

CAUSE # 401/90

1-07-92

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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BETWEEN
PHYLLISON LIMITED
AND
G. H. LIMITED

PLAINTIFF
DEFENDANT

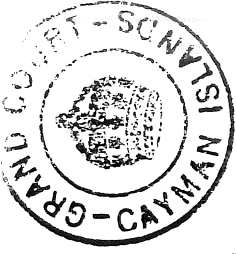
Mr. Angus Foster and Mr. Alan Turner for the plaintiff
Mr. Ramon Alberga O.C. and Mr. Brian Asherheim for the defendants

SCHOEFIELD J.

JUDGMENT

The Great House is a superior condominium complex situated along Seven Mile Beach, Grand Cayman, on land registered as West Bay Beach North, Registration Section Block 110, parcel 21. It was designed and built after the fashion of a Caribbean great house. The idea of the complex was that of Martyn Bould who is the senior partner of a firm of quantity surveyors known as B.C.O.S. In recent years Bould has been involved in other building development projects including the Plantana Condominiums which are adjacent to the Great House. The land upon which the Great House is built was owned by the Webster family of Grand Cayman through one of the family-owned companies. A company was formed, called G. H. Ltd., for the purpose of developing the complex and the land was sold to G.H. Ltd. and the Webster family company received U.S.\$2m. for the land plus U.S.\$2m. worth of preference shares in G.H. Ltd. G. H. Ltd. is the defendant to this suit.

The plaintiff to the suit is Phyllison Ltd., a company limited by guarantee in which Martyn Bould has a one hundred per cent beneficial interest. Its directors and shareholders are provided by Campbell Corporate Services. Phyllison is the vehicle through which Bould has purchased properties, a prudent measure to ensure that any liability which may arise from his partnership in B.C.O.S would not affect his house and home. Bould not only intended to develop and promote the Great House but he intended to purchase, through Phyllison, one of the better



apartments in the complex. Phyllison signed an agreement with G.H. Ltd. to purchase apartment #21 on the 3rd June 1988. I shall refer to that agreement in this judgment as "the Phyllison contract". Bould was the sole Director and shareholder of G. H. Ltd. on 3rd June, 1988, but he did not arrange for an independent board of Directors to be appointed to approve the Phyllison contract nor did he notify the prospective shareholders of his interest in Phyllison. Indeed he first declared his interest in Phyllison at the first meeting of the newly-constituted Board of Directors on the 6th February 1989. At that meeting Bould declared that he had a thirty per cent interest in Phyllison, whereas he had a one hundred percent interest.

On the 28th September, 1990, G.H. Ltd. sent a notice to Phyllison rescinding the Phyllison contract on the ground that Bould did not disclose to G.H. Ltd. or to its shareholders that he had a financial interest in Phyllison. A second copy of this notice was sent to Phyllison on 1st October 1990. This suit, filed on 5th October 1990, seeks orders:

- 1) for a declaration that the notices of rescission were and are ineffectual;
- 2) in the alternative, for a declaration that G. H. Ltd. is estopped and/or prevented from rescinding the agreement for sale;
- 3) that G.H. Ltd. does perform its obligations under the agreement for sale; and
- 4) for damages in respect of the loss suffered by Phyllison as a result of G.H. Ltd's breach of the agreement for sale.

G. H. Ltd. has filed a counterclaim. The first two prayers are:

- (1) for a declaration that G. H. Ltd. was entitled to rescind the Phyllison contract.
- (2) in the alternative, for damages for conspiracy.

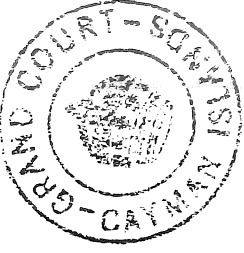
There is a third prayer in the counterclaim. The property referred to in the Phyllison contract is described in the Land Register as including two rooms separate from apartment 21 and



over a garage building. These rooms were to be maids' quarters. G. H. Ltd contends that these rooms were not agreed to be sold as part of the Phyllison contract and seeks a declaration that the Land Register wrongly includes them as part of apartment 21. G. H. Ltd. seeks an order that the Land Register be rectified accordingly. As this prayer involves a decision on whether the maids' quarters form part of the Phyllison contract I need only give it consideration if I hold that the contract was wrongly rescinded, for if the Phyllison Contract no longer exists G. H. Ltd. may do what it will with the maids' quarters.

Bould first presented to the Webster family a feasibility study on the Great House project in 1984. Nothing came of the study at that stage but it was resurrected by Bould in early 1987. Bould put a joint proposal to the Webster family and a meeting was held on 3rd April 1987 at which the venture was favourably received by them, but they indicated they wanted time to discuss the proposal.

