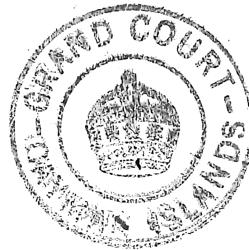
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.



CIVIL CAUSE NO. 212 OF 1989

BETWEEN:	PEDRO DEVELOPMENTS LTD.	PLAINTIFF
AND:	HUIG ZUIDERANT	FIRST DEFENDANT
AND:	SPOTTS DEVELOPMENT LTD.	SECOND DEFENDANT

Mr. Ramon Alberga Q.C., and Ms. Bridges for the plaintiff.

Mr. Norman Hill Q.C., and Mr. Bannon for the defendants.

JUDGMENT

Pedro Developments Ltd. (to which I shall refer as "Pedro") was incorporated under the laws of the Cayman Islands on the 27th April, 1979. Its purpose was, inter alia, to purchase and re-sell land and, indeed, it acquired about 80 acres of land at Pedro's Bluff, Grand Cayman, divided the land into various parcels, and sold those parcels off. That is the one and only development carried out by Pedro so far. The first shareholders of Pedro were three companies which provided professional corporate services. Their shares were subsequently transferred to other persons. On the 26th June, 1980, the date on which Pedro entered into the agreement to purchase the land which was to be developed, the shareholding according to the minutes of a meeting of directors held on that day was distributed as follows:

Shareholder	Number of Shares
Ian Fincham	360,417
Retsil International Investments Ltd.	144,165
Rex Crighton	72,083
Huig Zuiderant	72,082
James M. Bodden Snr.	72,082

On 5th February, 1981, Crighton's shares were

divided and transferred in almost equal portions to Zuiderant and Bodden.

The first directors of Pedro were Bernard Knight and Colin Whitelock who both held office until 25th June, 1980. On that day George V. Lister, who owned or controlled Retsil International Investments Ltd. ("Retsil"), and the first defendant Huig Zuiderant (to whom I shall refer as "HZ") were appointed directors. James M. Bodden Snr. (to whom I shall refer as "JMB") was appointed a director on 14th November, 1980. Lister and JMB are now deceased. HZ ceased to be a director of Pedro on 21st July, 1985, but was reappointed on 1st April, 1987, and so acted until finally removed on 4th July, 1989.

The majority shareholder, Ian Fincham, has never been a director or officer of Pedro. He is a Canadian lawyer who does not appear to have visited these Islands recently. In 1984 he appointed Douglas Irwin, a business consultant from Quebec, Canada, to look into the affairs of Pedro. On the 1st April, 1987, Irwin was appointed managing director of Pedro. On the 13th April, 1987, Fincham purchased all the remaining issued shares in Pedro from HZ, JMB, and Retsil, paying them each $1 for their shares. It is as a result of Irwin's investigation into Pedro that this action is brought against HZ. Pedro alleges that the only person who actually paid for his shares was Fincham, to the extent of US$255,000, and that the other persons to whom shares were issued, including HZ, never paid for them. I should say at once that all amounts referred to in this judgment are expressed in U.S. dollars. Pedro further alleges that large sums of money passed through the company's books, but that a great deal of money was misapplied or diverted and that the company was in fact plundered by its directors. No dividend was ever paid and by the time Irwin commenced his investigations Pedro had a total of $242.86 in its bank accounts. Pedro alleges that HZ and his fellow directors acted in breach of trust or in breach of their fiduciary duty in various transactions or were grossly negligent in the management of the company's affairs and are liable to account to Pedro therefor.

There is an alternative claim against the second defendant Spotts Development Ltd. ("Spotts) to which I shall return.

THE CLAIM

Pedro has listed thirteen transactions for which HZ should be held liable. Some of these transactions overlap and certain claims contained therein are duplicated. That is no criticism of the manner in which the claims were presented. The Court is grateful to counsel for the way in which this was done. I shall describe these transactions in turn and the alternative claim against Spotts.

