

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 478/99

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BETWEEN: (1) PUBLISHERS REPRESENTATIVES LIMITED (suing as trustee of the Asian Sources Retirement Plan and also on behalf of itself and all other employers of the beneficiaries of the said Plan)

(2) LEE SKU KEE (suing on behalf himself and all other beneficiaries of the said Plan in the same interest)

PLAINTIFFS

AND : UBS (CAYMAN ISLANDS) LIMITED

DEFENDANTS

Appearances:

**Sonia Proudman Q.C. and Alastair Walters for the Plaintiffs
Neil Timms, for the Defendants**

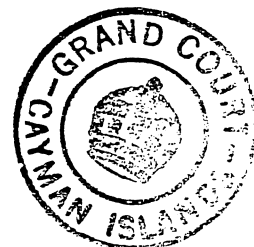
Dates: 16th, 17th and 18th May, 2000

MR. JUSTICE SANDERSON

REASONS FOR JUDGMENT

The Defendants, UBS (Cayman Islands) Limited, ("UBS") applied to strike out the portions of the statement of claim which alleged; fraud or dishonesty; and negligence.

With respect to the claim of fraud or dishonesty UBS submitted that;

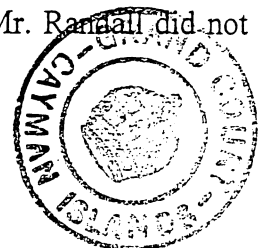


- (a) The facts as pleaded and particularized, even if proved, disclose no cause of action, are frivolous and vexatious or otherwise an abuse of process and;
- (b) UBS could not be held liable because, the Plaintiffs have not alleged which individual or individuals, within UBS's corporate structure, acted dishonestly or fraudulently ;

With respect to the claim in negligence, UBS says that a beneficiary has no legal right to sue a trustee for the independent tort of negligence. His only right is to sue for breach of trust which would include a claim of negligence.

UBS is a bank and trust company carrying on business in the Cayman Islands and were the former trustees of the subject pension trust. The Plaintiffs, Publishers Representatives Limited and Lee Sku Kee (Publishers) are current trustees and beneficiaries of the pension trust. Publishers primary claim against UBS is for breach of trust arising out of UBS's alleged failure to disclose certain information to Publishers.

Publishers' allege that, between September 1985 and March 1987, the UBS's trust officer Mr. Barry Randall, committed frauds and serious irregularities in relation to other trust's managed by UBS. In September 1986 Mr. Randall resigned from UBS but did not actually leave until March 20th 1987. However, by late 1986, UBS's controller and internal auditor David Meyerhoff commenced an investigation into Mr. Randall's dealings on the relevant accounts. Before Mr. Randall left UBS, Mr. Meyerhoff discovered several irregularities for which Mr. Randall did not



provide adequate explanations. Mr. Meyerhoff reported this to UBS's managing director and UBS became suspicious as to the propriety and validity of the transactions and the honesty of Mr. Randall's conduct.

Mr. Randall became a shareholder and managing director of a trust company called Cayman Capital Trust Company (Cayman Capital) on February 20th, 1987. After he left UBS on March 20th he conducted trustee work through Cayman Capital and UBS knew this. On April 16th, 1998 UBS retired as trustee of the plan and Cayman Capital was appointed as trustee in UBS's place.

Publishers allege in paragraph 12.1 of the statement of claim that the state of knowledge of UBS on or before April 6th 1988 was as follows;

12.1 "At the time of the said Deed of Removal and Appointment, namely on or before 16th April 1988, the Defendants knew or ought to have known of Mr. Randall's dishonest conduct committed whilst in their employment, as described above.

PARTICULARS OF KNOWLEDGE

Prior to discovery and/or interrogatories herein, the best particulars that the Plaintiffs can provide of the Defendants' knowledge or means of knowledge, are as follows:

- (i) In 1985 a customer of the Defendant, Mr. Campbell reported suspicious activity in his accounts with the Defendant and which were controlled by Mr. Randall.
- (ii) In December 1985, the Defendants' Mr. Kaufman experienced difficulties obtaining a lien agreement from Mr. Randall in connection with a transaction involving one of the accounts under Mr. Randall's supervision and control.
- (iii) In June 1986, the Defendants had experienced a loss on payment of interest on one of the accounts under Mr. Randall's supervision and control.



