International Sales and Agencies Ltd and another v Marcus and another

QUEEN'S BENCH DIVISION
LAWSON J
7, 8, 9, 10, 15 APRIL 1981

Trust and trustee – Constructive trust – Cheque drawn by director on company's account – Director appropriating company's funds to settle personal debt incurred by deceased director – Creditor knowing that payment made in breach of trust – Whether creditor a constructive trustee for company of money received.

Company – Dealing with company – Person dealing with company in good faith – Transaction decided on by directors deemed to be within company's capacity – Person dealing with company in good faith not bound to inquire into company's capacity – Whether person receiving money from company in breach of trust protected from being a constructive trustee of money received – European Communities Act 1972, s 9(1).

The defendants, who were registered moneylenders, made personal loans of £30,000 to F, who was the major shareholder in the two plaintiff companies. F became seriously ill and told the defendants that his friend M would see that they were repaid if he died. M was also a shareholder in and director of the plaintiff companies and helped F to run them. F later died insolvent, leaving his shares in the plaintiff companies to his widow and children. However, the companies were thereafter effectively controlled by M, who arranged for the £30,000 to be repaid to the defendants by five cheques drawn on the plaintiff companies' bank accounts. Following M's death, F's beneficiaries directed the plaintiff companies to bring proceedings against the defendants to recover the £30,000. The companies accordingly claimed the return of the £30,000 on the ground, inter alia, that it was money had and received. The defendants contended, inter alia, that they were protected by s 9(1)[a] of the European Communities Act 1972, which provided that as regards a person dealing with a company in good faith any transaction decided on by the directors was deemed to be within the company's capacity to enter into and that the person dealing with the company was not bound to inquire into the capacity of the company to enter into the transaction or whether there was any limitation on the powers of directors.

Held – The plaintiff companies were entitled to the return of the £30,000, for the following reasons—

(1) The money had been paid to the defendants by M in breach of his fiduciary duty as constructive trustee of the money in the bank account of the companies over which he had control. Furthermore, the payments were ultra vires the objects clauses in the memoranda of association of the companies, since the mere fact that the objects clauses contained express power by the companies to draw cheques did not prevent the court from inquiring into the nature and purpose for which the cheques were drawn. It followed that the defendants became constructive trustees of the money received by them, since they had actual notice that the money received was the property of the plaintiffs and that in arranging for the payment M had acted in breach of trust (see p 556 *j* to p 557 *e* and *h* to p 558 *c* and p 560 *h j*, post); dicta of Ungoed-Thomas J in *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* [1968] 2 All ER at 1093, of Lord Dunpark in *Thompson v J Barke & Co (Caterers) Ltd* 1975 SLT at 75 and *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 applied.

(2) The defendants' liability to account to the plaintiffs for the money received by them

a Section 9(1) is set out at p 558 *j* to p 559 *a*, post

in breach of trust was not affected by s 9(1) of the 1972 Act, since the purpose of s 9(1) was to protect innocent third parties who entered into transactions with companies which might otherwise avoid their obligations by relying on the ultra vires doctrine. Section 9(1) therefore did not affect the operation of a constructive trust if the facts gave rise to such a trust (see p 559 *f* to *h* and p 560 *a b*, post).

Notes

For directors' liability as trustees of a company's property, see 7 Halsbury's Laws (4th edn) para 505, and for cases on the subject, see 10 Digest (Reissue) 1335, *8531–8533*.

For constructive trusts arising out of the acquisition of property, see 38 Halsbury's Laws (3rd edn) 858, para 1446, and for liability as a constructive trustee, see ibid 860, para 1449, and for cases on the subjects, see 47 Digest (Repl) 184–188, 192, *1525–1565*, *1595–1609*.

For the European Communities Act 1972, s 9, see 42 Halsbury's Statutes (3rd edn) 60.

Cases referred to in judgment

Belmont Finance Corp v Williams Furniture Ltd (No 2) [1980] 1 All ER 393, CA.

Carl-Zeiss-Stiftung v Herbert Smith & Co (a firm) (No 2) [1969] 2 All ER 367, [1969] 2 Ch 276, [1969] 2 WLR 427, CA, 1(1) Digest (Reissue) 34, *237*.

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122, [1943] AC 32, HL, 12 Digest (Reissue) 495, *3479*.

Karak Rubber Co Ltd v Burden (No 2) [1972] 1 All ER 1210, [1972] 1 WLR 602, 3 Digest (Reissue) 585, *3730*.

Lee, Behrens & Co Ltd, Re [1932] Ch 46, [1932] All ER Rep 889, 9 Digest (Reissue) 571, *3419*.

Nelson v Larholt [1947] 2 All ER 751, [1948] 1 KB 339, 47 Digest (Repl) 187, *1554*.

Reckitt v Barnett, Pembroke & Slater Ltd [1929] AC 176, [1928] All ER Rep 1, HL, 1(1) Digest (Reissue) 459, *3206*.

Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3) [1968] 2 All ER 1073, [1968] 1 WLR 1555, 9 Digest (Reissue) 403, *2379*.

Sinclair v Brougham [1914] AC 398, [1914–15] All ER Rep 622, HL, 3 Digest (Reissue) 543, *3545*.

Thompson v J Barke & Co (Caterers) Ltd 1975 SLT 67.

Action

By a writ issued on 29 August 1978 the plaintiffs, International Sales and Agencies Ltd (ISA) and Janthorpe Properties Ltd (Janthorpe) claimed from the defendants, Sidney Marcus and Bentinck Securities Ltd, the sum of £30,000, being £10,000 as money had and received to the use of Janthorpe and £20,000 as money had and received for the use of ISA, or alternatively damages for conversion in respect of both amounts, a tracing order and/or an account of the proceeds of the payments. The facts are set out in the judgment.

Mark Potter QC for the plaintiffs.

Patrick Milmo for the defendants.

Cur adv vult

15 April. **LAWSON J.** I would like to say before I commence delivering my judgment that I am very grateful indeed for all the assistance I had from counsel in this case. I am not going to cite at great length from authorities in the course of my judgment, but I have, of course, read again the authorities and particularly the passages cited to me. The second thing I would like to say is that I am grateful to the solicitors for having arranged the documentation in the case in such a clear and easily accessible manner. It is not always that this happens.

The plaintiffs, International Sales and Agencies Ltd and Janthorpe Properties Ltd (I shall call International Sales and Agencies 'ISA' and Janthorpe Properties 'Janthorpe'), by a writ issued on 29 August 1978, claim against the first defendant, Mr Sidney Marcus, and the second defendants, Bentinck Securities Ltd, as to ISA £20,000 and as to Janthorpe £10,000 as moneys lent repayable on demand, alternatively as money had and received to their use. There are also claims for the same amount at common law and in equity. All these claims arise out of dealings by a Mr Munsey (who died on 4 March 1978) with the defendants during the period November 1973 to April 1974. They relate to the payment to the second defendants of one Janthorpe cheque for £10,000 and four ISA cheques each for £5,000. All these cheques were drawn by Mr Munsey purportedly as director of Janthorpe and ISA.

It is necessary to set out in some detail the background to the issue and payment of these cheques. The plaintiff companies were the main vehicles through which the late Mr Aziz Fancy transacted his business and financial affairs. Mr Fancy who was of the Ishmaeli Muslim faith, had a long and chequered career. He was reputedly a rich man and indeed, on some occasions, he may well have been. ISA was a company mainly engaged in commodity and steel dealings. The deceased, Mr Fancy, held all but one of the 325,000 issued £1 shares in ISA; the remaining one was held by Mr Munsey. Both were directors of ISA. Janthorpe was mainly a property-owning company in which Mr Fancy and his widow (who took no part in the operation or administration of the company's affairs and was in no sense a woman of business) held some 90% of the equity and Mr Munsey held about 5%. Again, both Mr Fancy and Mr Munsey were directors together with a Mr Day. Mr Fancy and Mr Munsey were close friends of long standing and both were actively and fully engaged in the businesses of the companies.

Mr Sidney Marcus, who is a director of, and controls, Bentinck Securities, the second defendants, who are registered moneylenders, is a man whose main and lengthy business experience through another of his companies was dealing in cars of the more prestigious types. Bentinck Securities Ltd carried out some four or five moneylending transactions a year; some of them were in substantial sums. Mr Marcus had been for many years a close friend of Mr Munsey's, who introduced him some years ago to Mr Fancy. Early in 1973 it is clear that Mr Fancy, to Mr Munsey's knowledge (but not to the knowledge of his widow or his son Ismat, nor to that of his solicitor, Mr Crowe of Gouldens, or of his accountant, a Mr Hawkins) was in serious financial difficulties. On behalf of Mr Fancy, Mr Munsey approached Mr Marcus and proposed that Bentinck Securities, Mr Marcus's moneylending company, should lend Mr Fancy £30,000 for six months. This loan was arranged at 14% per annum, interest payable monthly for six months. The transaction was duly recorded in the necessary statutory memorandum which was specifically prepared for the transaction by Mr Marcus's solicitor, a Mr Kenyon, of Philip Evans & Co. Mr Fancy received Bentinck Securities' cheque for £30,000 on 23 April 1973 and on that occasion Mr Fancy paid Mr Marcus, on behalf of the second defendants, £2,100 interest in advance.

In the summer of 1973 Mr Fancy became seriously ill. Mr Marcus heard of this and after Mr Fancy left hospital, being concerned about his loan, he went to see Mr Fancy, who, in the presence of Mr Munsey, told Mr Marcus that he need not be worried as Mr Munsey would see he was repaid if anything happened. On 7 August 1973 Mr Fancy made a will appointing Mr Munsey, his accountant and bank manager executors. By his will Mr Fancy left his shares in Janthorpe and the rest of his estate, including his ISA shares, in trust for his widow and children. On 23 October 1973 Mr Fancy died. Gouldens, his solicitors, were consulted by the nominated executors, who appraised the situation and concluded that Mr Fancy's estate was substantially, at least to the extent of £200,000, insolvent.