(i) Transaction I - The land purchase

Pedro acquired the land which was intended to be developed from a company called Alamo Investments Ltd. The land, originally registered as Parcel 23, Block 28D of the Savannah Registration Section of Grand Cayman, formerly belonged to a Mr. Fuertado. By agreement in writing dated 20th April 1979, Mr. Fuertado agreed to sell the land to Alamo for a price of $400,000. JMB and Lister were both directors and/or shareholders of Alamo. HZ was a director but claims he was appointed such on the day before the agreement to sell the land to Pedro was signed and for the purpose only of signing the agreement forms. He claims never to have been a shareholder of Alamo.

Be that as it may on the day he was appointed a director of Alamo HZ was also appointed a director of Pedro. On the next day, the 26th June, 1980, Pedro entered into an agreement with Alamo to purchase Alamo's rights in the agreement with Mr. Fuertado at a price of $800,000 representing a $400,000 profit for Alamo. The agreement was signed by HZ and Lister in their capacities as directors of both Alamo and Pedro.

It is Pedro's contention that this profit was not made known to the majority shareholder, Fincham, and thus it was a secret profit for which HZ and his fellow directors are liable to account. The allegation is that the $400,000 paid to Fuertado

was not paid by Alamo but was paid by Pedro. The $400,000 profit made by Alamo on the transaction was not paid out to Alamo but was utilised by the minority shareholders to obtain their shares at Pedro's expense. Pedro seeks recovery of the alleged secret profit.

<u>(ii)Transaction II - Alleged misappropriation or conversion of Fincham's paid-in share capital</u>

Pedro alleges that Fincham paid into the company the sum of $225,000 representing his paid-in capital for the shares issued to him. Of that amount Pedro retained only $135,000 and the balance of $120,000 was paid out, $60,000 to JMB and $60,000 to Manse Construction Company ("Manse"). All three directors of Pedro were shareholders in Manse; HZ held one third of Manse's shares and was also a director.

Pedro claims that both payments of $60,000 were made without consideration passing to Pedro and that the sums have never been repaid. That the directors are liable to make good the amounts.

<u>(iii) Transaction III - Alleged misapplication of Pedro's funds from land sales</u>

Pedro alleges that the land purchased was subdivided and that it was sold off in thirteen separate lots. The total sales came to $1,272,489.59 but of that amount it is alleged that $535,850.79 was misappropriated as follows :

To Manse,	$494,700.00
To JMB	24,801.45
To Cayman Development Co.	6,000.00
To Spotts	10,349.34
	$535,850.79

These amounts are all duplicated in other of the transactions which will be dealt with later in this judgment.

It is alleged that these amounts were paid out for no or no valid consideration and that the companies to which money was paid were owned and controlled by Pedro's directors. It is further alleged that HZ and the other directors were in breach of their fiduciary duties to Pedro by diverting these amounts.

<u>(iv) Transaction IV - Payments to Manse</u>

On the 30th June, 1981, at a meeting over which HZ presided as chairman, Pedro resolved to sell its remaining waterfront land for $380,000. The proceeds of sale were paid in to a newly opened bank account with the Royal Bank of Canada of which account HZ was the sole signatory. On that same day HZ instructed the Royal Bank of Canada to transfer the sums of $102,058.40 and $277,841.60 (totalling $379,900.00) to Manse. It is Pedro's contention that there was no consideration for those payments and that the monies have never been repaid. Manse no longer exists as it was struck off the Companies' Register on 2nd February, 1987.

Pedro alleges that the total payments to Manse are:

(a)	From Fincham's paid-in capital	$ 60,000
(b)	Diverted from sale of lots	$114,800
(c)	Diverted from the sale of the waterfront property	$379,900
		$554,700

In Pedro's ledgers is reflected an amount of $161,021.58 due to Manse for work done on Pedro's land. There is also an amount of $69,558.22 paid by Manse to Pedro. Pedro has reflected these two amounts in its claim under this head and has credited Manse for the total sum of $230,579.80. This has been deducted from $554,700 and the total claim in respect of Manse has been revised to $324,120.20. The figures at (b) and (c) represent the total of the first figure of diverted monies from land sales in transaction III. The $60,000 at (a) is duplicated in transaction II.

(v) Transaction V - The Spotts Rescue

Spotts is a land development company which was responsible for the development of the Ocean Club Development at Spotts in Grand Cayman. HZ was originally a fifty per cent shareholder in Spotts. He has always been a director of Spotts and it seems that JMB and Lister were also directors or at least had interests in the company.