- (iv) In late 1986, the Defendant's Mr. Meyerhoff looked into transactions undertaken by Mr. Randall involving an entity named Violet Securities, and expressed a suspicion that such transactions were not valid.
- (v) Also in about late 1986 the Defendants' Mr. Meyerhoff commenced some form of investigation into Mr. Randall's activities, which included perusal of relevant documents and contacting individuals, including external auditors.
- (vi) In particular, Mr. Randall was repeatedly asked in or about December 1986 to produce documents relating to account no. 90125 with the Defendants, but failed to do so.
- (vii) Further, in or about December 1986, the Defendants' officers discovered that Mr. Randall had himself undertaken to back a bank loan made in connection with one of the Defendants' clients' investments under his control.
- (viii) In or about December 1986, the Defendants received queries from Mr. Joseph Berlin, one of their clients, in relation to the operation of his investment account(s) held with the Defendants under Mr. Randall's supervision and control.
- (ix) Throughout 1986 and 1987, the Defendants encountered difficulties and irregularities in connection with transactions undertaken by Mr. Randall which involved an entity named Campbell Engineering.
- (x) Between January and March 1987, the Defendants' officers questioned Mr. Randall further, regarding the irregularities which had been discovered in relation to the transactions he had undertaken purportedly on behalf of the Defendants' clients. Mr. Randall failed or refused to provide any, or any adequate, answers or information to the Defendants.
- (xi) The Plaintiffs will provide voluntary further particulars, if necessary, hereafter.

In paragraphs 14.1 and 14.2 Publishers alleged that UBS's conduct was dishonest.

14.1 Further, in the circumstances pleaded in paragraphs 12 and 13 hereof the Defendants' conduct was dishonest.

PARTICULARS OF DISHONESTY



By (a) failing to disclose to the Principal Company that they knew or had strong ground to suspect that Mr. Randall was guilty of fraud and (b) retiring as trustee of the Trust Plan with a view to replacement by CCTC thus causing and permitting Mr. Randall to obtain control of the Trust Plan assets, the Defendants put the Trust Plan assets at risk in deliberate or alternatively reckless disregard of the beneficiaries' rights to have such assets managed by an honest, fit and proper trustee.

14.2 Further, in the pleaded circumstances, the Defendants' failure to disclose to the Principal Company that they knew or had strong grounds to suspect that Mr. Randall was guilty of fraud amounted to dishonest concealment of their state of knowledge since that knowledge was unlikely to be discovered (and was not, in fact, discovered) by any person interested in the Trust Plan until such disclosure was made.

Paragraphs 15.1, 15.2, 15.3 and 16.1 allege negligence of UBS in this way.

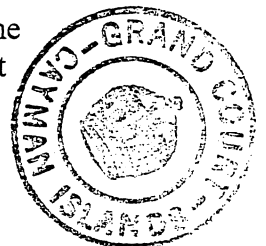
15.1 Further, by reason of the foregoing, in particular:-

- (i) the Defendants' position as professional trustees of the Trust Plan;
- (ii) the reliance placed upon the Defendants' skill and expertise as such; and
- (iii) the Defendants' knowledge of Mr. Randall's activities as described above.

The Defendants assumed a duty of care at common law towards the Trust Plan and/or to all parties interested therein or entitled thereunder, to exercise all reasonable skill and care in and about the management, care and control of the assets held under the Trust Plan.

15.2 In particular, and without prejudice to the generality of the aforesaid duty of care, The Defendants were required, in the circumstances described above, to:

- (i) put and keep in place proper means of control and supervision of the trust officers in its employment, including Mr. Randall, so as to ensure that their activities in relation to clients' investments were at all times proper and honest;
- (ii) upon obtaining knowledge or suspicion as to the activities of any of its trust officers, including Mr. Randall, to undertake a full, proper and prompt investigation into all matters of concern, and to conduct such investigation until completely satisfied that no irregularities had taken place or else deal with the trust officer in question, in order to protect the interests of the clients whose investments or assets were under that trust officers' control;
- (iii) disclose to each of the Companies, and/or to all other parties with any interest in or entitlement under the Trust Plan, the facts and matters set out at Paragraphs 13 (i) to (iii) above;



- (iv) act at all times in the interests of the Trust Plan, so as to protect the assets held thereunder.