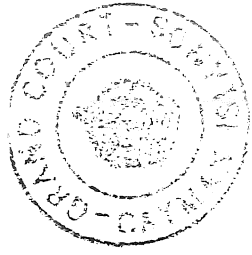
Charles Adams, the attorney, was present at the meeting and agreed to draw up a letter of intent indicating the obligations of the parties to the joint venture. The Webster family owns and controls a company known as the Grand Cayman Company Ltd. For the purpose of this development a wholly-owned subsidiary of Grand Cayman Company Ltd. was created called Newco. Newco granted an option to G.H. Ltd. giving G.H. Ltd. the right to purchase the land upon which the Great House was ultimately built. The price for the land was US\$4m, payable as to US\$2m in cash, and on completion of the sale, by the issue to Newco of two million preferred shares of U.S.\$1 each in G. H. Ltd. The capital of G. H. Ltd. consisted of 50,000 ordinary shares of US\$1 each carrying the right to 40% of the profits of the company, and preferred shares subscribed for by Newco as to US\$2m in settlement of the balance of the sale price for the land, and as to U.S.\$2.5 million to be issued for cash to other investors. G. H. Ltd. was registered on 9th June 1987. Initially the sole



shareholder, as holder of the ordinary shares, was Gould and he was a Director together with three companies which were operated from the office of Charles Adams. Gould, with Adams' assistance, prepared a memorandum of private offering of shares in G.H. Ltd. It is conceded that Gould erred in failing to mention in that memorandum that he intended, through Phyllison, to purchase an apartment in the Great House.

Agreements were put in place the effect of which was that the option to purchase the land from Newco expired on the 30th June 1988. The option could not be taken unless two conditions were satisfied. These were that Gould had to procure subscription for the additional 2,500,000 preference shares and also he had to secure agreements for the purchase of twelve apartments. Gould formed a company called Development Services International Ltd. ("DSI") through which company he provided his services (in consideration for \$1 and other good consideration) as President and Director of G.H. Ltd. to direct the development and oversee the construction and sales. Gould fixed the prices for the respective apartments and was responsible for their sales.

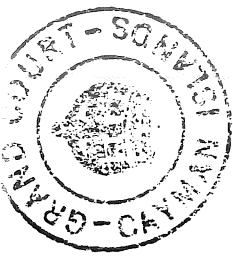
Gould set to work to meet the 30th June deadline by seeking investors for the 2,500,000 preference shares and purchasers for twelve apartments. He was under pressure to do so for if he failed to meet these pre-conditions the whole project would fail. Newco, of course, was to be allocated two million shares. Larry Liebert is an American industrialist who has substantial assets. He owned a condominium in the Plantana complex and has several other properties in the Cayman Islands. He was persuaded to take up 1,250,000 preference shares. William Patton is a property developer in Southern California, United States of America. He and his family have been visiting Cayman for a number of years. He is the agent for a company called American Financial Services which is owned by members of his family. American Financial Services subscribed for 500,000 preference shares. We will hear further about Messrs. Liebert and Patton.



A William Hallock, who has played no part in these proceedings, subscribed for 250,000 preference shares. Liebert wanted Bould, as the developer, to demonstrate his own commitment to the development by investing his own money in the type of shares he was persuading his outside investors to take. Somewhat reluctantly, it seems, Bould agreed to subscribe himself for 500,000 preference shares. The preference shares were all taken up by the 16th June, 1988, a fortnight before the 30th June deadline, and a shareholders' agreement was executed to reflect that situation. In June, 1988, Charles Adam purchased one thousand ordinary shares, because Adams thought there ought to be another ordinary shareholder in case anything happened to Bould. Adams did not intend to charge for his services as a Director and was content for his ordinary shareholding to recompense him for his time and effort.

The interest in the purchase of apartments to an extent followed the interest in the subscription for preference shares. Liebert contracted to purchase an apartment, as did Patton through American Financial Services. Phyllison, through Bould, contracted to purchase two apartments and therein lies the substance of this action.

Bould and his girlfriend, Vivienne Gallagher, wished to make their home in the Great House. They identified the apartment in which they wished to live as the central apartment on the upper floor. In many ways this is the most desirable apartment in the complex. It became apartment number 21. Because of the importance to the project of securing twelve sales, when someone else expressed an interest in Bould's preferred apartment he and Ms. Gallagher decided to take up apartment 9. When the person interested in apartment 21 decided not to take it Bould moved back to that apartment which at that stage, in April or May 1987, was listed at a price of \$811,200. Yet another party expressed an interest in apartment 21 with a different configuration, so Bould and Ms. Gallagher, moved their interest back to number 9,



for which they agreed a price of \$820,000. In January 1988 Bould was approached by a prospective purchaser who wanted apartment 9 at a negotiated price of \$900,000. Bould and Ms. Gallagher then moved their interest to apartment 19. A price was fixed for apartment 19 and on 23rd March, 1988, Phyllison contracted to purchase apartment 19 at that time for \$820,000. Bould felt that it was fair and proper to retain the same price as agreed for apartment 9 because he had moved to accommodate another purchaser. The contract was signed by Bould on behalf of G.H. Ltd. and by Roger Ayles, the attorney, who was a Director of Phyllison.

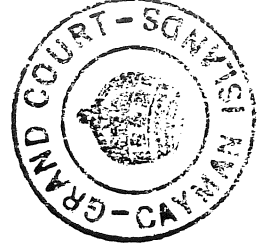
In late April or early May of 1988 the potential purchaser for apartment 21 stepped out of the project. Bould and Ms. Gallagher, whose favoured apartment it was, stepped in. Because there were so many other matters occupying his time Bould did not get to contract until the 3rd June 1988. Again the purchaser of the apartment was Phyllison and again Bould signed the contract on behalf of G.H. Ltd. and Ayles signed as Director on behalf of Phyllison. By the 3rd June 1988 there were eleven apartments for which contracts had been signed, all of course subject to the pre-conditions being met for the project to proceed. Two potential purchasers had indicated that they would sign contracts in early June, but they had failed to do so. Bould testified that he decided to proceed to contract for apartment 21, without relinquishing apartment 19, to ensure that there were in place the necessary twelve contracts for the project to proceed. He instructed Ayles to increase the price of apartment 19 to \$915,000 to bring it in line with the prices of similar apartments. The contract price for apartment 21 remained at \$820,000. That twelve sales had been contracted for permitted the agreements to be signed for the project to proceed.