Mr Marcus, shortly after Mr Fancy's death, was informed by Mr Munsey, who also told him that the £30,000 was in jeopardy. I find that in early November Mr Munsey and Mr Marcus called on Mr Fancy's elder son, Ismat Fancy (I say elder son; there was another son, but he was a boy at this time, whereas Ismat Fancy was in his very early

twenties). Mr Ismat Fancy on this occasion was, for the first time, told of his late father's debts and I find that Mr Marcus was told on this occasion that the family had no money, but that Mr Munsey would see if anything could be done about repayments. I find that Mr Munsey suggested that the only possibility was through the deceased's companies, but said on that occasion that nothing could be done at the time. Mr Marcus instructed his solicitor, Mr Kenyon, who spoke to Mr Crowe of Gouldens. Mr Crowe told Mr Kenyon that the estate was probably insolvent, but that Mr Munsey would see if it were feasible that the £30,000 debt could be repaid. After receiving this letter, I find that Mr Marcus, with his accountant, a Mr Graham, called on Mr Munsey to discuss the question of the £30,000 debt. Mr Munsey said he would use his best endeavours to see that Bentinck Securities were repaid. I am sure this was in no way a promise, but a mere assurance of Mr Munsey's goodwill. After this meeting Mr Marcus told his solicitors to take no further action for the time being. It is clear that from then on Mr Marcus did not consult his solicitors as to the legal position or seek their advice concerning the means of repayment of the £30,000 Aziz Fancy loan. On 26 November 1973 Gouldens sent a letter to all the known creditors of Aziz Fancy, informing them that his estate was insolvent and that the nominated executors had, as was the fact, renounced probate. A copy of this letter was sent to Mr Marcus's solicitors who informed Mr Marcus of its contents. The renunciations of probate were filed on 26 November 1973. As far as I am aware no letters of administration were ever taken out.

Some time before this, in November 1973, Mr Munsey sought Mr Crowe's advice as to whether the plaintiff companies could pay the debt owed by Mr Fancy's estate to Bentinck Securities. Mr Crowe told Mr Munsey that there was no way in which that could be done. Mr Crowe did not know any of the later dealings between Mr Munsey and Mr Marcus relating to the cheques and moneys of the plaintiffs until the late spring of 1974 after these dealings were completed. Mr Munsey then told Mr Crowe, as he also told Ismat Fancy, that the moneys which had passed to the defendants on the plaintiffs' cheques were loans repayable when the moneys were needed by the plaintiffs or by the Fancy family. Mr Munsey maintained this pretence so far as the plaintiffs' auditors were concerned.

On 27 November 1973 Mr Munsey handed Mr Marcus an ISA cheque for £10,000. It is common ground that the proceeds of this cheque were to be a temporary loan to Mr Marcus until 31 December 1973 (and Mr Marcus later signed a receipt dated 27 November 1973 to that affect). This cheque was paid into Bentinck Securities' bank account on 29 November 1973. At the time no one except Mr Munsey and Mr Marcus knew of this transaction. Mr Marcus's explanation in evidence was that the £10,000 was to be a temporary loan as Mr Munsey did not want the payment to appear in ISA's accounts for the year ending 31 December 1973. Mr Marcus went on to testify that he and Mr Munsey agreed that Mr Marcus was to give Mr Munsey a cheque in repayment dated 31 December 1973 and that he, Mr Munsey, would give Mr Marcus a cheque for £10,000 in exchange dated 1 January 1974. This exchange of cheques duly took place. The cheque which Mr Marcus received from Mr Munsey in exchange for the Bentinck Securities' cheque for £10,000 payable to ISA was in fact drawn by Mr Munsey on Janthorpe's account and represents the first item in the plaintiffs' claim in this case. There followed another cheque for £5,000 drawn by ISA payable to Mr Marcus paid into Bentinck Securities' bank account on 4 January 1974. Mr Marcus gave no evidence concerning this incident which apparently occurred whilst he was away over the Christmas and New Year holiday in Bournemouth. On 16 January 1974 Mr Marcus wrote a letter to Mr Munsey, which I will read. It is written to Mr Munsey at his home address, not at a business address.

'Dear Michael [which is Mr Munsey's first name],

Many thanks for your cheque. [This would, I think, be the cheque of 4 January.] Should your conscience prick you and you feel like sending me some more funds, I should be most grateful. The simplest solution to this would be for you to send it direct to my Bank which is Barclays, 56 Great Portland Street, to the account of

Bentinck Securities Ltd. Look forward to meeting you upon my return when we will get together.'

