was not at arm'slength;
 - (b) it was not for value;
 - (c) it was in breach of the First Defendant's fiduciary duty to the Plaintiff; and
 - (d) it took place in circumstances which were fraudulent.

PARTICULARS OF FRAUD

- i. The First Defendant was aware of the true value of the Properties and as a director would have been aware that the Plaintiff was insolvent at the material time.
 - ii. At the date of the transfer Thomas Desulme was deceased and incapable of executing the said transfer.
7. By an instrument in writing dated the 26th day of June, 1997 the First Defendant mortgaged the Properties in favour of the Second Defendant for the sum of \$431,000.00.
 8. The Properties have and have had at all material times a monthly value of not less than US\$3,000.00.
 9. The First Defendant has not accounted to the Plaintiff for the income received from, or the use of the Properties since 10th April, 1995, the date of the aforesaid transfer.
 10. As a result of the First Defendant aforesaid breach of fiduciary duty, the Plaintiff has suffered loss and damage.

PARTICULARS

- (a) Value of the Properties J\$30 million (approximately)
 - (b) 36 months (to date) @US\$3,000 per month US\$108,000.00
11. In addition to the salary and emoluments to which he was entitled, the First Defendant has received various sums from the Plaintiff which he has failed and/or refused to repay. Furthermore, in order to conceal the true destination of the funds, the First Defendant caused the payments to be recorded in the Plaintiff's book in various accounts, many of which appeared to have no connection with the First Defendant.

PARTICULARS

<u>Name of Account Used</u>	<u>Sums Received and Not Repaid(\$)</u>
Special Advances	5,344,987
Salary Advances - All Employees	3,226,338
Directors' Loan Account	539,865

Staff Loans - All Employees	1,115,856
Salaries - President's Office	585,000
Subsistence Account	449,294
Gift and Donation Account	<u>125,000</u>
	<u>11,386,340</u>

12. Between November, 1995 and January, 1998 the First Defendant also caused the Plaintiff to pay the sum of \$1,765,750 to his Attorneys in payment for legal fees incurred by him personally and for which the Plaintiff received no benefit.
13. Between May, 1995 and January, 1998 the First Defendant drew a number of cheques totalling \$245,360 in favour of the Plaintiff, and caused the Plaintiff to give him cash in exchange therefor. Upon the cheques being presented for payment, they were dishonoured by the First Defendant's banker. Despite receiving notice of dishonour, the First Defendant has failed and/or refused to reimburse the Plaintiff.

Defence and Counterclaim

In his Defence and Counterclaim dated 25th March, 1999 he states:

1. Save that this Defendant admits that the Plaintiff is a company incorporated under the Companies Act, no admission is made as to paragraph 1 of the Statement of Claim.
2. Paragraph 2, 3 and 4 of the Statement of Claim are admitted.
3. As to paragraph 5 of the Statement of Claim this Defendant denies that he committed breaches of his fiduciary Duties as alleged or at all.
4. In further answer to paragraph 5 of the Statement of Claim this Defendant says that the property known as 8 Carmel Way, Cherry Gardens was purchased by him with his own funds and a loan from the Plaintiff Company.
5. This Defendant further says prior to the purchase of the property, he discussed the matter with his late father, Thomas Desulme, who was the founder of the Plaintiff company and who at the material time was a Director and its Executive Chairman.
6. At all material times the late Thomas Desulme was acting as the agent of the Plaintiff Company.

7. Prior to the purchase of the property, this Defendant who was an employee of the Plaintiff Company and then the Vice-President in charge of manufacturing as a part of his emolument from the said Plaintiff Company lived in an apartment owned by the Plaintiff Company for which he paid no rent.
8. That this Defendant informed the late Thomas Desulme that he proposed to make a down payment on the property and obtain a mortgage from Mutual Life Assurance Society for the balance of the purchase money whereupon the late Thomas Desulme advised him that the Plaintiff Company would advance the deposit and give him a mortgage. He further advised that this Defendant should put the title in the Company's name as Tax Benefits were to be gained in doing so.
9. That it was agreed between this Defendant and the late Thomas Desulme acting on behalf of the Plaintiff Company that the Company would advance the deposit and that this Defendant would be given a housing allowance to compensate him for the loss of entitlement to the apartment and that the said housing allowance would be deemed as payment to the Plaintiff Company in respect of the mortgage.
10. That acting in pursuance of the agreement referred to supra the Plaintiff Company advanced the deposit, the title was put in the name of the Plaintiff Company and the Defendant repaid his indebtedness to the Company out of foreign funds and the housing allowance referred to above.
11. That in the year 1986, the Plaintiff Company wrote its bank Mutual Security Limited and indicated that the property, 8 Carmel Way, belonged to Jean-Marie Desulme and was not a part of the security the Plaintiff Company was offering in respect of its indebtedness to the bank, and the bank wrote back confirming same.
12. This Defendant says that in or about December 1986, the Company executed an Instrument of Transfer of the said property to this Defendant. The said transfer was prepared by Keith Brooks, Attorney-at-Law and signed by two Directors of the Company, one of whom was the late Thomas Desulme and

the company's seal was affixed thereto.