Patton contracted to purchase apartment 22 on behalf of American Financial Services on 23rd June 1988. There is dispute between Bould and Patton over the content of their negotiations



for the purchase of that particular apartment. Patton maintains that he indicated to Bould from the beginning that his preference was for apartment 21 but he accepted apartment 22 on the understanding that should 21 become available he would be allowed first option. Patton's testimony is that he was shocked when he learned that Bould had himself, through Phyllison, contracted to purchase 21. There was a stiff exchange of communication between Bould and Patton late in 1988 which culminated in an agreement between them that Bould would exchange apartment 19 for apartment 22 which American Financial Services had contracted to purchase. This agreement was approved by the Board of Directors of G. H. Ltd. on the 6th March 1989. Bould then indicated to G.H. Ltd that he wished to return apartment 22 to the company. The Board did not approve this, but fortunately another purchaser stepped forward and offered for apartment 22 \$230,000 more than Bould had agreed to pay. This purchase was completed and Bould returned the profit of \$230,000 to G.H. Ltd. Bould says he volunteered this repayment but Patton, in his evidence, said that Bould suggested to him that the \$230,000 could go to Phyllison or American Financial Services and he, Patton, insisted on its return to G.H. Ltd. The end result was that Phyllison was left with a contract to purchase apartment 21 at a price of \$820,000.

The plaintiff concedes that when that contract was entered into, the 3rd June 1988, Bould as a promoter of G. H. Ltd. owed a fiduciary duty to disclose his interest in Phyllison either to an independent board of directors of G.H. Ltd. or to its potential shareholders in the offering memorandum and that Bould was in breach of that duty. However, the plaintiff argues that it was but a technical breach, that Bould did not know of his duty or the extent of it, and indeed that all those who should have known of his interest full well knew that he was purchasing an apartment in the Great House. Bould testified that he told the Webster family of his intention to purchase an apartment at their meeting of 3rd April 1987. It was, he said, one of the selling points of the development, that the developer was confident



enough in the project to buy an apartment himself. On the other hand Bould admitted that in a telephone conversation with Webster on 31st May, 1988, he told Webster that Phyllison is an Englishman well known to him. Bould gave his reason for so doing that Webster is prone to gossip and he did not want his affairs to be spread around Cayman. Of course on 31st May 1988 Webster was neither a shareholder nor a director of G.H. Ltd, but he did represent the company and the family which would provide the land for the project and would become substantial shareholders in G.H. Ltd.

Bould testified that he told Liebert and Liebert's accountant, Joseph Nerone, of his intention to purchase an apartment from very early on in Liebert's interest in the Great House. Liebert was primarily interested in Bould's commitment to the project and Bould told the Court that the purchase of an apartment was a demonstration of his commitment. At a dinner party held in Bould's house on the 25th March 1988 Vivienne Gallagher and he discussed extensively with Mr. & Mrs. Liebert the changes they were going to make to apartment 19. Ms. Gallagher confirmed Bould's evidence in this respect although Liebert's account of the dinner differed and he testified that he could not remember any discussion of Bould's purchase of an apartment.

Bould testified that at a dinner with the Pattons on 1st July 1988 he and Ms. Gallagher discussed their purchase of an apartment at the Great House. Again, Ms. Gallagher confirmed this piece of evidence. Patton testified that he knew at least by 11th May 1988 that Bould was going to purchase an apartment in the Great House but he said that at the dinner in July 1988 Bould did not indicate that he had purchased apartment 21. He said that at the time he committed himself to invest in the Great House he did not know anything about Phyllison. Indeed, that is the evidence of the representatives of the three major shareholders who testified, Patton, Webster and Liebert; that



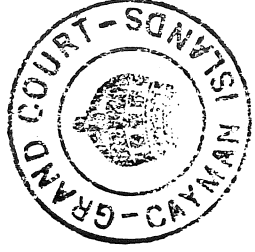
Bould did not declare his interest in Phyllison up to and beyond the signing of the agreement by Phyllison to purchase apartment 21, the 3rd June 1988. Patton testified that if he had known that two of the pre-contract sales were to Bould himself he would have taken another look at the project. Liebert testified that if he had known prior to June 1988 that Bould had a one hundred percent beneficial interest in Phyllison he would not have invested in G.H. Ltd. because he would have been concerned about Bould's financial capacity to purchase two apartments. Webster testified that had he been told prior to June 1988 of Bould's interest in Phyllison and that Phyllison had contracted to buy two apartments he would have looked at the transactions closely and would have been concerned by Bould's previous non-disclosure and would have endeavoured to ascertain if Bould had the financial resources to fulfil the two transactions.

