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COPY

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 703 OF 1996

BETWEEN:

CAYMAN WATER COMPANY

Plaintiff

AND:

CAYMAN HOTEL AND GOLF INC. and  
ELLESMERE BRITANNIA LTD.

Defendants

\*\*\*\*\*

Judgment of The Honourable Mr. Justice  
Graham, on Tuesday, March 3, 1998,  
in George Town, Grand Cayman.

\*\*\*\*\*

APPEARANCES:

For the PLAINTIFF:

Mr. R. Alberga, Q.C.,  
Mr. B. Ashenheim

For the DEFENDANTS:

Mr. I. Croxford, Q.C.,  
instructed by Mrs. S. Bridges  
of Ritch & Conolly

(TUESDAY, MARCH 3, 1998)

1 THE COURT: This case is entitled in the Grand Court 02:39 PM  
2 of the Cayman Islands cause number 703 of 1996 between the 02:39 PM  
3 Cayman Water Company plaintiff, first defendant Cayman 02:39 PM  
4 Hotel and Golf Inc., and the second defendant Ellesmere 02:39 PM  
5 Britannia Ltd. The appearances are these: Mr. Ramon 02:39 PM  
6 Alberga, Q.C., and Mr. Bryan Ashenheim of Myers and Alberga 02:39 PM  
7 appeared for the plaintiff. Mr. Ian Croxford, Q.C., with 02:39 PM  
8 Mrs. Cherry Bridges of Messrs. Ritch & Conolly appeared for 02:40 PM  
9 both defendants. 02:40 PM  
10 The factual background is very briefly this: The 02:40 PM  
11 plaintiff, Cayman Water Company has a licence issued under 02:40 PM  
12 the Water (production and supply) Law (1996 Revision). I 02:40 PM  
13 am going to call that "the law" in future. It is for the 02:40 PM  
14 region of the Seven Mile Beach and West Bay. That licence 02:40 PM  
15 was granted to the plaintiffs by the Governor-In-Council 02:41 PM  
16 and it is expressed to be for that region; that is to say, 02:41 PM  
17 Seven Mile Beach and West Bay. 02:41 PM  
18 The defendants are the developers of a hotel 02:41 PM  
19 Britannia development on the West Bay Road, also golf 02:41 PM  
20 course, condominium, et cetera. The amended Statement of 02:41 PM  
21 Claim seeks relief from the plaintiffs. The factual 02:41 PM  
22 allegation against the defendants is that wrongly -- and I 02:41 PM  
23 use that phrase in the broad sense, wrongly -- they have 02:42 PM  
24 produced water and supplied it to properties within the 02:42 PM  
25 Britannia development and thereby have infringed, if I may 02:42 PM

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1 use that phrase, the licence I have referred to issued to 02:42 PM  
2 the plaintiffs by the Governor-In-Council. 02:42 PM  
3 I turn to the Statement of Claim. In paragraph 4 of 02:42 PM  
4 the amended Statement of Claim the plaintiff alleges this: 02:42 PM  
5 the first defendant and Hyatt Britannia Corporation 02:42 PM  
6 Limited -- I am editing as I go along -- acting as itself 02:43 PM  
7 or agent supplied by means of pipes not only the hotel, 02:43 PM  
8 which is the Hyatt, and the golf course, and Beach Club 02:43 PM  
9 owned by the first defendant, which they supplied with 02:43 PM  
10 water prior to the 25th of March -- or the 6th of May 1991, 02:43 PM  
11 but also to all the Britannia condominia and subdivisions 02:43 PM  
12 developed by the second defendant and sold to individual 02:43 PM  
13 purchasers who continue to receive and pay to the second 02:43 PM  
14 defendant for such water. 02:43 PM  
15 They then set out that historically on the 31st of 02:43 PM  
16 May 1996 they wrote a letter complaining about this and 02:44 PM  
17 threatening legal action. 02:44 PM  
18 Now, the law in question unto which the licence was 02:44 PM  
19 issued is the Water (production and supply) Law of 1979. 02:44 PM  
20 Section 12 of that law (1) reads as follows: 02:45 PM  
21 "Whoever - 02:45 PM  
22 (a) subject to subsection 2- 02:45 PM  
23 (i) produces water with the intention 02:46 PM  
24 of supplying it for reward; or 02:46 PM  
25 (ii) supplies water for reward; 02:46 PM