Pedro alleges that in 1984 Spotts was experiencing severe financial difficulties. Pedro had valuable cash flow at that time from its land sales. In January, 1984, at meeting of which HZ was the chairman, the directors of Pedro resolved to borrow $600,000 from First Cayman Bank Ltd. to pay off Spotts' debts to the Royal Bank of Canada. This was done, it is alleged, despite the fact that there was no benefit to Pedro from this transaction. In 1986 HZ's father paid off the outstanding indebtedness of Pedro to First Cayman Bank Ltd. but Pedro had expended a total of $236,947.70 in servicing the loan.

Pedro clams, as against HZ, the sum of $236,947.70 which it maintains was expended improperly and as a result of a breach of fiduciary duty by, inter alia, HZ. There is an alternative claim against Spotts in that regard, to which I shall return.

(vi) Transaction VI - The Elsa Greer judgment

A Mrs. Elsa Greer obtained a money judgment against Spotts in the Grand Court. On 14th April, 1983, Spotts, HZ, Lister and JMB entered into an agreement with Mrs. Greer to pay her $169,214.52 with interest to satisfy that judgment.

Pedro alleges that its directors improperly and in breach of their fiduciary duty expended $58,100 of Pedro's funds to Mrs. Greer to discharge Spotts' indebtedness. That HZ was either actively involved in making those payments or took no steps to bring to an end the improper use of Pedro's funds of

which he was aware.

(vii) Transaction VII - The Phillips Electrical payments.

In 1982 Phillips Electrical obtained two judgments against Manse in the total of $82,000. Pedro alleges that Pedro's directors improperly and in breach of their fiduciary duties made payments totalling $81,162.47 in discharge of Spotts' indebtedness in connection therewith and that HZ is jointly liable with his co-directors to make good that amount.

(vii) Transaction VII - Payment to Retsil

During the course of the trial it became apparent that as a result of a release given by Pedro to Retsil this claim, being for $53,000 paid by Retsil and subsequently recovered from Pedro, should not be pursued against HZ.

(viii) Transaction IX - Payment of $17,500 to HZ

By cheque dated 11th November, 1983, HZ received a payment of $17,500 from Pedro's bank account for which it is alleged there was no consideration or authorisation.

(x) Transaction X - Alleged diversion of monies to Cayman Development Co.

Cayman Development Company is a company in which HZ, Lister and JMB all had an interest as both directors and shareholders. In transaction III there is reference to an alleged improper payment to that company from Pedro's land sales. Pedro also alleges that there were two further improper payments to the company, of $15,000 on 14th August, 1981, and of $8,846.09 on 20th October, 1983, and that HZ is liable to Pedro for the total payments of $29,846.09.

(xi) Transaction XI - Payment of fees for Grand Cayman Golf Resorts.

A cheque for $812.50 was paid from Pedro's bank account on 22nd November, 1983. It was in respect of annual fees to the Registrar of Companies for three companies, namely Pedro, Spotts and Grand Cayman Golf Resorts Ltd. HZ is the owner of this latter company. Pedro apportions a rounded-down figure of $270.80 to the fees for Grand Cayman Golf Resorts and maintains that this was an improper payment from Pedro's account for which HZ is liable.

(xii) Transaction XII - Further alleged diversions to JMB.

This transaction is a duplication of part of the claims in transactions II and III. It relates to the $24,801.45 allegedly diverted from the land sales to JMB, and the further sum of $60,000 allegedly diverted to JMB from Fincham's paid-in capital. Pedro alleges that these payments, or diversions, were improper, were never repaid and are the liability of the directors jointly and severally.

(xiii) Transaction XIII - Further alleged diversion of monies to Spotts.

This relates to a claim that a further $10,620.19 was improperly used from Pedro's funds for the benefit of Spotts and to the detriment of Pedro. $10,349.34 of the total is duplicated in transaction III. The balance of $270.85 is attributed to Spotts' share of the annual fees to the Registrar of Companies paid by Pedro in the cheque referred to in transaction XI.

(xiv) The alternative claim against Spotts.