There is nothing sinister about the proposal that any more money should be sent direct to Mr Marcus's bank for the account of Bentinck Securities because that letter was written on the eve of Mr Marcus's departure on a cruise to West Africa. A day or so later he went to West Africa and in his absence on 22 January 1974 a further ISA cheque for £5,000 was paid into the second defendant's banking account. There were two further payments of ISA cheques each for £5,000 payable to Mr Marcus and paid into Bentinck Securities' banking account on 7 March and 1 April respectively. All these ISA cheques, as was the Janthorpe cheque, were drawn by Mr Munsey as a director of the respective companies. Mr Marcus gave no evidence throwing any further particular light on any of these dealings in 1974. He apparently spoke to his solicitors on 24 May 1974 and Mr Kenyon's record of this conversation with Mr Marcus reads as follows: 'Sidney Marcus told me on Monday last the 20th May, that he had recovered so far from Mr Fancy's estate £25,000.' I attach importance to the fact, as I find, that Mr Kenyon was not told that anything had been paid by or received from the plaintiffs. On 22 July 1974 Mr Marcus's solicitors wrote to him again a letter which said:

'The Late Aziz Fancy. I assume that there are no further steps that I should take in this matter on your behalf and that my file may now be marked as dead. Is this correct?'

After that Mr Marcus's solicitors entirely vanished from the scene.

Shortly after Mr Fancy's death his widow and his elder son, Ismat, were appointed directors of the plaintiff companies, but from then on until his death in March 1978 the business of the plaintiff companies was conducted wholly and solely by Mr Munsey who took all the business decisions and who had full and unfettered authority to act on behalf of the companies. From time to time, as I find, he told Mr Ismat Fancy in broad terms how the businesses were going. I am satisfied, and so find, that at no time did Mr Munsey tell Mr Ismat that the deceased's debt to Bentinck Securities had been paid and I reject Mr Marcus's evidence that he thanked Ismat Fancy in that regard. Mr Marcus may well also have made a passing remark of gratitude to Mrs Fancy, but I am quite sure that, being a woman wholly unacquainted with business, it would have meant nothing whatever to her. I am satisfied that until after Mr Munsey's death no one connected with the plaintiff companies had any idea that the payments made to the defendants in January to March 1974 were otherwise than loans repayable on demand when the money was required. The plaintiff companies' records consistently treat them as loans; conversely, Bentinck Securities' records treat all the payments, including the temporary loan in November 1973, as repayments to Bentinck Securities of the April 1973 loan to Mr Fancy except that in the second defendants' records there is no record of the £10,000 Janthorpe cheque paid in on 1 January 1974.

After Mr Munsey's death Mrs Fancy, Ismat and others held a meeting with the plaintiff companies' solicitor, Mr Crowe, and the accountant, Mr Hawkins, in which it was decided to take steps to recover the 1974 payments. The first move came on 28 March 1978. Mr Marcus took advice with the result that his accountants wrote a letter which was settled in consultation with him. It is dated 9 May 1978 from Wallace, Catch & Co.

'Our client has no knowledge of a loan of £30,000 made to him by your clients. In fact, Mr Marcus' company, Bentinck Securities Ltd., made an advance to Mr. Aziz Fancy on the 12th April 1973 as a loan to him. Also on that date, Mr. Fancy paid to Bentinck Securities Ltd. £2,100, being six months advance interest as agreed between the parties. The sum of £30,000 was repaid by instalments as follows.'

And then it sets out: 29 November 1973 the £10,000 which was in fact repaid by Mr Marcus by his cheque of 31 December; £5,000 on 4 January; £5,000 on 22 January; £5,000 paid in on 7 March; and £5,000 on 1 April.

'We understand that at the time the loan was made to Mr. Fancy in April 1973, he was the Managing Director of International Sales & Agencies Limited. Our client [and this is an important passage] informs us that neither he nor his Finance Company, Bentinck Securities Ltd., have transacted any other business, other than that shown above with Mr. Fancy and/or International Sales & Agencies Limited.' *a*

The matters then passed to the parties' solicitors and letters were exchanged between them. There was further correspondence, but those further letters add really nothing to the history of the matter and so it came about that the writ was issued on 29 August 1978. *b*

The first question which I have to decide is as to the nature of the dealings under review, that is, the issue and payment of the cheques totalling £30,000, the subject of the claim, to the defendants. I can dispose briefly of any suggestion that these loans were repayable on demand, as clearly Mr Munsey represented them to be. I am quite satisfied that Mr Marcus never regarded himself or his company as borrowers in relation to the moneys which passed in the January to March 1974 dealings. *c*

It is clear and I am satisfied that these dealings were to further Mr Munsey's assurance that he would use his best endeavours to see that the defendants recovered the £30,000 lent to Aziz Fancy in the situation that, to Mr Marcus's knowledge, from early November 1973, the deceased's estate was insolvent. There is no evidence that either of the plaintiff companies had ever had other business transactions with the defendants (see the passage in the letter of 9 May 1978 from the defendants' accountants to which I have already referred). The January to March 1974 dealings were not in the context that the plaintiff companies, or either of them, had any interest, present or prospective, in seeing that the defendants were paid or that the discharge of the deceased's estate's liability could or would be of any benefit to the plaintiffs. Such considerations were never at any time discussed between Mr Munsey and Mr Marcus. Mr Marcus in his evidence frankly conceded that neither of the plaintiffs nor Mr Munsey had any obligations to the defendants in relation to the loan to Mr Fancy. *d* *e*