1 (b) contravenes any provision of this Law; 02:46 PM  
2 or  
3 (c) for any purpose connected with this 02:46 PM  
4 Law makes any statement or 02:46 PM  
5 representation in the truth of which 02:46 PM  
6 he does not believe, proof of his 02:46 PM  
7 belief being upon him 02:46 PM  
8 is guilty of an offence and liable on 02:46 PM  
9 summary conviction to a fine of five 02:46 PM  
10 thousand dollars and to imprisonment for 02:46 PM  
11 one year, and, in the case of a continuing  
12 offence, a fine of one hundred dollars per 02:46 PM  
13 day for each day the offence continues  
14 after conviction in the first instance."  
15 Reading the law as a whole, I have to ask myself the 02:47 PM  
16 question: Has a right, been enacted by the legislation, 02:47 PM  
17 giving the plaintiffs as the undoubted concessionaires 02:47 PM  
18 under that law, the right to pursue a private remedy 02:47 PM  
19 against the defendants whom they allege have infringed 02:47 PM  
20 their right causing them loss, damage and the 02:47 PM  
21 potentialities of future loss? The general principle of 02:47 PM  
22 statutory interpretation is that unless something is 02:48 PM  
23 spelled out in a statute it is quite wrong for a court to 02:48 PM  
24 import it into the statute. And in general, the 02:48 PM  
25 proposition of law is as follows: unless one can spell out 02:48 PM

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1 a private right to sue from the statute then that right 02:48 PM  
2 does not exist. 02:48 PM  
3 I turn to very helpful dicta in a leading case on 02:48 PM  
4 this very matter. X(minors) v. Bedfordshire C.C. This was 02:48 PM  
5 the decision of the House of Lords. The question of fact 02:50 PM  
6 was whether the imperfect performance by a local authority 02:50 PM  
7 of its statutory duties relating to the education and 02:50 PM  
8 welfare of children could fund an action for negligence by 02:50 PM  
9 those very children adversely or said to be adversely 02:50 PM  
10 affected by the local authorities' actions or inactions, 02:50 PM  
11 and the court had to decide how one should regard -- look 02:50 PM  
12 at the statute to see whether such a private right could be 02:50 PM  
13 spelled out of the statute. Lord Browne-Wilkinson at 02:50 PM  
14 page -- I should say the case is reported at 1995 3 All ER 02:51 PM  
15 at page 353, but I turn to the judgment of Lord 02:51 PM  
16 Browne-Wilkinson at page 364 letter C. And I read as 02:51 PM  
17 follows under the title: 02:51 PM  
18 "Breach of statutory duty simpliciter. 02:51 PM  
19 This category comprises those cases where 02:51 PM  
20 the statement of claim alleges simply 02:51 PM  
21 (i) the statutory duty, (ii) a breach of 02:51 PM  
22 that duty, causing (iii) damage to the 02:51 PM  
23 plaintiff. The cause of action depends 02:51 PM  
24 neither on proof of any breach of the 02:52 PM  
25 plaintiff's common law rights nor any 02:52 PM

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1 allegation of carelessness by the 02:52 PM  
2 defendant. 02:52 PM  
3 The principles applicable in determining 02:52 PM  
4 whether such statutory cause of action 02:52 PM  
5 exists are now well established, although 02:52 PM  
6 the application of those principles in any 02:52 PM  
7 particular case remains difficult." 02:52 PM  
8 To which I say amen. 02:52 PM  
9 "The basic proposition is that in the 02:52 PM  
10 ordinary case a breach of statutory duty 02:52 PM  
11 does not, by itself, give rise to any 02:52 PM  
12 private law cause of action. However, a 02:52 PM  
13 private law cause of action will arise if 02:52 PM  
14 it can be shown, as a matter of 02:52 PM  
15 construction of the statute, that the 02:52 PM  
16 statutory duty was imposed for the 02:52 PM  
17 protection of a limited class of the 02:52 PM  
18 public and that Parliament intended to 02:52 PM  
19 confer on members of that class a private 02:53 PM  
20 right of action for breach of the duty. 02:53 PM  
21 There is no general rule by reference to 02:53 PM  
22 which it can be decided whether a statute 02:53 PM  
23 does create such a right of action but 02:53 PM  
24 there are a number of indicators. If the 02:53 PM  
25 statute provides no other remedy for its 02:53 PM