Pedro maintains that Pedro's directors are primarily responsible for making good those funds which were improperly diverted or misapplied. However, if it fails in that claim then Pedro maintains that Spotts is liable to refund those

amounts which were improperly diverted to Spotts or applied to Spotts' benefit. In summary these amounts are :

Transaction V for servicing the loan	236,947.70
Transaction VI for the Greer judgment	58,100.00
Transaction VII for the Phillips Electrical payments	81,162.47
Transaction XIII for the further payments	10,620.19
	$386,830.36

THE DEFENCE

HZ admits that he was a director and shareholder of Pedro but he resigned as a director on 21st July, 1985, and was re-appointed on 1st April, 1987. He avers in his defence that he paid for his shares in the company. From early 1983, he claims, he took no part in the running of Pedro.

HZ denies acting in concert with the other directors of the Pedro to the detriment of the company or for his own benefit and for the benefit of companies owned and/or controlled by himself and the other directors. He denies acting in breach of trust or of his fiduciary duty to Pedro. In his defence and evidence HZ made various factual assertions, particularly in relation to his involvement with and knowledge of the circumstances of the individual transactions. I need not set them out here because I shall consider them in detail when I come to review the evidence and my findings in relation to each transaction. However, it is as well to list here the various general defences raised in HZ's pleadings and the defences raised by Spotts.

(i) Release

On 18th May, 1987, a written agreement was entered into between JMB, HZ, Retsil and Fincham (through his agent Irwin) which provided inter alia that for certain consideration Fincham would renounce his claims against JMB, HZ, Lister and Retsil.

On 18th November, 1987, Fincham and JMB entered into a further agreement which valued Fincham's claim and demands against JMB in connection with his investment in Pedro at $350,000. Pursuant to that agreement Fincham issued a release and discharge to JMB from all claims and demands by him arising out of their involvement in Pedro. JMB was a shareholder in a company called Omega Properties Ltd. and Retsil had an interest in it. Pursuant to the agreement of 18th November, 1987, Fincham gave a similar release and discharge to Omega Properties Ltd. as it gave to JMB. By that same agreement Fincham gave a full release and discharge, both from himself and Pedro, of all claims they had against Retsil its officers and directors and the estate of George Lister.

HZ argues that the effect of these releases is to release him from liability to Pedro since a release given to one of a number of persons who is jointly or jointly and severally liable discharges the others. In discharging the estate of Lister from liability Pedro effectively discharged all its directors.

(ii) Limitation, Laches and Acquiescence

In his written defence HZ averred that Pedro brought the action outside the limitation period provided in the Limitation Law. Alternatively he claims that Pedro is guilty of laches in bringing this claim. A further defence pleaded, but not argued, was that Pedro and/or Fincham acquiesced in any breach of trust or fiduciary duty by HZ.

(iii) Indemnity

Article 127 of Pedro's Articles of Association provides for indemnity out of the assets of the company for loss etc., incurred through acts of, inter alia, directors acting in relation to the affairs of the company "except such (if any) as they shall incur or sustain by or through their own wilful neglect or default ....". HZ maintains that this Article is intended to relieve directors who act honestly from liability for damages incurred by any act or omission unless such act or

omission is the result of wilful neglect or default.

(iv) Credit of $350,000

By the agreement dated 18th November, 1987, JMB agreed to pay Fincham the sum of $350,000 to secure his release and the release of Omega Properties Ltd. from liability to Fincham in connection with Fincham's investment in Pedro. HZ avers that he is entitled to credit in that amount in the event of Pedro being held entitled to the whole or part of the relief claimed.

Spotts' defence

At pp. 285-6 of the bundle is a deed of release made on the 9th October, 1986, between Pedro and Spotts. Spotts holds up this release as a complete defence to the claim made against it. Pedro asks the Court to set aside the release as being improperly obtained.

In its written defence Spotts denies that funds of Pedro were improperly used to rescue Spotts and that Phillips Electrical ever worked for Spotts. Neither did it owe a debt to Phillips Electrical which was paid from Pedro's funds. Spotts avers that it borrowed $574,822.55 from Pedro and repaid Pedro a total of $690,905.35.

Spotts maintains it never authorised nor approved the payments in respect of the Elsa Greer judgment, to Phillips Electrical and the further payments to Spotts amounting to $10,620.19, nor was it a party to the use of Pedro's funds.