The only conclusion it is possible to draw is that Mr Munsey for no consideration handed over the plaintiffs' moneys to the defendants without any obligation. One can only speculate as to the motive but it may well be, as Mr Marcus suggested in evidence, that as Mr Munsey had introduced Mr Fancy to Mr Marcus and he, Mr Munsey, himself, had first suggested the £30,000 loan to Mr Marcus, Mr Munsey felt morally obliged to an old friend to make these payments. *f*

It is important to consider the consequences of these dealings because this has bearing on the other questions I have to consider. Remembering that at all material times from early November Mr Marcus, as I find, knew that Mr Fancy's estate was insolvent, the effect of the dealings under review was not only to deprive the plaintiff companies of their moneys and the use of their moneys, but the other consequences were to the extent that there was any value in the estate's shareholdings in the plaintiff companies (the shares were in fact charged to secured creditors) this would be diminished and to that extent the assets falling into the estate would be smaller in value. Secondly, the defendants would get priority over all the other creditors of the deceased's estate. Thirdly, the defendants would get their loan repaid in full whereas the other creditors of the estate would receive a dividend, if only a small one. *g* *h*

Mr Marcus in his evidence said that these matters did not occur to him at the relevant time. He was speaking of course of 1974 and now he is older and he is a sick man. I am unable to rely on his evidence now as to his state of mind then.

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 repayment 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 not in breach of his fiduciary duty as constructive trustee of the money in the banking accounts of the companies over which he has control. I make a reference to a passage in Ungoed-Thomas J's judgment in *j*

Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3) [1968] 2 All ER 1073 at 1093, [1968] 1 WLR 1555 at 1577 and the authorities to which he there refers.

The nature of the dealings should also be approached from the aspect of the vires of the company which may be important. I earlier indicated the nature of each of the plaintiff companies' main businesses. Their respective memoranda of association, in addition to setting out their main objects, contained common-form exhaustive lists of ancillary objects, including, for example, lending money and giving credit, giving guarantees and indemnities, making, drawing and so forth negotiable instruments and doing all such things as may be deemed incidental or conducive to the attainment of the companies' objects. I find it impossible to form a view that the handouts, as I shall now call them, with which I am concerned, could conceivably fall under the umbrella of the objects clause of either of these plaintiffs. But counsel for the defendants submits that in considering the question of ultra vires the court is not concerned with the *nature* of any transactions in question, but merely to inquire whether the form in which it is clothed (for example, the drawing and the issue of cheques) is one covered by the objects clause which would be the case here. I was referred to the Scottish case of *Thompson v J Barke & Co (Caterers) Ltd* 1975 SLT 67, a decision of the Outer House given by Lord Dunpark. It was there contended on behalf of the pursuer, the plaintiff (suing on dishonoured company cheques issued to settle a director's personal debts), that as the company's objects clause contained an express power to draw cheques, no inquiry should be made as to the purpose for which they were drawn. Lord Dunpark rejected this submission and referred to the issue of the cheques in the course of his judgment (at 70) as an 'attempted unlawful application of company funds . . . which no sane director could genuinely believe . . . was desirable in the interests of the company'. I will not cite any more from this judgment, which I have studied very carefully, and I respectfully adopt Lord Dunpark's reasoning since I find this a persuasive authority. I have also, in this context, read the judgment of Eve J in *Re Lee, Behrens & Co Ltd* [1932] 2 Ch 46, [1932] All ER Rep 889, which reinforces my conclusion that the 'handouts' were ultra vires.

The next question follows from my conclusion that the handouts constituted breaches by Mr Munsey of his fiduciary duty to the plaintiff companies as constructive trustee of their moneys and the admitted fact that the defendants were the recipients of those moneys. In my judgment, the effect of the authorities, subject to some further consideration of recent cases, is accurately stated in 38 Halsbury's Laws (3rd edn) 858–859, paras 1446–1557 and in the passages in *Snell's Equity* (27th edn, 1973) p 186. These passages were approved by Danckwerts LJ in *Carl-Zeiss-Stiftung v Herbert Smith & Co (No 2)* [1969] 2 All ER 367 at 372, [1969] 2 Ch 276 at 290. It is important to bear in mind that there are two categories of persons, recipients of company's money who are treated as constructive trustees or may be treated as constructive trustees. The first category is the person who receives moneys held by a constructive trustee and receives those moneys for his own benefit; that is the present case. The second category is the constructive trustee who acts as a channel through which funds disposed of in breach of constructive trust reach other quarters, and it is clear from the authorities and from the passages in Halsbury's Laws and *Snell* that different considerations relate to the state of mind of the persons in the two categories. I think it is necessary to say that because the authorities do not always entirely make it clear which category they are dealing with when they discuss such questions as knowledge, constructive knowledge, imputed knowledge, and so forth. Applying these passages, I conclude that the defendants in this case became constructive trustees of the moneys received if Mr Marcus had actual or constructive notice (i) that the money received was the property of the plaintiffs and (ii) that the issue of the cheques to the defendants was a breach of trust and duty on Mr Munsey's part.