13. That after making certain additions to the house at 8 Carmel Way, this Defendant went to reside there and has continued to reside there.
14. That subsequently, the Instrument of Transfer was sent to Milholland, Ashenhein and Stone, Attorneys-at-Law, but due to cash flow problems of the Plaintiff Company, the said transfer was not registered and was returned to Milholland, Ashenhein and Stone with a covering letter dated November 21, 1991.
15. That the said transfer was mislaid and in September, 1993, a new transfer was prepared and the late Thomas Desulme and Ernest Goodin both Directors of the Plaintiff Company signed on behalf of the Company and same was witnessed by Sharol Gill, Secretary of the late Thomas Desulme and this is the transfer that was ultimately registered.
16. This Defendant denies paragraph 6 of the Statement of Claim and refers to paragraphs 5 to 13 hereof.
17. Paragraph 7 of the Statement of Claim is admitted.
18. No admission is made as to paragraph 8 of the Statement of Claim.
19. In answer to paragraphs 9 & 10 of the Statement of Claim this Defendant repeats paragraphs 5 to 13 hereof.
20. In answer to paragraphs 11 & 13 this Defendant denies being indebted to the Plaintiff Company in the sum alleged in the Statement of Claim or at all and says that the Plaintiff Company with the approval of its Directors made regular contributions to a particular political party. The said contributions were made in cash and recorded in the books as money received by the Defendant
21. This Defendant denies the allegation made in paragraph 12 of the Statement of Claim and says that the sum expended was spent on behalf of the Plaintiff Company.
22. This Defendant denies that the Plaintiff is entitled to any of the reliefs claimed or to any relief at all.

COUNTERCLAIM

1. This Defendant says that as from 9th March, 1998, he has been barred from entering the premises of the Plaintiff Company and prevented him from performing his services as President thereof. That his services were terminated without notice and that he is entitled to at least one years notice or salary in lieu thereof.
2. This Defendant further says that in or about the year 1983, while he was employed to the Plaintiff Company the Plaintiff company established a Pension Scheme to which he and the other workers contributed and that this Defendant has been deprived of the contributions made to the said Pension Scheme.

This Defendant counterclaims
for one year's salary \$1,800,000.00

Alternatively, this Defendant
claims redundancy payment of \$1,730,750.00

The Defendant counterclaims
being the sum contributed to
the said Pension Scheme \$1,600,000.00

The Plaintiff's reply and Defence to Counterclaim was filed and served on the 9th April, 1999. In this the Plaintiff states:

1. No admission is made as to paragraphs 5 to 10 of the Defence and Counterclaim, save and except that the late Thomas Desulme was the father of the first Defendant, founder of the Plaintiff, and at some time Director of the Plaintiff. The Plaintiff specifically denies that the first Defendant has paid any sums to the Plaintiff with reference to the property. The Plaintiff further says that at all material times the first Defendant was treated as living in property owned by the Plaintiff and the accommodation was treated as a taxable emolument. At no time was the first Defendant given, nor entitled to a housing allowance which was treated as payment in respect of the property.
2. In further answer to paragraphs 5 to 10 of the Defence and Counterclaim, the Plaintiff denies that the late Thomas Desulme acted as agent of the Plaintiff as alleged.

3. Paragraphs 11, 12, 13 and 14 of the Defence and Counterclaim are not admitted.
4. The Plaintiff makes no admission as to the contributions alleged in paragraph 20 of the Defence and Counterclaim and denies that any such contributions were recorded in the manner alleged by the first Defendant.