As it was Bould first revealed to Patton that he had an interest in Phyllison in November, 1988 Patton testified that Bould first told him Phyllison was a friend of his from England and that he, Bould, was a minor partner of the company. This is when, according to Patton, he realised that Bould intended to live in apartment 21 despite assurances to Patton that Patton could have first refusal on the apartment. Patton wrote to Bould on the 21st December 1988 describing his disappointment at not being allocated apartment 21, and referring to the conversation in which Bould had said he was a partner in Phyllison. Bould's written reply contained the following sentence:

"I am not a partner in Phyllison Ltd. but a minority shareholder in the company which I do not control."

It will be recalled that at the time Bould had a one hundred per cent beneficial interest in Phyllison which is a company limited by guarantee.

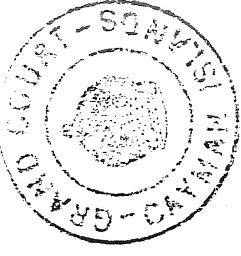
On the 30th December 1988 the first Annual General Meeting of



G.H. Ltd. was held. Bould was Chairman of the meeting and held proxy for Hallock. Liebert was present as a shareholder and John Broadbent, the attorney, held proxy for American Financial Services. Charles Adams, who by that time had been allocated his ordinary shares, was also present. Bould testified that Adams knew of his interest in Phyllison from at least March 1988. However, Bould made no declaration of his interest in Phyllison at that meeting. He told the Court he was unaware of his obligation to do so.

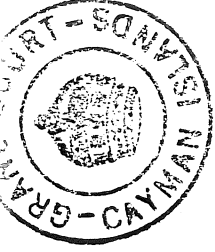
Bould did formally disclose that he had an interest in Phyllison at the first Directors' meeting of G.H. Ltd. on the 6th February 1989. Bould was present as President of the company. At that meeting Charles Adams and Desmond Webster joined the Board as did Roger Ayles who had been privy to the negotiations on the project from very early on. Joseph Nerone, Liebert's accountant, was in attendance at the meeting by invitation. According to the minutes of that meeting: "Martyn Bould's interest as a 30% shareholder of Phyllison was declared". Bould's explanation for this patently inaccurate declaration to the Board is that at that time Phyllison was committed to approximately \$2.25 million to \$2.5 million for the purchase of apartments and his ability to fund the apartments from his own resources was limited to thirty percent of that amount. The remaining seventy percent would be provided by bank borrowing and funds from another, English, investor who in the end did not invest. Bould declared that it was not his intention to mislead the other Directors.

Ayles was, and is, Liebert's attorney on these Islands and Liebert said he drew comfort from Ayles' presence on the Board of G. H. Ltd. Ayles also acted as attorney for Patton and American Financial Services and it is Patton's evidence that when he learned of Bould's interest in Phyllison, in November 1988, he sought Ayles' legal advice on the subject. To further confuse matters Ayles was, as has been mentioned earlier, a Director of



Phyllison. There is no record or evidence as to Ayles's reaction to Bould's inaccurate declaration. He should have been embarrassed by Bould's declaration that he merely had a thirty per cent interest in Phyllison and the position he found himself in. However, this aspect of the matter and Ayles's reaction (or lack of it) to further declarations made at a subsequent Board meeting, to which I shall refer, are not issues which I need investigate in this judgment. They must be dealt with elsewhere.

Webster testified that had he been told at that time that Bould had a one hundred percent interest in Phyllison he would have been shocked and concerned that the declaration came at that late stage. He would have discussed it with the other Directors of Newco and with his legal advisors. Patton who was, of course, not a Director of G.H. Ltd. but who was a shareholder, said that had he known between November 1988 and February 1989 that Bould's interest in Phyllison amounted to one hundred per cent he could not say how he would have reacted. He did testify that when he had learned of Bould's interest in Phyllison he considered Bould should declare it, and Patton said he took Ayles's advice on the matter. Liebert was not a Director of G.H. Ltd. at that stage, but he was a major shareholder and was represented by Nerone at the meeting of the 6th February 1989. He testified that had he been told of the extent of Bould's interest at that time it would have caused him serious concern. Nerone said he asked two questions at the meeting: were progress payments being made on time and did Phyllison have the resources to meet its commitments? Had he been told the extent of Bould's interest in Phyllison it would have been a great shock to him as he did not, and does not, believe that Bould could service two loans for apartments in the Great House. He would have discussed the matter with Liebert and would have considered getting other advice. Nerone in fact wrote to Bould on 2nd February 1989, expressing some concern and making some suggestions regarding the operation of the project. He said: "As



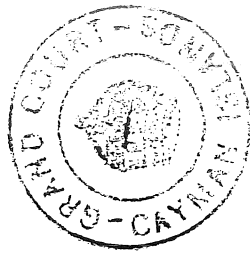
you may have expected, we are quite concerned about the Phyllison and Patton matters and went on to request a brief summary of the history of the Phyllison investment in the Great House and the units ascribed to it. He said they had concern that the units were sold at a " deep discount" and asked for the percentage ownership of each "partner" in Phyllison together with the names and details of those partners. As a result of that letter the Phyllison matter was raised at the next Directors' meeting on the 6th March 1989. The Directors present were Bould, Ayles and Webster. The minute of the discussion reads:

"A history of the Phyllison Ltd. apartment purchases was tabled and is attached to and forms part of these minutes. The apartments #19 and #21 were not sold at a discount, but at the ruling market price. Other partners in Phyllison (sic) Ltd. have no involvement in G. H. Ltd."