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1 breach and the Parliamentary intention to 02:53 PM  
2 protect a limited class as shown, that 02:53 PM  
3 indicates that there may be a private 02:53 PM  
4 right of action since otherwise there is 02:53 PM  
5 no method of securing the protection the 02:53 PM  
6 statute was intended to confer. If the 02:53 PM  
7 statute does provide some other means of 02:53 PM  
8 enforcing the duty that will normally 02:53 PM  
9 indicate that the statutory right was 02:53 PM  
10 intended to be enforceable by those means 02:53 PM  
11 and not by private right of action." 02:53 PM  
12 And His Lordship referred there to Cutler v Wandsworth  
13 Stadium Ltd. [1949] 1 All ER 544. And the leading case of 02:54 PM  
14 Lorrho Ltd. v. Shell Petroleum Co. Ltd. [1981] 2 All ER -- 02:54 PM  
15 that's a decision of the House of Lords. 02:54 PM  
16 "However..." 02:54 PM  
17 His Lordship continued: 02:54 PM  
18 "...the mere existence of some other 02:54 PM  
19 statutory remedy is not necessarily 02:54 PM  
20 decisive. It is still possible to show 02:54 PM  
21 that on the true construction of the 02:54 PM  
22 statute the protected class was intended 02:54 PM  
23 by Parliament to have a private remedy. 02:54 PM  
24 Thus the specific duties imposed on 02:54 PM  
25 employers in relation to factory premises 02:54 PM

1 are enforceable by an action for damages, 02:54 PM  
2 notwithstanding the imposition by the 02:55 PM  
3 statutes of criminal penalties for any 02:55 PM  
4 breach: See Groves v. Lord Wimborne, 02:55 PM  
5 [1898] 2 QB 402." 02:55 PM

6 We turn to the law. It is undoubtedly the case and so far 02:55 PM  
7 as I can make a finding of fact, or mixed fact and law: in 02:55 PM  
8 this case I found that the plaintiffs are indeed within the 02:55 PM  
9 category of a limited class of persons, but what I am 02:55 PM  
10 afraid I do not find if there is anything in that law which 02:56 PM  
11 persuades me that Parliament intended them to have a right 02:56 PM  
12 to take private action, or that any private action or the 02:56 PM  
13 scope of any private action can be extrapolated from any 02:56 PM  
14 combination of the sections, or that any duty was imposed 02:56 PM  
15 by that law such as to give rise to a private right to 02:56 PM  
16 bring suit against anyone interfering with their 02:56 PM  
17 concession. What is perfectly plain is that what the 02:56 PM  
18 legislator had in mind was action -- enforcement action -- 02:56 PM  
19 in the event of a breach over a whole series of possible 02:57 PM  
20 breaches in the criminal courts. In particular, I note 02:57 PM  
21 that a per diem penalty could be enforced upon any 02:57 PM  
22 mal-doer -- wrongdoer I should say. However hard I try, I 02:57 PM  
23 simply cannot -- and I have tried hard -- I cannot construe 02:57 PM  
24 that statute as providing the plaintiffs -- and they would 02:57 PM  
25 have to show me that that right was explicit or implicit in 02:57 PM

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1 the law, and I am not able to make that finding; having 02:57 PM  
2 read the law repeatedly and with care. Accordingly, that 02:58 PM  
3 part of the statement of claim which depends upon an 02:58 PM  
4 alleged breach of statutory duty will be struck out from 02:58 PM  
5 the amended statement of claim. 02:58 PM

6 I had addressed to me an argument by Mr. Alberga 02:58 PM  
7 which at first I found attractive. He reminded me of 02:58 PM  
8 what -- well he didn't remind me, he informed me, because I 02:58 PM  
9 did not know of it, of the Interpretation Law (1995 02:58 PM  
10 Revision), Section 47 which reads as follows: 02:58 PM