DEFENCE TO COUNTERCLAIM

5. Save and except that the first Defendant has been barred from entering the premises of the Plaintiff and prevented from performing services as President thereof, the Plaintiff denies paragraph 1 of the Counterclaim.
6. The Plaintiff further says that the services of the first Defendant were not wrongfully terminated, but terminated by operation of law upon the appointment of the Receiver on March 9, 1999.
7. Further and in the alternative, the Plaintiff will say that by reason of the matters set out in the Statement of Claim, it was entitled in any event to dismiss the first Defendant summarily and without notice.
8. Further and in the alternative, the Plaintiff will say that the first Defendant having not made any claim for a redundancy payment within six months of his services having been terminated he is not entitled to a redundancy payment. In any event, the plaintiff says that the sum to which the first Defendant could have been entitled as redundancy payment would not be one year's salary but a payment based on the number of continuous years of service by the first Defendant to the Plaintiff.
9. Save and except that the plaintiff established a Pension Scheme to which the first Defendant and other employees contributed, the Plaintiff makes no admission as to paragraph 2 of the Counterclaim. The Plaintiff will say that any sums to which the first Defendant is entitled in respect of contributions to a Pension Scheme are to due to him from the Trustees of the Scheme and cannot be set off against any sum due to the Plaintiff from the first Defendant.

10. Save as is hereinbefore expressly admitted the Plaintiff denies each and every allegation contained in the Counter-claim as if the same were set out and traversed seriatim and repeats and relies on the matters set out in the Statement of Claim.

Mr. Richard Downer the Receiver and Manager of the Plaintiff pursuant to a Debenture, in his affidavit dated 28th May, 1998 in support of the Motion for Summary Judgment verifies the claim set out in the Statement of Claim and states that in his belief the Defendant have no defence.

In another affidavit dated 27th April, 1998 (pargraphs 4-11) Mr. Downer swore that:

4. The first Defendant, Jean-Marie Desulme, is and was at all material times a Director of the Plaintiff.
5. Up to April 9, 1995, the Plaintiff was the registered proprietor of the properties comprised in Certificate of Title registered at Volume 1193 Folio 600 and Volume 1188 Folio 20 of the Register Book of Titles ("the Properties"). Exhibited hereto are copies of the titles referred to above, marked "RD 3" and "RD 4" respectively.
6. The properties known as Upper Carmel Way, Cherry Gardens, in the parish of Saint Andrew and at all material times, a substantial dwelling house was erected thereon.
7. On the 10th day of April, 1995 the properties were transferred from the Plaintiff to the first Defendant, purportedly by way of gift. The transfer was signed on behalf of the Plaintiff by Ernest George Goodin, and, purportedly by Thomas Desulme. I exhibit hereto marked "RD 5" a copy of the transfer, along with a Declaration of Value which is attached thereto, which I have obtained from the Titles Office.
8. I have been informed by his son, Yvon Thomas Desulme, and do verily believe that the said Thomas Desulme died on the 9th December, 1993 and was buried on the 19th December, 1993.
9. Since the said transfer the first Defendant has mortgaged the properties in favour of the second Defendant for the sum of \$431,000.00. I exhibit hereto marked "RD 6" a copy of the said mortgage.

10. I have seen nothing in the files or records of the Plaintiff to indicate that as at April, 1995, or at any time prior to or subsequent to that time, there was a Director's meeting approving or ratifying this "gift" to the first Defendant or that the disposition had even taken place.
11. Exhibited hereto and marked "RD 7" are the financial statements of the Plaintiff for the years ended 30th September, 1994 and 30th September, 1995 which show that at all material times the Plaintiff was suffering substantial and increasing losses and declining net current assets and was clearly headed towards insolvency.

In yet a third affidavit dated 8th December, 1998 Mr. Downer stated that:

"In paragraph 3 of the Desulme affidavit it is alleged that there was an agreement between the first Defendant and the Vendor of the premises at 8 Carmel Way and that the late Thomas Desulme paid a deposit of \$100,000.00 on the behalf of the first Defendant.

The documents in the Plaintiff's files indicate that:

- (a) The agreement was between the Plaintiff and the Vendor.
 - (b) The deposit was infact \$210,000.00 not \$100,000.00.
 - (c) The deposit was paid by the Plaintiff and not by the late Thomas Desulme.
 - (d) The balance purchase price was paid by the Plaintiff.
4. I exhibit hereto as exhibit "RD 8", "RD 9" and "RD 10" respectively, copies of cheque number 48497 dated 18th April, 1986 fromt he Plaintiff to Dunn, Cox & Orrett in the sum of \$210,000.00; cheque number 50886 dated 28th August, 1986 in the sum of \$504,548.81 from the Plaintiff Dunn, Cox & Orrett addressed to the Plaintiff.
 5. In paragraph 4 of the Desulme affidavit, it is alleged that a housing allowance due to the first Defendant was to be applied to reduce and pay off his obligation to the Plaintiff for the monies allegedly advanced on his behalf for the purchase of the property. The Plaintiff's records

for the period 1996-1997 indicate that during this period, the first Defendant did not receive housing allowance, but instead occupied a company-owned house.