There is no record of any comment being made Ayles, who was the Director of Phyllison present at the meeting.

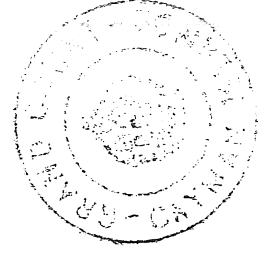
From about this time board meetings became difficult as there appears to have been decreasing confidence between Bould and Adams on the one hand and Webster, Liebert and Patton (the interests of the latter two being represented on the Board by Ayles) on the other. I need not recite the reasons for that breakdown here and, indeed, it appears that they are the subject of a separate suit. Bould maintains that it became increasingly difficult to get decisions out of the Board to enable him to properly direct the project. Webster, Liebert and Patton maintain that they were not kept adequately informed of matters relevant to those decisions.

Webster, Liebert and Patton became so concerned about the progress of the development that they held a meeting in Dallas, Texas, United States of America, in November 1989. Those three shareholders were present, as were Nerone, Timothy Nagy who was Liebert's American attorney, Webster's Cayman attorney Brian Ashenheim, and Patton's friend, attorney and owner of an



apartment in the Great House, Douglas Jennings. A plan (Bould would say a plot) was set in motion for the preference shareholders to take control of the Board of Directors of G.H. Ltd. At a meeting of the preference shareholders held on 6th December 1989 it was announced that Ayleen had resigned as a Director of G.H. Ltd. and Liebert and Patton were elected to the Board. This meant that the Board of Directors of G.H. Ltd. now comprised Bould, Adams, Webster, Liebert and Patton. Whether the Board was properly constituted is a matter which is disputed by Bould. Be that as it may, at a meeting of the Board the following day, the 7th December, 1989, Webster was elected President of G. H. Ltd. in place of Bould and a new project management agreement was approved in draft. Although it was still intended that Bould, through DSI, should manage the project, Bould was obviously upset by these developments and took legal advice. Negotiations between the interested parties took place which resulted in a new project management agreement being signed, maintaining Bould, through DSI, as project manager, and confirming Bould's re-instatement as President of G.H. Ltd. The agreement was signed on 19th February 1990.

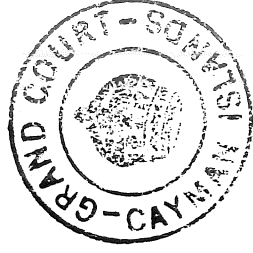
Throughout the period February 1989 to this, as it turned out, temporary resolution of the problems between Bould and the other preference shareholders, there had been no indication to Bould that G.H. Ltd. or any of its members or Directors were contemplating rescission of the Phyllison contract. However the Phyllison issue was raised by Webster in a letter to Bould in December 1989. Bould felt it prudent to involve the Phyllison issue in the negotiations leading up to the signing of the new project management agreement. To that end he included a clause in an initial draft to the effect that apartment 21 may be resold by Phyllison for such price as it thinks fit and the proceeds of sale would be the property of Phyllison. Bould says that he included that clause in the draft to clear up any misunderstandings in Webster's letter of December, 1989. He was not at that stage concerned about possible rescission of the



Phyllison contract and he denies that he sought an express waiver or release of any rights which G.H. Ltd. may have had against Phyllison. Nagy redrafted the clause but at the end of the day both parties rejected it and Phyllison was not referred to in the final agreement. A clause was included in the final agreement which obliged Bould to provide the Directors of G.H. Ltd. with full details of his interest in Phyllison. A letter from Bould to the Directors dated 26th February 1990 declared, inter alia: "I have a beneficial interest in Phyllison Ltd."

Webster, Liebert and Patton all testified that by that declaration they thought that Bould was indicating that there was no change in the extent of his already inaccurately declared thirty per cent interest. Webster testified that had Bould notified them at that time that his interest in Phyllison was one hundred per cent he would have been very upset and would have discussed the matter with his attorney and co-directors. Liebert testified that his reaction to that information at that time would have been one of absolute dismay.

The project still did not proceed smoothly and there was continual friction between Bould on the one hand and Webster, Liebert, Patton and their advisors on the other. An American firm of construction managers was brought in, against Bould's wishes, to conduct a construction audit. At a Directors' meeting held on 27th August 1990, four days before the official opening of the Great House was to be performed, the Board resolved to meet on 12th November 1990 to review the performance of DSI and Bould under the project management agreement and to vote upon the termination of the agreement. As it is that meeting never took place for in the interim Webster, Liebert and Patton consulted a Jamaican attorney who resides in these Islands, Hugh Hart, who after consideration advised them to terminate the project management agreement and to rescind the Phyllison contract. Notice of the rescission was given to Phyllison under Webster's signature on 28th September 1990 in



the following terms:

"Re: Contract dated the 3rd day of June, 1988 made between your company (as buyer) and G.H. Ltd. (as seller) relating to apartment No. 21, the Great House

Take notice that G. H. Ltd. hereby rescinds the Contract on the grounds that Martyn Bould, the sole director of G. H. Ltd. at the date of the contract was made did not disclose to G.H. Ltd. or to its shareholders that he had a financial interest in Phyllison Ltd. which he should have declared to G.H.Ltd. and that Phyllison Ltd. was at that time aware of Martyn Bould's interest in G.H. Ltd.".