So far as the first point is concerned, it is beyond argument that the defendants had actual notice that the moneys received from paying in the plaintiffs' cheques were the plaintiffs' moneys. As to the second matter, after considering the authorities cited to me, in particular *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555, *Nelson v Larholt* [1947] 2 All ER 571, [1948] 1 KB 339, *Carl-Zeiss-Stiftung v Herbert Smith & Co* [1969] 2 All ER 367, [1969] 2 Ch 276, *Karak Rubber Co Ltd v*

Burden (No 2) [1972] 1 All ER 1210, [1972] 1 WLR 602, and the most recent authority, *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, a decision of the Court of Appeal, in my judgment, the knowing recipient of trust property for his own purposes will become a constructive trustee of what he receives if either he was in fact aware at the time that his receipt was affected by a breach of trust, or if he deliberately shut his eyes to the real nature of the transfer to him (this could be called 'imputed notice'), or if an ordinary reasonable man in his position and with his attributes ought to have known of the relevant breach. This I equate with constructive notice. Such a position would arise where such a person would have been put on inquiry as to the probability of a breach of trust. I am satisfied that in respect of actual recipients of trust property to be used for their own purposes the law does not require proof of knowing participation in a fraudulent transaction or want of probity, in the sense of dishonesty, on the part of the recipient. That is a test which relates, not to knowing recipients of trust property for their own use, but to those who knowingly participate by assisting in a breach of trust. (They may be acting, of course, as a channel through which money is passed to other persons.)

I now come to my finding on notice so far as the defendants are concerned. Mr Marcus gave some very candid answers in cross-examination. He agreed that he knew that directors of companies had to run the businesses in the interests of the shareholders and must not give the company's money away. He knew that if the companies paid Fancy deceased's debt they were giving away the companies' money. He knew that Fancy's estate was insolvent and after his death no one was liable for his debts, except his estate. In answer to me he said, it was true that as long as he got his debt paid he did not mind where the money came from. He also said that these matters, together with the matters to which I earlier referred (getting paid 100% in priority to all the other creditors at the expense of the deceased's estate) never occurred to him at the time, and that had he thought there was anything wrong about the dealings under review he would not have taken part in them. I regret to say I do not accept these last answers as rightly reflecting his state of mind in November 1973 through to 1 April 1974. I find it most striking that, having initially consulted his solicitors about the recovery of the debt, and having had meetings and discussions with Mr Munsey, he stayed his hand and had no further recourse to his solicitors or to his accountants about whether the arrangements he had reached with Mr Munsey were 'legally feasible', to use the language of his solicitors' letter. I am sure the financial benefit he was going to derive in the circumstances, from his arrangements with Mr Munsey, overbore the impropriety of these arrangements which were I find obvious to him. I notice also that he does not appear to have told his solicitors in May 1974 that what he had recovered had come from the plaintiff companies and I find that he told his solicitor that it had come from the estate which, as Mr Marcus knew, was clearly untrue. I conclude then that the defendants became constructive trustees of the £30,000 which they received on the ground that they, through the first defendant, had actual notice that this receipt was a consequence of Mr Munsey's breach of trust. In *principle* therefore the defendants are accountable to the plaintiffs for the £30,000 they received. I would add that at the very least Mr Marcus was turning a blind eye to the obvious, but I have been forced to a more unfavourable view, that is to say that he actually knew of Mr Munsey's breach of trust and duty.

I now turn to the question raised by the amended defence, which is whether the defendants' liability to the plaintiffs to account for the moneys they knowingly received in breach of trust is affected by the provisions of s 9(1) of the European Communities Act 1972. This Act was passed to give effect in England to EEC Council Directive 68/151 of 9 March 1968. Section 9(1) of the 1972 Act reads as follows:

> 'In favour of a person dealing with a company in good faith, any transaction decided on by the directors shall be deemed to be one which it is within the capacity of the company to enter into, and the power of the directors to bind the company shall be deemed to be free of any limitation under the memorandum or articles of association; and a party to a transaction so decided on shall not be bound to enquire

as to the capacity of the company to enter into it or as to any such limitation on the powers of the directors, and shall be presumed to have acted in good faith unless the contrary is proved.'