11 "The imposition of a penalty or fine by 02:58 PM  
12 any law in the absence of expressed 02:58 PM  
13 provision to the contrary shall not 02:58 PM  
14 relieve any person from liability to 02:58 PM  
15 answer for damages to a person injured." 02:58 PM  
16 I was asked to interpret that as meaning that even if a 02:59 PM  
17 duty is not spelt out in the law, the fact that a fine is 02:59 PM  
18 imposed in the sense in some way, which I was not able to 02:59 PM  
19 understand, provides a private law remedy. I interpret 02:59 PM  
20 that as meaning that no defendant in a civil action can 02:59 PM  
21 say, oh, but I'm liable to criminal liability and therefore 02:59 PM  
22 I'm not to be held to be liable of the tort or breach of 02:59 PM  
23 contract which it is said I am liable otherwise for. And I 02:59 PM  
24 so interpret Section 47 of the Interpretation Law (1995 02:59 PM  
25 Revision). I come to those conclusions without the 02:59 PM

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1 slightest hesitation. 03:00 PM  
2 I turn now to paragraph 12 of the amended Statement 03:01 PM  
3 of Claim, and it alleged: 03:01 PM  
4 "The plaintiff has suffered loss and/or 03:01 PM  
5 damage by reason of the knowing and 03:01 PM  
6 intentional interference by an unlawful 03:01 PM  
7 means by the defendant, their servants or 03:01 PM  
8 agent officer, one or other of them with 03:01 PM  
9 the performance of the licence and/or the 03:01 PM  
10 plaintiff's rights under and by virtue of 03:01 PM  
11 the licence the plaintiff was unable to 03:01 PM  
12 give, in particular, the amounts of damage 03:01 PM  
13 in the discovery." 03:01 PM  
14 Yesterday and possibly erroneously -- it matters not -- I 03:01 PM  
15 gave leave for an amendment of Section 12 which now reads 03:02 PM  
16 as follows: 03:02 PM  
17 "Further and/or in the alternative the 03:02 PM  
18 plaintiff has suffered loss or damage by 03:02 PM  
19 reasons of the knowing and intentional 03:02 PM  
20 interference done with the intention of 03:02 PM  
21 injuring the plaintiff and causing his 03:02 PM  
22 loss and damage by unlawful means by the 03:02 PM  
23 defendant, their servants or agent. With 03:02 PM  
24 the performance of the licence and/or the 03:02 PM  
25 plaintiff's rights trades and/or business 03:02 PM

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1 under or by virtue of the licence..." 03:02 PM  
2 And then the assertion as to the inability to give 03:02 PM  
3 particularity at that stage is repeated. 03:02 PM  
4 This is one of those causes of action which has 03:02 PM  
5 developed, is developing I will not say it to be 03:03 PM  
6 discouraged, it is. It arose or seems to have arisen from 03:03 PM  
7 the myriad of trade union cases which beset the courts in 03:03 PM  
8 the United Kingdom but not exclusively so in the 1980s. 03:03 PM  
9 The simple proposition is this; that if the defendants set 03:03 PM  
10 out to injure a plaintiff and do so in respect of their 03:03 PM  
11 trade and business, then damages should flow from conduct 03:04 PM  
12 of that description. Now there is some debate as to 03:04 PM  
13 whether intention is required or not. I need not deal with 03:04 PM  
14 that at this stage I think probably it is required but 03:04 PM  
15 whether it is or not, it is alleged at the moment in the 03:04 PM  
16 amended Statement of Claim. Prima facie therefore that is 03:04 PM  
17 properly pleaded and stands as an assertion which the 03:04 PM  
18 plaintiffs hope to prove should this matter ever come on 03:04 PM  
19 for trial. Mr. Croxford, having in a gentlemanly way 03:04 PM  
20 consented to the amendment of the Statement of Claim seeks 03:04 PM  
21 to strike it down by reference to the matter which has 03:05 PM  
22 caused me the most concern in dealing with this particular 03:05 PM  
23 case at the stage that it is at; namely, interlocutory 03:05 PM  
24 proceedings. Mr. Croxford, on behalf of the defendants, 03:05 PM  
25 seeks to strike out all of the Statement of Claim. He 03:05 PM