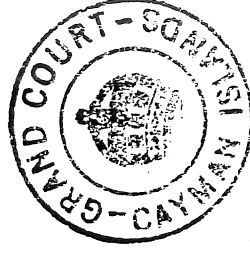
It seems a second copy of the notice was sent on 1st October, 1990. That rescission was ratified at a subsequent meeting of the Board of Directors of G.H. Ltd. Webster, Liebert and Patton all testified that at the time such notice was sent out they still thought Bould's interest in Phyllison amounted to thirty per cent. Bould first declared that he was and always had been the sole beneficial owner of Phyllison when he was cross-examined in Court.

A great deal of the examination of the witnesses was directed at their good faith and even-handedness. Each individual has his own standards of integrity and may even bring different standards to different aspects of his dealings in a project depending upon the extent of his personal involvement in any given aspect. I do not intend, because I do not think it necessary, to consider every allegation made against every participant in the project. It is sufficient for the purposes of this judgment for me to make some general comments on good faith so far as it affects my view of the witnesses and their credibility Webster, Liebert and Patton are three men from entirely different backgrounds who were thrown together solely and fortuitously by their interest in the Great House. Webster comes from a old and wealthy Caribbean family. Liebert is a wealthy industrialist with an entirely different background. He has access to a team of professional advisors. Patton, also a man with means, is in property development. He lives in a different part of the United States



of America to Liebert and is an entirely different type of personality. Indeed, these three Directors of G. H. Ltd. are from disparate backgrounds and struck me as having nothing in common but the project itself. I do not believe that these three men have conspired in bad faith to deprive Bould of his apartment. As Webster commented, all the investors started out as Bould's friends. I am certain that they must feel they had reason to take the action they did. In my view these witnesses became so frustrated with Bould's handling of the project, his attitude to them and what they perceive to be a far from honest approach in his dealings with them, that they determined to take whatever legal action was open to them. At first blush an attempt to deprive Bould of what has been referred to as his "dream home" appears a mean act, but it must be looked at in the context of the overall frustrations with the project. I do not and cannot make any findings as to what is the subject of another suit; I do not attempt to judge where the blame lies for this total breakdown between the respective parties. But I am of the view that the members of the Board of Directors of G. H. Ltd., who made the decision to rescind the Phyllison contract, did so genuinely believing they were justified in so doing.

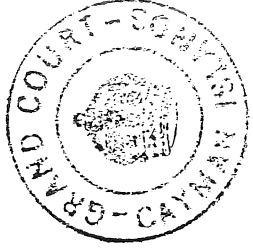
Bould deceived his co-investors and I am satisfied that he did so up to the hearing of this case. He cannot be heard to say on the one hand that the potential and eventual shareholders knew of his own investment in apartments in the Great House and on the other hand that he wanted to keep his investment from Webster, whose involvement was integral to the project, because of Webster's propensity to gossip. He cannot pretend to be open-handed with the preference shareholders when he wrote to Patton that he was a minority shareholder in Phyllison and did not control it. The reason he gave for declaring a thirty per cent interest in Phyllison is, frankly, incredible coming from this witness who has substantial experience in Cayman with investments in developments. His subsequent declaration of an interest as a result of the new project management agreement,



when he was obliged to declare the extent of that interest, was a furtherance of his deceit. A truthful and open-handed declaration would have involved putting right the earlier erroneous declaration of the extent of his interest. It may have been hard for him at that late stage to honestly declare his full interest in Phyllison, but he had a duty to do so. He was a party to the project management agreement under which the extent of his interest fell to be declared. It may be that Rould discussed in general terms with the preference shareholders, either before or after their investment, that he intended to live in the Great House. It was one thing to discuss in general terms his intention to buy an apartment, but it was another to specifically identify the corporate vehicle through which he intended to do so. I believe the defence witnesses when they say they did not know until, in one case late November, 1988, and in others February, 1989, that Rould had an interest in Phyllison and that they did not know until then that he had contracted to purchase two apartments. I believe them when they say they did not know that he had a one hundred per cent interest in Phyllison until he declared it to the Court.

On the date the Phyllison contract was entered into Rould was both a promoter and a Director of G.H. Ltd. In both capacities he owed fiduciary duties to G.H. Ltd. In particular, as a promoter he had a duty to disclose to G.H. Ltd. any interest which he had in any transaction entered into by that Company. So much is clear from the English authorities starting in the late Nineteenth century with Erlanger v. New Sombrero Phosphate Co. (1878) 3 App. Cas. 1218. In particular, as a Director Rould had a duty not to put himself in a position where his own interests conflicted with that of G.H. Ltd. (see, for example, Aberdeen Ry. v. Blackie (1854) 1 Macq. H.L. 461). Rould was in breach of both those duties.

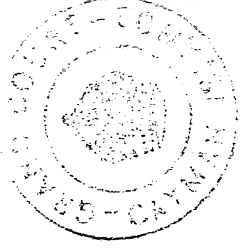
There were no shareholders to whom Rould could have declared his interest in the Phyllison contract on 3rd June, 1988.