6. As a result, and in accordance with the law, the first Defendant was treated as receiving a taxable emolument in the form of the accommodation, which was valued at 15% of his basic salary, and he paid income tax on that sum. Exhibited hereto marked "RD 11", "RD 12" and "RD 13" respectively, are copies of the Plaintiff's annual PAYE returns to the Income Tax Department for the years ending December 31, 1988, 1989, 1990 and 1991, respectively.
7. The records of the Plaintiff also indicate that there were no deductions from the first Defendant's salary during the period 1986 to 1997 towards a housing loan.
8. The records of the Plaintiff have at all material times shown the said property as an asset of the Plaintiff. I have seen no records of the Plaintiff which indicate that the first Defendant has any interest whatsoever in the property. Exhibited hereto by way of example and marked "RD 15" is a copy of the Plaintiff's fixed asset schedule as at the end of 1994, which shows the property as one of the assets of the Plaintiff.
9. In paragraph 3 of the Desulme affidavit, it is also alleged that in 1986 the first Defendant transferred the sum of US\$16,000.00 to his father's account, purportedly to be used for the payment for goods used by the Plaintiff. The Plaintiff's records show that there were only two occasions between 1985 and 1987 that the late Mr. Thomas Desulme paid for purchases for the company. These purchases were in January, 1986 and August, 1986 from Melam Plastic, a company owned by the late Thomas Desulme. In posting the relevant accounting entries, the payments were credited to the late Mr. Thomas Desulme's director's loan account, and therefore the Plaintiff did not receive the benefit of those payments.

Cynthia Desulme the sister-in-law of the first Defendant and the Secretary of the Plaintiff from its incorporation until around December, 1993 testified that her father-in-law the late Thomas

Desulme died on the 9th December, 1993 and was buried on the 19th December, 1993.

She exhibited a copy of the instrument of transfer dated 10th April, 1995 signed on behalf of the Plaintiff by Ernest George Goodin and purportedly by her father-in-law Thomas Desulme.

Of course Mr. Thomas Desulme could not have executed a transfer in April, 1995. Mrs. Desulme also swore that she was very familiar with her father-in-law's signature and in her opinion the signature on the transfer is not his true signature.

Mr. Yvon Thomas Desulme a son of the late Thomas Desulme and brother of the first Defendant, a director of the Plaintiff from 1972 to 1996 in an affidavit dated 27th April, 1998 swore that the properties known as 8 Upper Carmel Way were purchased by the Plaintiff.

He, too, swore that, in his opinion the signature on the transfer which purports to be his father's was not written by his father. He exhibited an affidavit from Mr. Wilford Williams an handwriting expert of over twenty (20) years experience.

There are two affidavits filed on behalf of the first Defendant. One sworn to by Mr. Ernest Goodin and the other by the first Defendant himself both dated 23rd June, 1998. In his affidavit the first Defendant claims that in early part of 1986 he came to an agreement with Mr. Sinclair Shirley to purchase premises now known as 8 Carmel Way for the sum of \$700,000.00. The premises were partly completed but construction had ceased. He discussed the matter with his father, the late Thomas Desulme who agreed to advance the deposit of \$100,000.00 on his behalf on the understanding that he would re-imburse him out of monies held by him in Miami, Florida (Para. 3).

He further claimed that in order to protect his interest his father had an Instrument of Transfer prepared by Mr. Keith Brooks and that this was executed by his father and Mr. George Johnson as Directors of the Plaintiff and himself and the seal of the company affixed (para. 5).

At paragraph 10 he states that the Instrument of Transfer dated 10th April, 1995 was in fact executed in September, 1993. Mr. Goodin a director of the company at the time, in his affidavit speaks to discussions he had with and instructions given to him by the late Thomas Desulme with a view to taking "step to tidy up his affairs."

It is important to note that these instructions which support the first Defendant's defence were not given to him by the Plaintiff but allegedly by Mr. Thomas Desulme.