15.3 Wrongfully and in breach of the aforesaid duty of care, the Defendants, their servants or agents, failed to exercise the requisite standard of skill and care.

PARTICULARS OF NEGLIGENCE

- (i) The Defendants knew or ought to have known on or before 6th April 1988 about Mr. Randall's irregular activities and dishonest acts committed whilst in their employment.
- (ii) The Defendants failed to put into place any adequate means of controlling or monitoring the activities of Mr. Randall in relation to their clients' investments under his supervision, in particular, the verification or authentication of clients' instructions in relation to their investment accounts. The only form of purported control or monitoring initiated by the Defendants was the appointment of Mr. Meyerhoff, in late 1986, as the accountant in the Defendants' trusts section, and his subsequent investigation into Mr. Randall's activities.
- (iii) As previously described, the Defendants failed to carry out a proper and prompt investigation into the irregular activities and dishonest acts carried out by Mr. Randall whilst in the Defendants' employment.
- (iv) The Defendants failed to disclose to any of the Companies, or to any other party with any interest in or entitlement under the Trust Plan, any of the facts and matters set out at Paragraphs 13 (i) to (iii) above.
- (v) The Defendants thereby failed to take any, or any sufficient, steps to ensure that CCTC, as the new trustee of the Trust Plan, was competent to undertake that Position.
- (vi) The Defendants thereby failed to take any, or any sufficient, steps to protect the assets held under the Trust Plan.
- 16.1 It is the Plaintiffs' alternative case that, to the extent that the Court might find that the Defendants did not know of Mr. Randall's irregular conduct and dishonest acts, then this resulted from the breaches of their duty of care as professional trustees, as set out in Paragraphs 13-15 above."



It is the above quoted paragraphs that UBS applied to strike out. Publishers had also provided further and better particulars with respect to these paragraphs

Publishers claim that if UBS had disclosed to Publishers, what it knew about Mr. Randall's conduct, Publishers would not have appointed Cayman Capital as trustee and the loss would have been prevented. Publishers allege that UBS's failure to advise it of Mr. Randall's conduct was;

- (a) in breach of trust;
- (b) alternatively dishonest;
- (c) alternatively negligent

UBS's has 4 main arguments in support of its application to strike the pleadings referred to. They are:

1. DISHONESTY

UBS submits that its alleged failure to advise Publishers what it knew or suspected does not constitute dishonesty at law. It argues that Publishers must allege that UBS had a conscious appreciation of a duty to act and made a deliberate decision not to discharge that duty;

2. IDENTITY

Alternatively, UBS submits that if the acts or the omissions alleged can constitute dishonesty, Publishers has failed to identify which officers of UBS acted dishonestly and therefore it cannot be held to be dishonest because it can only be dishonest through or by the individuals who are its directing mind and will.



3. FACTS

UBS says that on the facts as pleaded and particularized Publishers have no prospect of success;

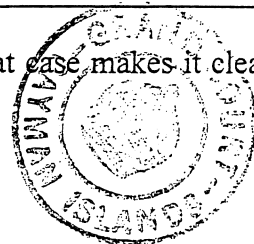
4. NEGLIGENCE

UBS asserts that the claim against it in negligence is not a proper cause of action because there is no common law duty of care which is independent from and concurrent with the duties as a trustee.

In determining whether to strike the pleadings on the basis that they disclose no cause of action, I except Publishers' assertion that a reasonable cause of action means a cause of action which has some chance of success, which is arguable, or which raises a question of law fit to be tried. If a case is weak or is unlikely to succeed, it is no ground for striking it out unless the case is obviously hopeless or doomed to fail. For the purpose of this application the facts as pleaded are accepted. (Drummond - Jackson BMA [1970] 1 WLR 688, Wenlock v Moloney [1965] 1 WLR 1238).