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1 attacks paragraph 12 of the Statement of Claim by reference 03:05 PM  
2 to the ex turpi causa non oritur actio. What that means is 03:05 PM  
3 this; is that if the behaviour of the plaintiff is such 03:05 PM  
4 that it would be wrong for him to recover damages, the 03:06 PM  
5 courts have traditionally deprived him of the fruits of his 03:06 PM  
6 wrongdoing, if I may express it in those terms. The 03:06 PM  
7 factual background is this; Mr. Croxford points out to me 03:06 PM  
8 that in a number of significant respects the plaintiffs 03:06 PM  
9 have not been acting in accordance with the licence granted 03:06 PM  
10 to them by the Governor. Their obligation is to produce 03:06 PM  
11 potable water themselves. Their obligation is to own the 03:07 PM  
12 plant in which that operation is accomplished themselves. 03:07 PM  
13 On the face of it they would appear to have failed to do 03:07 PM  
14 so. There is affidavit evidence before me, and as it is 03:07 PM  
15 uncontroversial, I can therefore accept at this stage that 03:07 PM  
16 what the plaintiffs actually do is to buy in water, which 03:07 PM  
17 is at that stage potable, which I take to mean safely 03:07 PM  
18 consumable by members of the public, and then to preserve 03:07 PM  
19 its condition by the addition of chlorine and other 03:08 PM  
20 chemical substances. On the face of the licence, that does 03:08 PM  
21 not appear to be what was intended when the Governor 03:08 PM  
22 granted the licence. Mr. Croxford powerfully and 03:08 PM  
23 persuasively urges upon me that for me to let paragraph 12 03:08 PM  
24 stand would permit them to profit from their own 03:08 PM  
25 wrongdoing. He quotes me the example given in the case of 03:08 PM

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1 the burglar who falls out of a window when burglarizing some 03:08 PM  
2 unfortunate person's house and has the nerve to sue the 03:09 PM  
3 householder for negligence and complains that it will be 03:09 PM  
4 some time before he's able to climb up walls again and he 03:09 PM  
5 should be compensated for what he would have made away with 03:09 PM  
6 as a busy and skillful burglar. The courts have had no 03:09 PM  
7 difficulty in saying in that case, of course, he shall 03:09 PM  
8 certainly not have the fruits of his crime. We are a world 03:09 PM  
9 away from circumstances like that. 03:09 PM

10 I am referring now to the case of Euro-Diam Ltd. v. 03:09 PM  
11 Bathurst, a decision of the Court of Appeal reported in 03:10 PM  
12 1991 Queen's Bench and I am turning to the judgment of Lord 03:10 PM  
13 Justice Kerr, and I go to page 35. He reads: 03:10 PM

14 "In my view the relevant principles can 03:10 PM  
15 then be summarised as follows: 03:10 PM

16 (1) The *ex turpi causa* defence 03:11 PM  
17 ultimately rests on a principle of public 03:11 PM  
18 policy that the courts will not assist a 03:11 PM  
19 plaintiff who has been guilty of illegal 03:11 PM  
20 (or immoral) conduct **of which the courts** 03:11 PM  
21 **should take notice.** It applies if in all 03:11 PM  
22 the circumstances it would be an affront 03:11 PM  
23 to the public conscience to grant the 03:11 PM  
24 plaintiff the relief which he seeks 03:11 PM  
25 because the court would thereby appear to 03:11 PM

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1 assist or encourage the plaintiff in his 03:11 PM  
2 illegal conduct or to encourage others in 03:11 PM  
3 similar acts... 03:11 PM  
4 The problem is not only to apply this 03:11 PM  
5 principle, but also to respect its limits, 03:11 PM  
6 in relation to the facts of particular 03:12 PM  
7 cases in the light of the authorities." 03:12 PM  
8 Then His Lordship set out a large number of well-known 03:12 PM  
9 cases and examples where the court had applied the 03:12 PM  
10 doctrine. 03:12 PM  
11 "(3) However, the ex turpi causa 03:12 PM  
12 defence must be approached pragmatically 03:12 PM  
13 and with caution, depending on the 03:12 PM  
14 circumstances..." 03:12 PM  
15 And he referred to Lord Justice Bingham, as he then was, in 03:12 PM  
16 Saunders v. Edwards. 03:12 PM  
17 "This applies in particular to cases which 03:12 PM  
18 at first sight appear to fall within 03:12 PM  
19 (2)..."  
20 Which I have referred to above. 03:12 PM  
21 "Thus: situations covered by (2) (i) above 03:12 PM  
22 must be distinguished from others where 03:12 PM  
23 the plaintiff's claim is not founded on 03:12 PM  
24 any illegal act, but where some 03:13 PM  
25 reprehensible conduct on his part is 03:13 PM