Summary Judgment

S.79(1) of the Judicature (Civil Procedure Code) provides:

Where the defendant appears to a writ of of summons specially indorsed with or accompanied by a statement of claim under Section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. **The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."**

Preliminary Requirements

- (a) The Writ of Summons must have been specially endorsed with or accompanied by a Statement of Claim under S.14 of the Civil Procedure Code.
- (b) The defendant must have entered appearance to the Writ of Summons.
- (c) The application must be supported by an affidavit which verifies the facts and contains a Statement of the defendant's belief that there is no defence to the action.

It is not in dispute that these requirements have been met.

These requirements having been met, the burden thereafter shifts to the defendant to:

- (a) Satisfy the court that he has a good defence to the action on merits or
- (b) disclose such facts as may be deemed sufficient to entitle him to defend the action generally.

Mr. Hylton Q.C., submitted that there are two separate issues:

- (a) Has the first Defendant shown a good or arguable defence to the Plaintiff's claim for the house?
- (b) Has the first Defendant shown a good and arguable defence to the Plaintiff's claim for the money?

Counsel for the Plaintiff contended that the first Defendant, as a director of the Plaintiff, owed the Plaintiff a fiduciary duty to apply its assets only for the purposes of the company. For this he relied on Aberdeen Railway Company v. Blaikie 1843-1860 All E.R. Rep. 249; International Sales and Agencies Ltd. and Another v. Marcus and Another (1982) 3 All E.R. 551; Halsbury's Laws of England 4th Edition Volumes 7 and 16 paragraphs 518 and 911 respectively.

He also submitted that the liability resulting from a breach of these fiduciary duties is independent of fraud, intent or personal incompetence and exists where the breach is innocent or merely technical. Consequently the claim is not based on allegations of fraud, although it arguably discloses instances of fraudulent behaviour. Here he relies on Hanbury & Maudsleys Modern Equity at page 598.

Mr. Scharschmidt is not disputing that the first Defendant owed the plaintiff a fiduciary duty. In his defence the first Defendant denies that he committed breaches of his fiduciary duties. Mr. Scharschmidt's contention is that there is a misconception that the court is involved in a trial. He submitted that what the defendant is required to do is to show that he has a defence to the action on the merits. Once the defence discloses a credible defence, that is enough, and the defence may do so by affidavit or otherwise. This is indeed so, however, in my view the nature of the duty of a director of a company is relevant to the decision which the court has to make.

DIRECTOR'S DUTY

In the Aberdeen Railway Company case (supra) the court held that:

"It is the duty of a director of a company so to act as best to promote the interests of the company. That duty is of a fiduciary character, and no one who has such duties to discharge can be allowed to enter into engagements, in which he has, or can have a personal interest which conflicts, or possibly may conflict, with the interests of the company. A director, therefore, is precluded from entering on behalf of the company into a contract with himself or with a firm or company of which he is a member, and so strictly is this principle adhered to that no question can be raised as to the fairness or unfairness of a contract so entered into."

In the International Sales and Agencies Ltd case (supra) where cheques were drawn by the only effective director of the company on the company's account to settle a personal debt incurred by a deceased director, LawsonJ, said at p.556:

"I am quite satisfied and I hold that the issue of the cheques by Mr. Munsey with intent that they should be cashed by the defendants and taken in payment of their loan to the deceased, Aziz Fancy, was a clear breach of Mr. Munsey's duty to the plaintiffs as their director. It is to my mind unarguable that a director who gives away his company's money without the consent of the shareholders is in breach of his fiduciary duty as a constructive trustee of the money in the banking accounts of the company over which he has control."

In the instant case it is without doubt that the first Defendant owed a fiduciary duty to the plaintiff. It is the contention of the plaintiff that the first Defendant has breached this fiduciary duty and must make restitution.

Reference was made to Halsbury's Laws of England 4th Edition Volume 7 paragraph 518 which states:

"A director who has misapplied or retained or become liable or accountable for money or property of the money or who has been guilty of any breach of trust in relation to the company must make restitution or compensate the company for the loss. Where the money of the company has been applied for purposes which the company cannot sanction, the directors must replace it, however honestly they may have acted."

Volume 16 (ibidem) at paragraph 911 states:

"The principle of following assets applies wherever a fiduciary relation between parties subsists and extends to enable property to be recovered not merely from those who acquire a legal title in breach of some trust, express or constructive, or of

some other fiduciary obligation, but from volunteers into whose hands the legal title to property has come, provided that, as a result of what has gone before, some equitable proprietary interest had attached to the property in the hands of the volunteer."

With these principles in mind, I will now proceed to consider whether the first Defendant has shown a good or arguable defence to the plaintiff's claims for the money and the house.