DISHONESTY

Publishers argues that UBS had knowledge of certain facts from which it knew that Mr. Randall was a dishonest person or strongly suspected that he was dishonest in the conduct of his trust business. Publishers submit that to say or do nothing in these circumstances, can amount to dishonesty. Ms. Proudman argues that in doing nothing UBS committed a dishonest breach of trust and is liable as an accessory to Randall's fraud. Alternatively, she submits that UBS did not care if Publishers money was safe with Mr. Randall and turned a blind eye to the real risk that he might steal it. She relies upon the judgment of the Privy Council in Royal Brunei Airlines SDN. BHD v. Tan [1995] 3 WLR 64. In my view the Judgement of Lord Nicholls in that case makes it clear



that the failure of a person to disclose facts to a beneficiary may in some circumstances, amount to dishonesty. At page 389 he stated;

Dishonesty

“Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *Reg v. Ghosh* [1982] Q.B. 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed does have a strong subjectivity element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another’s property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.

In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not knowingly take others’ property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless. However, in the situation now under consideration the position is not always so straightforward. This can best be illustrated by considering one particular area: the taking of risks.

Taking risks

All investments involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to length which call into question the honesty of the person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own.

...

The analysis of the position of the accessory, such as the solicitor who carries through the transaction for him, does not lead to such a simple, clear-cut answer in every case. He is required to act honestly; but what is required of an honest person in these circumstances? An honest person knows there is doubt. What does honesty require him to do?



The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific. Knox J. captured the flavour of this, in a case with a commercial setting. When he referred to a person who is “guilty of commercially unacceptable conduct in the particular context involved:” see *Cowan de Groot Properties Ltd v. Eagle Trust Plc.* [1992] 4 All E.R. 700, 761. Acting in reckless disregard of others’ rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did.

Before leaving cases where there is real doubt, one further point should be noted. To inquire, in such cases, whether a person dishonestly assisted in what is later held to be a breach of trust is to ask a meaningful question, which is capable of being given a meaningful answer. This is not always so if the question is posed in terms of “knowingly” assisted. Framing the question in the latter form all too often leads one into tortuous convolutions about the “sort” of knowledge required, when the truth is that “knowingly” is adapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not kind. (emphasis added.)

Ms. Proudman also argues that willful blindness or reckless disregard are sufficient to establish fraud for limitation purposes. She referred to Shaw & other [1954] 2 Q.B.429 where Denning L.J., held that a failure by a man to disclose that he was already married when he went through a ceremony of marriage, could constitute a fraud within the limitations legislation. She also relied on King v Victor Parsons & Co. 1 WLR 1973 p. 29 C.A. in which the Court of Appeal concluded that



it was a fraud within the meaning of the Limitation Act, to consciously and knowingly conceal a wrong from a person against whom he committed it. Both of these cases, however, recognize that fraud as used in the Limitation Statutes is to be given a broader interpretation than it was at common law.

Mr. Timms for UBS, relied upon the decision of the English Court Appeal in Armitage v Nurse and others 1998 Ch. 241 C.A. which held that the word fraud as used in the Limitations Act 1980 required proof of dishonesty and that it should not be given any different or broader meaning when it is used in the Limitations Act. He distinguished the applicability of the previous cases where fraud had been given a wider interpretation because he said the Limitations Act of 1990 had replaced the previous wider interpretations by using the words “deliberate concealment”.

In Armitage, supra, Millet L.J. held that proof of dishonesty was required; that gross and culpable negligence is not enough. He stated at p. 250;

“The distinction between fraud properly so-called and other cases to which the Court of Chancery, in his own words, “undoubtedly did apply the term ‘fraud’ although I think unfortunately” is expounded in the speech of Viscount Haldane L.C. in *Nocton v. Lord Ashburton* [1914] A.C. 932, 953. As he explained: “In Chancery the term ‘fraud’ thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction.” It is worthy of note that he himself used the expression “actual fraud” throughout his speech to distinguish cases of common law fraud or deceit from these other cases. Lord Dunedin did the same when he said, at p. 963: “if based on fraud, then, in accordance with the decision in *Derry v. Peek* 918890 14 App. Cas. 337, the fraud proved must be actual fraud, a mens rea, an intention to deceive.” *Derry v. Peek* established that nothing short of a fraudulent intention in the strict sense will suffice for a case of deceit or fraud properly so-called. It requires proof of dishonesty. Nothing less will do. Gross and culpable negligence is not enough. This was confirmed in *Nocton v. Lord Ashburton* which also established that dishonesty is not a necessary factor in cases of so-called equitable fraud.