However he had a duty to notify the potential shareholders (see Erlanger v. New Sombrero Phosphate Co. (supra) and Gluckstein v. Barnes [1900] A.C. 240). He could have done so in the offering memorandum or, as one of the shareholders, Newco, was already identified and Bould himself was recruiting the others, he could have expressly given notice of his interest in another way. However, Bould says that whilst he did not formally disclose his interest in Phyllison to the potential shareholders he did not intend to deceive them either. That assertion goes against the admitted facts. He was asked directly by Webster, who represented the identified potential shareholder Newco, about the ownership of Phyllison. He deliberately lied about that ownership.

Bould asserts that he could not have the disclosed his interest to G. H. Ltd. because he was, on the date the contract was entered into, the only shareholder and Director of the company. That may be so, but the three corporate directors were retired from the Board on 28th May, 1988, some six days before the Phyllison contract was entered into. Now it could well be that there was no connection between the retirement of those Directors and the contract being entered into, but Bould would perhaps have brought himself within his duties to the Company by declaring his interest, through Phyllison, in apartment 21, to the Board before the other Directors retired. But he was in control of G. H. Ltd. Better still he could have arranged the appointment of independent Directors to whom he could have declared his conflict of interest. He most certainly could have declared his interest at the first shareholders' meeting in December, 1988, to seek ratification of the contract.

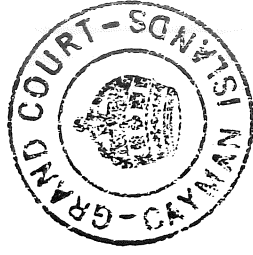
The potential shareholders in G. H. Ltd had a right to know that Bould's company, Phyllison, had contracted to purchase two apartments, in the Great House. They had a right to make the decision of whether to invest in G.H. Ltd. given that the developer himself was purchasing two apartments. That he was



doing so was relevant to their decision in at least two ways. First, they had a right to consider whether the pre-condition of twelve apartment sales was met when the developer himself was taking two of them. Secondly, they had a right to consider whether they wanted to be involved in a development in which two contracts had been signed by a developer who may or may not have been in a financial position to fulfil the terms of those contracts. And on this latter consideration the extent of Bould's interest in Phyllison was relevant, because as one hundred percent owner he may not have been able to find the funds to pay for both apartments, but if he had financial backing for seventy per cent of the price the position may be different. I do not regard Bould's non-disclosure as a mere technical breach of his fiduciary duties to G. H. Ltd. I regard his false disclosure of a thirty per cent interest as a false disclosure in a material particular.

It is said on Bould's behalf that he did not know of his duty to disclose his interest in Phyllison. Bould took on the responsibilities of a Director and he should have ascertained what those responsibilities involved. He was from the outset surrounded by lawyers. In any event a prudent and open-handed approach to the company would have led him to discuss the contracts for the purchase of two apartments with the potential shareholders. After all he was contracting to purchase one of the prime apartments at a very favourable price.

It is said on Bould's behalf that the Articles of Association of G. H. Ltd. permitted him to enter into a contract with the company. However, a company cannot be deprived of its remedy of rescission or other remedy against a promoter by any provisions in its articles. "In any judgment" said Sargent J. in Omnium Electric Palaces Ltd. v. Baines [1914] 1 Ch 332, 347, "promoters cannot relieve themselves of the general equitable obligations recognized and enforced in Erlanger v. New Sombrero Phosphate Co. by an astuteness in the drafting of the regulations which they

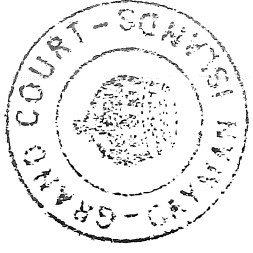


prepare for their company".

It is said by Bould that G. H. Ltd acted inconsistently with an intention to rescind the Phyllison contract and has accordingly affirmed such contract. I need not in this judgment, for reasons which will become clear, make a determination upon the defendant's main argument that affirmation only applies (1) where there has been a breach of a term of a contract, or (2) where the contract has been induced by misrepresentation (as opposed to non-disclosure which does not amount to a misrepresentation) by one party. No reason was given for these distinctions and it is sufficient to say that I would need further persuasion to adopt the argument.

Had Bould's interest in Phyllison been thirty per cent, as stated to the Directors on 6th February, 1989, I may well have determined that G.H. Ltd., by its subsequent actions in proceeding as if the Phyllison contract was effective, had affirmed the contract. But the Directors of G. H. Ltd. did not know the extent of Bould's interest in Phyllison even beyond the date they purported to rescind the contract. I have already indicated that the extent of Bould's interest was a material fact which the Directors and shareholders of Phyllison were entitled to be informed of. Had it come to the attention of Webster, Liebert or Patton that Bould had a one hundred per cent interest in Phyllison on or after the 6th February, 1989, they may have taken entirely different action. From their previous and subsequent actions it is safe to assume they would at least have sought legal advice. Parties can only affirm a contract if they discover the whole of the material facts (see Halsbury's Laws of England, 4th Edition, Vol. 31, para 1131). G.H. Ltd. did not learn the whole of the material facts until after this hearing was commenced. The company cannot be said to have affirmed the contract.