The Money

(i) In paragraph 11 of its Statement of Claim the plaintiff claims \$11,386,340.00 being the sum total of various amounts received by the first Defendant from the plaintiff. Mr. Richard Downer in his first affidavit said that from investigations he discovered that the first Defendant had obtained substantial amounts of the plaintiff's money for his personal use and has not repaid those sums to the plaintiff. He verified the claim of the plaintiff.

In his defence (paragraph 20) the first Defendant denies being indebted to the plaintiff in this sum or at all. He claims that the plaintiff company with the approval of its Directors made regular contributions to a particular political party. The said contributions, he states, were made in cash and recorded in the books as money received by the Defendant. The first Defendant is accordingly admitting that the sums the plaintiff claims are recorded in the books of the plaintiff as money he received.

Thus his assertions that these sums represent contributions to a particular political party is contradicted by the contemporary documents and the compelling evidence of Mr. Richard Downer. Although it is true, as Mr. Scharschmidt Q.C., submitted, that we are not here involved in a trial, the mere assertion of a fact in certain circumstances will not suffice to show that the defendant has a good defence on the merits.

In Bhogul v. Punjab National Bank (1988) 2 All E.R. 296 where the facts underlying most of the allegations were very much in issue, Bingham L.J. at p.303(c) stated:

"But the correctness of factual assertions such as these cannot be decided on application for summary judgment unless the assertions are shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence." (emphasis mine)

In the instant case the first Defendant as I said before, has admitted that the sums claimed are recorded in the books and records of the plaintiff company of which he was a Director as having been received in cash by the first Defendant. He nonetheless claims that the plaintiff with the approval its directors made contributions in cash to a political party and that it was these contributions which were recorded in the plaintiff's books as money received by him.

I ask myself whether it is credible or reasonably probable that contributions made by a company to a political party would be entered in the books of the company as payments made to a Director of the company. I have concluded that it is not.

The plaintiff in paragraph 11 of its statement of claim gave particulars of the names of accounts. It seems to me that there is not a fair or reasonable probability of the defendants having a real or bona fide defence.

(ii) In paragraph 12 of the Statement of Claim the plaintiff claims that between November 1995 and January 1998 the first Defendant also caused the plaintiff to pay the sum of \$1,765,750.00 to his attorneys in payment for legal fees incurred by him personally and for which the plaintiff received no benefit.

The defendant denies this allegation and states that the sum expended was spent on behalf of the plaintiff company.

Here again it seems to me that the first Defendant is not disputing the averment that the sum claimed was expended for legal fees albeit he is saying it was spent on behalf of the plaintiff company.

Mr. Downer the Receiver and Manager of the business property and assets of the plaintiff does not agree with the first Defendant's claim.

Although in these proceedings it is not for me to weigh the rival claims, the mere assertion by the Defendant that the particular sum was spent on behalf of the plaintiff company does not in my view ipso facto entitle the first Defendant to leave to defend. I must look at all the material before me and ask myself whether the Defendant has satisfied me that there is "a fair and reasonable probability of the Defendant establishing a real or bona fide defence."

In my view the first Defendant in these circumstances is

is required by his affidavit to satisfy me that he has a good defence. As already stated two affidavits were filed on behalf of the first Defendant.

Mr. Ernest Goodin a Director and Vice-President, Finance, of the plaintiff company, did not in his affidavit address this issue.

The first Defendant in his affidavit at paragraph 12 said:

".....unlike Mr. Downer I have not been permitted to have access to the books and records of the plaintiff and I am therefore unable to provide my attorneys with the information and facts necessary to prepare my Defence and Counterclaim, and to respond to the claims made in paragraphs 11, 12 and 13 of the Statement of Claim, and other matters not hereinbefore dealt with."

This affidavit was sworn to on the 23rd June, 1998, His Defence and Counterclaim is dated March 25, 1999.

It is hardly necessary for me to say that the civil procedure does provide the defendant with the ways and means of accessing the plaintiff's books and records. The reason the first Defendant gave, is to say the least, a very lame one.

I can only conclude that what the first Defendant said in answer to the plaintiff's claim is not credible and there is no "fair or reasonable probability of him setting up a defence."

(iii) In paragraph 13 of the Statement of Claim the plaintiff avers that between May, 1995 and January, 1998 the first Defendant drew a number of cheques totalling \$245,360.00 in favour of the plaintiff and caused the plaintiff to give him cash in exchange therefor. Upon the cheques being presented for payment they were dishonoured by the first Defendant's bankers despite the first Defendant receiving notice of dishonour, the first Defendant has failed and/or refused to reimburse the plaintiff.