The decisions in Royal Brunei Airways v Tan (supra) and Armitage v Nurse (supra) were considered and reconciled by the Court of Appeal in Walkers & Ors v Stones & anr. unreported Court of Appeal (Civil Division) 19.07.00.

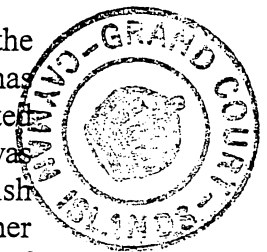
In giving judgment for the Court Sir Christopher Slade held at p. 40

163. With respect, however, I find myself unable to agree with the third proposition, if stated without qualification. At least in the case of a solicitor-trustee, a qualification must in my opinion be necessary to take account of the case where the trustee's so-called "honest belief", though actually held, is so unreasonable that, by any objective standard, no reasonable solicitor-trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries. I limit this proposition to the case of a solicitor-trustee, first, because on the facts before us we are concerned only with solicitor-trustees and, secondly, because I accept that the test of honesty may vary from case to case, depending on, among other things, the role and calling of the trustees. ...

In civil cases, the impossibility of eliminating reference to objective standards where such questions arise is demonstrated by the decision of the Privy Council in **Royal Brunei Airways v. Tan** [1995] 2 AC 378 ("Tan"). In that case the Privy Council held that where a third party dishonestly assisted a trustee to commit a breach of trust, the third party would be liable to the beneficiary for the loss occasioned by the breach, even though the third party had received no trust property and irrespective of whether the trustee had been dishonest or fraudulent. The case therefore involved an examination by the Board of the concept of dishonesty. Though this took place in the context of accessory liability, their observations are in my judgment equally applicable to the consideration of the exemption clauses in the Bacchus Trust Deed. In the course of delivering the judgment of the Board, Lord Nicholls of Birkenhead said this:

He then quotes from Royal Brunei Airways, and at page 42 he continued;

"168. There is an obvious difference of emphasis between the judgements in the **Tan** and **Armitage** cases so far as they relate to the concept of dishonesty and it has been suggested that they relate to the concept of dishonesty and it has been suggested that they may be irreconcilable. I do not think they are. The decision in **Tan** was cited to the Court of Appeal in **Armitage**, Millett LJ did not purport to distinguish **Tan**, either on the grounds that it related to the liability of accessories or on any other grounds. As already stated, I can see no grounds for applying a different test of



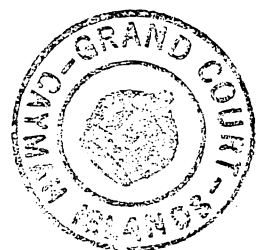
honesty in the context of a trustee exemption clause, such a clause 15 of the Bacchus Trust Deed, from that applicable to the liability of an accessory in a breach of trust. It would be surprising if the Court in **Armitage** had regarded itself as differing from **Tan** without saying so or explaining why. I think that in the relevant passage from his judgment quoted above – and in particular in saying that if trustees deliberately commit a breach of trust they are not dishonest provided that “they do so in good faith and in the honest belief that they are acting in the interests of the beneficiaries”- Millet LJ was directing his mind to the not uncommon case of what Selwyn LJ had once describes as “judicious breaches of trust”. I think it most unlikely that he would have intended this dictum to apply in a case where a solicitor-trustee’s perception of the interests of the beneficiaries was so unreasonable that no reasonable solicitor-trustee could have held such belief. Indeed in my opinion such a construction of the cause could well render it inconsistent with the very existence of an effective trust..