It is to be observed that the section (indeed the Act in which it is set) does not in fact reproduce, first, the statement of purposes which precedes the text of the actual articles in the directive; second, the heading of Section II of the directive (this is the section of the directive which contains art 9, which is the ancestor of s 9(1) of the 1972 Act) is: 'Validity of obligations entered into by a company'; third, there is an important qualification in the first paragraph of art 9 of the directive (which broadly corresponds with s 9(1) of the 1972 Act) which appears in the second paragraph of art 9. The introductory words of Directive 68/151 make it clear that what the directive is concerned with is the obligations of companies. For example, one of the recitals provides:

> 'Whereas the co-ordination of national provisions concerning disclosure, the validity of obligations entered into by, and the nullity of, such companies is of special importance . . . [and further on:] whereas the protection of third parties must be ensured by provisions which restrict to the greatest possible extent the grounds, on which obligations entered into in the name of the company are not valid . . .'

In my judgment, those passages and the heading of Section II of the directive are reflected effectively in the words: 'In favour of a person dealing with a company in good faith, any transaction decided on . . .' This is directed at transactions with companies which obviously will result in the companies being under obligations which before the enactment of the 1972 Act they might have been able to avoid by the application of the old ultra vires doctrine. The other passage in the directive which is not reflected in s 9(1) relates to the state of mind of the person dealing with the company. The second paragraph of art 9(1) reads:

> 'However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects . . . [and it goes on:] or could not in view of the circumstances have been unaware of it . . .'

Whilst art 9(1) reflects, if it proves that the third party knew the act was outside those objects, it does not directly reflect or reflect in so many words, the alternative, 'or could not in view of the circumstances have been unaware of it'. Which seems to me very close to turning a blind eye. In my judgment I am entitled to look at the Council's directive as an aid to the interpretation of s 9(1) of the 1972 Act. I conclude, first, that s 9(1) relates only to legal obligations of the company under transactions with third parties, whether or not they be within or without its powers; second, that s 9(1) is designed to give relief to innocent third parties entering into transactions with companies against the operation in England of the old ultra vires doctrine; third, that the test of lack of good faith in somebody entering into obligations with a company will be found either in proof of his actual knowledge that the transaction was ultra vires the company or where it can be shown that such a person could not in view of all the circumstances, have been unaware that he was party to a transaction ultra vires.

It seems to me, so far as the amended defence is concerned, I have to ask a number of questions. First, does s 9(1) of the 1972 Act at all affect the principles of constructive trust in relation to the recipients of companies' moneys knowingly paid in breach of trust, as happened, I find, in this case? Second, if the answer to the first question be No, then there is no need to go any further; but, if the answer to the first question were Yes, one must then answer a number of further questions and these, in my judgment, are: were the defendants in this case '*dealing*' with the plaintiff companies (I emphasise the word 'dealing'); if so were the 'handouts', the result of these dealings, decided on by the directors of the plaintiff companies, to use the terms of s 9(1). Third, if so, has it been proved by the plaintiffs in this action that the defendants were not acting in good faith in relation to the 'handouts' which they received.

The onus of proof is on the defendants in relation to dealing with the companies in relation to the decision of the directors, but it is on the plaintiffs in relation to the absence of good faith. The first question: does s 9(1) of the 1972 Act affect the application of the principles of constructive trust in cases like the present? In my judgment, the answer to this question is No. Constructive trust situations may or may not arise in an ultra vires context. The basic principles governing the two doctrines are, I find, quite different. I am satisfied that s 9(1) of the 1972 Act was designed to deal not with the operation of the doctrine of constructive trust, but only with the effect of the doctrines of ultra vires. In my judgment, in the light of the EEC Council's directive, this conclusion is a plain one.

In the absence of any decided cases on the point (although I have referred to the text books, particularly Goff and Jones *The Law of Restitution* (2nd edn, 1978) and *Gower's Principles of Modern Company Law* (4th edn, 1979), which discuss this section) it is necessary for me to consider the further questions which would arise if my judgment that s 9(1) of the 1972 Act has no effect on the application of the doctrines and principles of constructive trusts. I may be wrong. So I ask whether the defendants in this case were dealing with the plaintiff companies. In my judgment, the answer to this is No. The payments here did not arise from dealings with the plaintiff companies; they arose clearly from dealings with Mr Munsey. Although the companies' cheques and moneys were used by Mr Munsey, they were used by him as a vehicle for his generosity to the defendants. Mr Marcus conceded that the plaintiff companies had no obligations to him in relation to the debt of Aziz Fancy's estate to the second defendants for £30,000 arising out of the April 1973 transaction.

Should I be wrong in my last conclusion, I have to answer the question whether these dealings were decided on by the plaintiffs' directors. In my judgment, although at the material times there were two other directors of the first plaintiffs (Mrs Fancy and Ismat Fancy) and three other directors of the second plaintiffs (the two Fancys and Mr Day), it is clear on the evidence that Mr Munsey was the sole effective director to whom all actual authority to act for the companies was effectively delegated. I conclude therefore that these dealings, if they were in fact dealings with the companies, were in fact decided on by the directors within the terms of s 9(1) of the 1972 Act.