The first Defendant's Defence to this claim is the same as that at (i) above.

This "defence" deserves to be given short shrift. In fact the first Defendant has not seriously addressed this claim in his affidavit or in the Defence filed.

Accordingly I agree with Mr. Hylton's submission that the first Defendant has not shown that he has a good or arguable defence to the plaintiff's claim for the money.

THE HOUSE

Has the first Defendant shown that he has a good and arguable defence to the plaintiff's claim for the house?

Mr. Hylton argues that on the material before court the answer must be in the negative. The first Defendant he said was in breach of his fiduciary duty to the company in that he did not apply the plaintiff's assets for the purposes of the plaintiff company.

He contended that the transfer of the plaintiff's property to the first Defendant was a sham and unenforceable in that:

- (a) it was not at arms length
- (b) it was not for value
- (c) it was in breach of the first Defendant's fiduciary duty to the plaintiff.
- (d) it took place in circumstances that were fraudulent.

The authorities he contended show that even if the Defendant acted with complete honesty he must return the house. He relied on Bishopsgate Investment Management Ltd. (In Liquidation) v. Maxwell (No. 2) 1994 1 All E.R. 261; Re: King's Settlement (1931) 2 Ch. 294; Toepfer v. Cremer (1975) 2 Lloyd's Rep. 118 and Doe D. Bryan v. Banks (1821) 106 E.R. 984.

Mr. Scharschmidt submitted that the defence of the first Defendant must be seen in the context of a father and son relationship and the position of the father who at the time was the founder, director and executive chairman of the plaintiff, and also the claim of the first Defendant that his father was acting as agent for the plaintiff. He submitted that the defence raises real and substantial questions to be tried.

He contended that the defence is relying on the transfer of 1986. There is no inherent implausibility in the defence, no inconsistency with contemporary documents. He referred extensively to the Supreme Court Practice (U.K.) 1995 Volume 1 Part 1 pp. 144-161.

As regards the Instrument of Transfer, he contended that there can be no question of it being a sham since:

- (a) The documents were prepared by Mr. Keith Brooks an attorney-at-law.
- (b) The instrument of transfer was sent by Mr. Goodin to Milholland, Ashenheim & Stone.
- (c) Mr. Goodin was advised by Milholland

Ashenheim and Stone through Miss Edwards-Bourne, attorney-at-law, of the costs of preparing the transfer.

- (d) The transfer was returned to the plaintiff.

The Certificate of Title in respect of the parcels of land registered at Volume 1193 Folio 600 and Volume 1188 Folio 20 show that the properties owned by the plaintiff were transferred to the first Defendant by way of gifts. These transfers were registered on the 13th April, 1995.

There is no dispute that the date of the Instrument of Transfer is 10th April, 1995. This transfer was signed on behalf of the plaintiff Ernest George Goodin and purportedly by Mr. Thomas Desulme. It was also signed by the first Defendant, Jean-Marie Desulme. Mr. Thomas Desulme was of course by then dead and buried. He died on the 9th December, 1993 and was buried on the 19th December, 1993.

The first Defendant's defence is that the property was purchased by him with his own funds and a loan from the plaintiff company. That the late Thomas Desulme acting as agent for the plaintiff advised him that the plaintiff company would advance the deposit and give him a mortgage and that the first Defendant should put the title in the plaintiff's name.

The defendant claims that it was agreed between himself and the late Thomas Desulme acting on behalf of the plaintiff that the company would advance the deposit and the first Defendant would be given a housing allowance.

He is claiming that the deposit was repaid by means of the application of the housing allowance due to him. However the plaintiff's records disclose that no loan was ever made to the first defendant for the purchase of the property, neither was any such loan repaid to the plaintiff. The plaintiff's records show that the first defendant occupied a company owned house and was treated as receiving a taxable emolument and income tax was paid on this basis.

I agree with Mr. Hylton Q.C., that the first Defendant's contention that he possessed an equitable interest in the property is patently false.

The explanation given to the date of the Instrument is that in or about December, 1986, the company executed an Instrument of Transfer of the said property to the first defendant.

The Instrument was then signed by two directors one of whom was his late father. Due to cash flow problem the Instrument was not registered then. The Instrument was mislaid. In September, 1993, a new transfer was prepared and his late father and Mr. Goodin signed on behalf of the plaintiff. That this was the transfer ultimately registered.