170. For all these reasons the Judge in my judgment erred in his approach to the construction of the effect of Clause 15 (1)(a)(iv) of the Bacchus Trust Deed. That clause in my judgment would not exempt the Trustees from liability for breaches of trust, even if committed in the genuine belief that the course taken by them was in the interests of the beneficiaries, if such belief was so unreasonable that no reasonable solicitor-trustee could have held that belief.

186.[As to (a), it is, I believe, common ground that a reckless indifference as to whether a transaction was contrary to the interests of the beneficiaries would constitute dishonesty: see **Armitage** (supra) at p. 251E per Millet LJ; see also **Three Rivers District Council and others v Governor and Company of the Bank of England (No.3)** [2000] 2 WLR 15 at p. 62G-H per Hirst LJ.]

Publishers have alleged that UBS knew or had strong grounds to suspect that its former employee, Randall, was guilty of fraud; essentially that he had been stealing from his previous clients (see paragraphs 12.1, 14.1, and 14.2.) It is claimed that with actual knowledge of this fraud or knowledge of facts which raised a strong suspicion of fraud, UBS decided not to say anything to Publishers when it transferred the trust funds to Cayman Capital, which was under the direction of Mr. Randall.

Is that something an honest person would do? Alternatively was UBS so recklessly indifferent as to whether the transaction was, contrary to the interest of the beneficiaries that it could constitute dishonesty.



I think in the circumstances such as those alleged here, an honest person would make disclosure of what he knew. I think that an honest person, having regard to the circumstances known to him (as described by Lord Nicholls), might have asked further questions regarding Publishers knowledge of Mr. Randall, or of Mr. Randall himself. It might have sought advice or recommended Publishers obtain advice but most importantly, it might have advised Publishers of the risks involved. It is not, however, necessary for me to make those determinations now. In order to strike the pleadings I must be persuaded that Publishers does not have some chance of success or has not raised a question of law fit to be tried. I am not so persuaded and UBS's application on this ground is dismissed.

IDENTITY

UBS asked Publishers to identify the particular individuals at UBS who were dishonest. Mr. Timms submitted that Publishers must be able to identify the persons at UBS who knowingly and dishonestly failed to disclose to Publishers what they knew about Mr. Randall. He says that if dishonesty is a state of mind it must be a person and not a company who was dishonest because a company does not have a mind.

In its reply to UBS' request to identify the individuals who were alleged to be dishonest, Publishers responded;

19. (i) "It is not alleged that any one individual in the employ of the Defendants was dishonest. The allegation is that the Defendant company was dishonest in the sense pleaded. The pleaded irregularities and frauds were within the knowledge of the Defendants as pleaded and hereinbefore particularised."



particularised.”

UBS also made the following request for further and better particulars of paragraph 14.2

20. (ii) “Please give full particulars of the alleged dishonest concealment of the state of knowledge of the individual (s) in the employ of the Defendants including, but not limited to, the identity of the alleged individual (s) who dishonestly concealed the state of knowledge.”

Publishers response was;

20. (ii) “It is not alleged that any individual in the employ of the Defendants was dishonest. The allegation is that the Defendant company was dishonest in failing to disclose its state of the knowledge to the Plaintiffs.

I accept UBS’s submissions that a company has no mind or will of its own and that the doctrine of directing mind and will attributes to the company the mind and will of the natural person or persons who manage and control its actions. (R v. Ghosh [1982] 1 Q.B. 1053 C.A. and El Ajou v Dollarland Holdings [1994] 1 BCLC 464.) I also accept Mr. Timms submissions that combining innocent acts of individuals cannot create a fraudulent or dishonest act in a company.

However, in this case it is not known who made the decision to not disclose to Publishers the information that UBS had. The allegation of dishonest conduct by the company has been pleaded and particularized. That is, Publishers rely on the knowledge of Albert Good. He had the knowledge of the conduct of Mr. Randall. His knowledge was therefore knowledge of UBS. It has been alleged in the pleadings that the person or persons at UBS who were the directing mind and will of UBS, made the decision not to

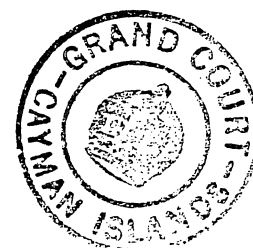
disclose what it knew to Publishers. It is not necessary to plead who made that decision if the plaintiff does not know. To require the plaintiffs to guess would be irresponsible and unfair to both parties.