The last question relating to the application of s 9(1) is whether the plaintiffs have proved that the defendants did not act in good faith as that expression in the 1972 Act is to be construed. My earlier findings are that the defendants had actual knowledge that the payments to them were in breach of duty and trust and were ultra vires the companies (and according to Mr Marcus's evidence, for example, he said specifically that he knew that company directors must not give away a company's money); alternatively, at the lowest, that the defendants could not in all the circumstances have been unaware of the unlawful nature of the payments that they received.

So, the final question on liability is whether, assuming Mr Munsey's dealings with the defendants were ultra vires, the plaintiffs, they being, through Mr Munsey, parties to the transactions, are disentitled to recover in this action. Counsel for the defendants relies on *Sinclair v Brougham* [1914] AC 398, [1914–15] All ER Rep 622. He cited extensively from speeches in that case. Counsel for the plaintiffs also referred me to important parts of the speech of Lord Parker in that case, to a passage in the speech of Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 at 136–137, [1943] AC 32 at 63–64, and finally to Goff and Jones *The Law of Restitution* (2nd edn, 1978) pp 363–364 and the authorities there referred to. My conclusion is that on my finding that Mr Munsey handed out the plaintiffs' moneys to the defendant without any obligation on his or their parts, the defendants gave no consideration for these moneys and received the moneys with notice that they were the companies' moneys paid over in breach of trust in order to implement Mr Munsey's assurance of 'using his best endeavours' to help an old friend, the decided cases in no way preclude the plaintiffs from recovery at common law or in equity. I base my conclusion, primarily, on my finding of the accountability of the defendants as constructive trustees, but I would reach the same conclusion if the plaintiffs' claims were based solely on the defendants' receipt (in the circumstances I find here) of the moneys paid ultra vires.

I now turn to the question of remedy. Counsel for the plaintiffs concedes that he is not in a position to seek a tracing order or to substantiate a claim for conversion of the plaintiffs' cheques or moneys. The remedy he seeks is to recover the plaintiffs' £30,000 as money had and received at common law or by way of restitution in equity. He submits that the defendants were virtually in the same position, so far as relief is concerned, as the defendants in *Reckitt v Barnett, Pembroke & Slater Ltd* [1929] AC 176, [1928] All ER Rep 1 and I agree with him. It follows that the first plaintiffs are entitled to judgment against the defendants for £20,000 and the second plaintiff, Janthorpe, are entitled to judgment against the defendants, for £10,000.

Judgment for the plaintiffs.

Solicitors: *Gouldens* (for the plaintiffs); *Jacobson Ridley* (for the defendants).

K Mydeen Esq Barrister.

Habib Bank Ltd v Tailor

COURT OF APPEAL, CIVIL DIVISION
CUMMING-BRUCE, DUNN AND OLIVER LJJ
25 MAY 1982

Mortgage – Order for possession of mortgaged property – Suspension of execution of order – Mortgagor permitted to defer payment of principal sum but provision also made for earlier payment in event of default by mortgagor – Mortgagor charging dwelling house to secure repayment of bank overdraft on current account – Mortgage containing covenant by mortgagor to repay principal sum secured by charge on bank's written demand for payment – Mortgagor exceeding overdraft and bank making written demand for repayment of principal sum and interest – Whether court entitled to exercise discretion to postpone order for possession to give mortgagor reasonable time to repay sums due – Whether mortgage permitting mortgagor 'to defer payment' of principal sum – Whether mortgage providing for 'earlier payment' in event of default – Administration of Justice Act 1970, s 36(1) – Administration of Justice Act 1973, s 8(1).

In 1978 a bank agreed to allow the defendant an overdraft of up to £6,000 on his current account. The overdraft was secured by a charge on the defendant's dwelling house. The charge contained a covenant in the usual bankers' form by which the defendant agreed to pay the bank, on demand being made in writing, the balance due in respect of all moneys owing to the bank. By July 1980 the defendant had exceeded the overdraft limit. He failed to reduce his indebtedness to the bank and on 8 July 1981 the bank made a written demand for payment of all the moneys then owed by the defendant, amounting to £6,570, made up of principal, interest and bank charges. The defendant did not comply with the demand and on 16 October 1981 the bank commenced proceedings against him in the county court for possession of the house. By the date of hearing the defendant owed the bank £7,212. The deputy registrar found on the facts that the defendant would not be able to pay off the whole of that sum within a reasonable time and therefore held that he was not entitled to exercise the discretion under s 36[a] of the Administration of Justice Act 1970 to delay making a possession order of a dwelling house in favour of a mortgagee in order to give the mortgagor reasonable time to pay the sums due under the mortgage. Accordingly, he made an order for possession in favour of the bank. On appeal by the defendant, the judge held that, because s 8[b] of the

a Section 36, so far as material, is set out at p 563 *j* to p 564 *c*, post
b Section 8, so far as material, is set out at p 564 *g* to p 565 *a*, post