However the transfer registered indicates it was by way of a gift. The Instrument of Transfer shows that it was made on the date set out in Item 3 of Schedule. The date at Item 3 is 10th April, 1995 not September, 1993.

In **Re King's Settlement (1931) 2 Ch. 294** it was held that:

"If a grantor conveys property in a form actually and actively misleading so that any persons reading the conveyance necessarily concludes that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction but that the grantees take on a secret trust not disclosed in the conveyance."

In **Toepfer v. Cremer (1975) 2 Lloyd's Rep. 118 at p.125** Lord

Denning states:

"When one person has led another to believe that a particular transaction is valid and correct, he cannot thereafter be allowed to say that it is invalid or incorrect where it would be unfair or unjust to allow him to do so. It is a kind of estoppel. He cannot blow hot and cold according as it suits his book. So in this case seeing that the sellers put forward the notice as valid for their own purposes - and induced the buyer to accept it as valid - they cannot now turn around and say it is invalid."

I agree entirely with Mr. Hylton Q.C., that the first Defendant cannot now be heard to say that the true reason for which the property was transferred and the consideration given for such transfer were otherwise than as he stated in the Instrument of Transfer, the terms of which he acknowledged and asserted as true in signing and lodging same with the office of the Registrar of Titles and causing the Registrar thereby to effect changes in the Register.

What is stated on the registration of the transfer must be

taken as depicting the true nature of the transfer which it purported to effect.

As said before the first defendant contends that the date of the Transfer as stated in the document was not the true date of execution, the former being a date long after Mr. Thomas Desulme whose purported signature the instrument bears had died.

In this regard Mr. Hylton Q.C., in my view, correctly submitted that the only purpose that such an incorrect date could serve would be to perpetrate a fraud upon the revenue and thereby avoid the payment of correct stamp duty and transfer tax which would be payable on transaction.

The Defendant contends that Mr. Thomas Desulme signed the Transfer. There is substantial evidence on behalf of the plaintiff that the signature on the Transfer is not that of the late Thomas Desulme. The Defendant does not dispute the fact that Mr. Thomas Desulme died in 1993. The Defendant has not seriously attempted to explain the fact that the Transfer was made in April, 1995. I agree with Counsel for the plaintiff that there are only two alternatives:

- (i) that the document was really signed in 1995, if that is so, Mr. Thomas Desulme's signature was clearly forged and the transaction must be set aside or;
- (ii) that the document was signed in 1993 in which case the Defendant would have perpetrated a fraud on the revenue and should not be allowed to lead evidence to rely on that fraud.

In Doe d. Bryan v. Banks (supra) at p. 987 the court held:

"Besides I take it to be an universal principle of law and justice, that no man can take advantage of his own wrong. Now it would be inconsistent with that principle, to permit the defendant to protect himself against the consequences of this action, by afterwards setting up his own wrongful act at a former period."

The court cannot avoid the observation that the defendant's allegations and the transfer of the property were made after his father's death.

The Defendant has no contemporaneous documentary evidence to support his defence. He makes these claims when his father is not around to deny them. His defence to say the least, lacks plausibility.

In my view the Defendant has failed to show that he has a good defence to this action on the merits.

He has also failed to disclose any fact as may be deemed sufficient to entitle him to defend the action generally.

There should be summary judgment for the plaintiff in the following terms:

- (a) A Declaration against the First and Second Defendants that the Plaintiff is the beneficial owner of properties known as 8 Upper Carmel Way and being the land comprised in Certificates of Title registered at Volume 1188 Folio 20 and Volume 1193 Folio 600 of the Register Book of Titles.
- (b) Against the First Defendant
 - (i) An Order that within fourteen (14) days of being requested to do so, the first Defendant do execute a transfer to the Plaintiff or to its order of properties comprised in Certificates of Title registered at Volume 1188 Folio 20 and Volume 1193 Folio 600 of the Register Book of Titles.
 - (ii) An Order that the Registrar of the Supreme Court do execute the said transfer if the first Defendant fails to do so.
 - (iii) An Order that the first Defendant pay the costs of transferring the said properties.
 - (iv) An Order that the first Defendant forthwith deliver up possession of the said properties to the Plaintiff.
 - (v) Costs to be taxed or agreed.
- (c) Against the First Defendant for:
 - (i) The sums of \$11,386,340.00; \$1,765,750.00 and \$245,360.00 as moneys had and received and damages to be assessed.
 - (ii) An account in respect of any profit derived directly or indirectly as a result of his breach of fiduciary duty.
 - (iii) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act.