Publishers acknowledge that at trial that it will have to prove that the directing mind and will of UBS knew of Mr. Randall's conduct and should have done something more than it did. Publishers claim should not be struck at the pleadings stage because it is unable to say who at UBS made the decision.

NO PROSPECT OF SUCCESS

I have previously dealt with UBS' submissions on what is required to show dishonesty and identity of the directing mind and will of a company which were argued by Mr. Timms in support of his contention that Publishers had no prospect of succeeding on the claim of dishonesty. Mr. Timms made further submissions on the pleadings and argued that the claims for dishonesty and negligence should be struck because factually they had no prospect of success. That is, even if the facts and pleadings were proved they could not sustain a claim for dishonesty or negligence.

I have carefully reviewed all of the pleadings and particulars provided and conclude that if proved the facts can sustain a claim for dishonesty or fraud or alternatively a claim for negligence. I generally accept the submission made by Ms. Proudman on this issue and do not propose to repeat them in these reasons.



NEGLIGENCE

UBS says the claim based in negligence should be struck because the damages claimed, arose after there was a failure to warn or supervise; and secondly that there was no common law duty, independent of the trustee's fiduciary duty, to disclose the knowledge it had at the time the trust was transferred.

It is not necessary that the damages arise at the same time as the alleged breach of duty of care. It is necessary that damages are suffered before a cause of action arises. The damage may occur at some later date and cause of action comes into existence at that time.

Mr. Timms then argued that Publishers cannot make any claim in negligence against the Trustee. He said that there is no room for a separate tortious duty. Rather, any conduct which could form the basis for a claim in negligence should properly be made as a negligent breach of trust. That is, any duty that arises, is by virtue of UBS's position as trustee and it should not result in the creation of two independent causes of action. He submits that there is an exclusive remedy in equity.

He relies upon the American text, Scott on Trusts, 4th Edition (1988) Volume 3 and the decision of Privy Council in Downsview Ltd v. First City Corpn. Ltd (P.C.) [1993] p 295.

At page 189 of Scott on Trusts it states:

“so the modern courts have not permitted the beneficiary of a trust to maintain an action at law for tort against the trustee for breach of trust.”



In Downsview Ltd, supra, the Privy Council was dealing with a receiver managers liability to the mortgagor and Lord Templeman observed at p. 316;

“The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss: see *C.B.S. Songs Ltd v. Amstrad Consumer Electronics Plc.* [1988] A.C. 1013, 1059; *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605 and *Murphy v. Brentwood District Council* [1991] 1 A.C. 398. If the defined equitable duties attaching to mortgagees and to receivers and managers appointed by debenture holders are replaced or supplemented by a liability in negligence the result will be confusion and injustice.”

However, there were no binding authorities cited which held that a beneficiary could not sue a trustee for negligence and Mr. Timms advised that there were none that he was aware of. He said that was probably because the proposition was so self evident that there would unlikely be any authorities directly on point.

Ms. Proudman conceded that if Publishers claim for breach of trust was successful she would not need to rely on a claim in negligence. However, UBS has taken the position that they were removed as trustees and its duties as trustees have, therefore, come to an end. If that argument is ultimately successful then Publishers will have to rely on its claim in negligence.

Bearing in mind the caution of Lord Templeman, there are nevertheless clearly some circumstances where the courts have held that contemporaneous duties exist in contract, tort, equity or by statute and that the courts should in appropriate circumstances recognize those independent duties. In the particular circumstances of this case I perceive that there may be independent causes of action and as previously stated there was no binding authority which held that there was not. Accordingly, I conclude that the pleadings in negligence should not be struck.



The Defendants applications are accordingly dismissed with costs to the Plaintiffs.

Dated this 6 day of October, 2000.

Sanderson J
Dale Sanderson
Judge of the Grand Court