The same principle applies to Bould's assertion that G. H.

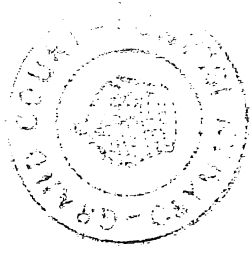


Ltd. is estopped by its conduct from rescinding the Phyllison contract. No representation can be relied on as an estoppel if induced by the concealment of any material fact on the part of the person who wishes to use it as such (see Halsbury's Laws of England 4th Edition, Vol. 16, para 1598). In concealing his full interest in Phyllison, Bould deprived the shareholders in G. H. Ltd. of information which may, and as I have said above probably would, have caused them to act entirely differently in relation to the Phyllison contract. And it is not open to Phyllison to ask the Court to speculate that a full and frank disclosure would not have affected the actions of the other shareholders (see Smith v. Kay (1859) 7 H.L.C. 750).

The last of the plaintiff's arguments I have to consider is that the contract cannot be rescinded because it is impossible to place the parties in their pre-contract position ie. restitutio in integrum is impossible. First, it is argued that apartment 21 is so altered in character, by way of improvements to its design, that it would not be possible to do justice between the parties by returning it to G. H. Ltd. Secondly, repayment of the amounts so far paid by Phyllison do not take account of the vast time and expense spent by Bould and Ms. Gallagher on apartment 21. Thirdly, that Bould gave up apartment 19 and the profit on apartment 22 and would not have done so had he known that the contract for apartment 21 would be rescinded.

On this third point I would merely remark that the return of the profit on apartment 22 has nothing to do with the Phyllison contract. If the contract for apartment 19 had stood, either in place of or in addition to the Phyllison contract, that contract would have been rescindable in the same way as the Phyllison contract.

On the first two points it cannot be gainsaid that apartment 21 has been altered in its design since the contract was entered into. It cannot be gainsaid that Bould and Ms. Gallagher have



expended a great deal of time and money on apartment 21 and it seems somewhat artificial to argue that they are, as individuals, divorced from Phyllison. Nevertheless the authorities show that where the substantial identity of the subject-matter remains restitutio in integrum is regarded as possible. The usual case is where a purchaser is seeking to set aside a transfer of property. Such was the case in Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 Ch. 392. Rigby LJ had this to say, at p. 456:

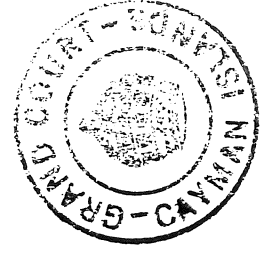
"Now, no doubt it is a general rule that in order to entitle beneficiaries to rescind a voidable contract of purchase against the vendor, they must be in a position to offer back the subject-matter of the contract. But this rule has no application to the case of the subject-matter having been reduced by the mere fault of the vendors themselves; and the rule itself is, in equity, modified by another rule, that where compensation can be made for any deterioration of the property, such deterioration shall be no bar to rescission, but only a ground for compensation."

At p. 457 he said:

"The obligation of the vendors to take back the property in a deteriorated condition is not imposed by way of punishment for wrongdoing, whether fraudulent or not, but because on equitable principles it is thought more fair that they should be compelled to accept compensation than that they should go off with full profit of their wrongdoing."

These passages were adopted and applied in the Scottish case of Spence v. Crawford [1939] 3 All E R 271 where the vendor was seeking rescission and the subject-matter of the sale, a shareholding in a company, had substantially developed since the sale. It was held that as the substantial identity of the subject-matter of the contract remained the remedy of rescission accompanied by restitutio in integrum would lie.

In the present case G. H. Ltd is prepared to take apartment 21 in its altered state. Phyllison can be compensated by G. H. Ltd by repayment of all instalments so far paid together with



interest, and payment of all expenses related to the alteration to the apartment. That Bould and Ms. Gallagher spent time and money on apartment 21 is a matter which should not affect the substantial justice of the case or its overall outcome. Bould and Ms. Gallagher were not to be paid by Phyllison for their time and expenditure and I consider it would be wrong to expect G. H. Ltd to compensate them for it.

I find therefore that Phyllison is not entitled to any of the reliefs sought. If the outcome does seem harsh it is because Phyllison, through its beneficial owner Bould, practised and continued a deceit on the shareholders of G. H. Ltd to whom Bould owed a duty of disclosure. This Court has had cause to emphasize the fiduciary duties of promoters and Directors of limited companies (see for example, Pedro Development Ltd. v. Huiq Zuidebant and another cc. 212 of 1989). It would be a strange result indeed if the Court endorsed Bould's deceit and was obliged to grant relief to a promoter and Director whose deceit had been called into question and who had furthered that deceit beyond the date the action was filed and right down to its hearing.

On the counterclaim, as stated above I may have found that the contract was affirmed had Bould's declaration of a thirty per cent interest in Phyllison been true. I cannot therefore make the declaration in the terms sought by G. H. Ltd. Instead I declare that G. H. Ltd. is entitled to rescind the Phyllison contract. So far as the counterclaim relates to the allocation of the maids' room to apartment 21, as the apartment has reverted to G. H. Ltd., the company can itself determine how those rooms are assigned.

Costs will follow the event.

Judge

Dated this 1st day of July, 1992