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1 disclosed in the course of the 03:13 PM  
2 proceedings, whether by the plaintiff 03:13 PM  
3 himself or otherwise.... 03:13 PM  
4 In such cases the ex turpi causa defence 03:13 PM  
5 will not succeed." 03:13 PM  
6 I am aware of the criticisms of some of the dicta in the  
7 Euro-Diam case in the majority judgment of Lord Goff of  
8 Chieveley in Tinsley v. Milligan [1994] 1AC page 340. And 03:13 PM  
9 I point out that in this case, the plaintiff's case is 03:13 PM  
10 pleaded without any reference to alleged illegal conduct on 03:13 PM  
11 their part. It is no part of their case at the pleading 03:13 PM  
12 stage to set up any alleged deviation from the terms of the 03:13 PM  
13 licence in order to plead their case. 03:13 PM  
14 I return to the words which I asked to be presented 03:13 PM  
15 in italics. The courts will not assist a plaintiff who has 03:13 PM  
16 been guilty of illegal or immoral conduct of which the 03:14 PM  
17 courts should take notice. What is Mr. Croxford's point 03:14 PM  
18 here? It is this: That by trading outside the scope of 03:14 PM  
19 their licence their behaviour is such that public policy 03:14 PM  
20 should prevent them recovering damages. I do not agree. I 03:14 PM  
21 do not think it is possible at this stage for a judge to 03:14 PM  
22 make a judgment as to exactly what their breaches were in 03:14 PM  
23 terms of public policy to enable me to strike out paragraph 03:14 PM  
24 12 of the defence and I decline to do so. He submits to me 03:14 PM  
25 that a balancing exercise is inappropriate. I do not 03:15 PM

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1 agree. Plainly what will have to done at some stage is an 03:15 PM  
2 evaluation of precisely what the relationships between the 03:15 PM  
3 plaintiff and the defendants were, because they were very 03:15 PM  
4 convoluted. For example, on a number of occasions the 03:15 PM  
5 defendants have actually supplied water to the plaintiffs 03:15 PM  
6 at their request, and indeed have as an agreed fact 03:15 PM  
7 contributed the sum of \$58,110 to the plaintiff for capital 03:15 PM  
8 expenditure on their plant. That shows the close 03:16 PM  
9 relationship which the plaintiff and the defendant have had 03:16 PM  
10 together over the period of the contract. It is said that 03:16 PM  
11 they should be debarred from recovering damages from the 03:16 PM  
12 date of July 1994, which is the last time that they 03:16 PM  
13 supplied potable water to the plaintiffs. I take no action 03:16 PM  
14 under that submission because that is simply a matter of 03:16 PM  
15 the trial judge to assess what, if any, damages should 03:16 PM  
16 arise from the relationship between the parties. I do not 03:16 PM  
17 have to deal with an injunction at this stage, so that I 03:16 PM  
18 move on to paragraph 13. There was no fiduciary 03:17 PM  
19 relationship between the plaintiffs and the defendant. 03:17 PM  
20 Consequently I can see no basis for the pleaded 03:17 PM  
21 constructive trust and I therefore strike out paragraph 13 03:17 PM  
22 of the Statement of Claim. Similarly, as to the remaining 03:17 PM  
23 cause of action in paragraph 12, this is not a case for an 03:17 PM  
24 account. I strike out paragraph 14 of the Statement of 03:17 PM  
25 Claim, save as to A and B as perhaps the trial judge may 03:17 PM

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1 order an injunction, although one supposes damages would be 03:17 PM  
2 an alternative, but C certainly survives, I do not take any 03:17 PM  
3 action at this stage. But 14 A and B are struck out. 03:18 PM  
4 Damages will either flow from the establishment of the tort 03:18 PM  
5 in paragraph 12 or they will not. That is all. 03:18 PM

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The Honourable Mr. Justice Graham  
Judge of the Grand Court