THE AGREED BUNDLE

Before I discuss the evidence and the law applicable to this suit I must refer to a preliminary issue which arose over the agreed bundles of documents admitted in evidence at the trial. At the commencement of counsel's opening two bundles of documents were presented to the Court as agreed

bundles. It was made clear by counsel for the defence at that stage that he was not accepting the truth of the contents of every document in those bundles. On the second day of the trial he then stated that he objected to the admissibility of the documents in the bundles. The Court spent over one and a half days on submissions on what had in fact been agreed between counsel and what that agreement involved.

Counsel for the defence contended that he had agreed that the bundles be handed to the court at the start of the trial for ease of reference but that he had not agreed to their admission in evidence. He said the defence had agreed the authenticity of the documents in the bundles but had not agreed their admissibility or the truth of their contents. In his arguments counsel seemed to link the question of admissibility of the documents with the question of the truth of their contents. That of course is an incorrect assessment of the position. Questions of authenticity, admissibility and truth of contents of documents are three separate and distinct questions. A document may be authentic and admissible in evidence. It may be authentic and inadmissible. A document may be authentic, for example it may be signed by the person whose signature purports to be on it, and on that basis may be admitted in evidence at the trial. However its contents may be true or untrue, accurate or inaccurate. The court may be asked to make a finding on the truth or accuracy of the contents of the document. One interpretation may be placed on the document by one party and another interpretation may be placed on it by another party; and the court may have to determine the correct interpretation. But truth and accuracy, or what interpretation is to be placed on a document, are issues separate and apart from authenticity and admissibility. The court may find that a document is authentic, is admissible and yet its contents are untrue. Evidence, whether documentary or otherwise, may be admitted at a trial, but it is for the court to make what it will of such evidence.

Having heard counsels' submissions and having been given sight of the exchange of letters in relation to the bundles

I made a finding that there had in fact been an agreement on both admissibility and authenticity of the documents in the bundles. I need not give my reasons for that finding. During the course of the arguments counsel agreed the admissibility of certain documents. During the course of the trial most, if not all, the documents disputed by the defence at its commencement were proved by the witness who made them. However, I think it appropriate to say a few words about counsel's duty in connection with the admission of documents in a civil trial.

During the course of the arguments on this matter it became apparent that counsel for the defence was being instructed by his lay client to object to the admission of every document to be produced by the plaintiff in the trial on the basis that the plaintiff had chosen not to go through the procedure laid down in Rules 13 to 20 of the Civil Procedure Rules, 1978, for pre-trial determination of whether the documents should be admitted without calling their maker. Of course counsel, and not his client, is responsible for the conduct of the litigation. He is free to present his client's case in such a way as he considers appropriate and it is not for the client to direct the way in which counsel should conduct the defence. If the client's express instructions do not permit counsel to present the case in what he considers to be the most appropriate manner then unless his instructions are varied he is free to withdraw from the case after seeking the court's approval.

In this case the main bundle contains about four hundred pages of documents, although some of them are duplicated. The second bundle, of Pedro's corporate records, consists of 150 pages. There were ledgers and a number of other documents admitted in evidence during the course of the trial. It would be improper for counsel to come to Court expecting that at the trial these documents should be considered individually in terms of admissibility. It is counsels' duty when preparing for trial to agree which documents are to be admitted in evidence and to prepare a bundle of such documents for the Court. The Court is entitled to assume that when an agreed bundle of documents is

handed up the admissibility of the documents is not in issue. If there are any documents which are challenged then a separate bundle of such documents should be prepared. These are questions which should not be left until trial; they should be clearly determined in advance of the hearing.

Counsel's duty to his client is subject to his duty to the Court. It is not in the parties' interests for unnecessary costs to be incurred in calling witnesses to strictly prove documents which are not seriously in contention. It is not in the Court's interest to have trials unnecessarily prolonged in hearing the evidence of witnesses which is not seriously in contention. Whenever it does not conflict with counsel's duty to his client he has a duty to save costs and time in agreeing to admit documents and other evidence. And the client is not the best person to determine what is in his own best interests in the conduct of the litigation. Counsel, with his expertise and experience, is the one who has to weigh the best interests of his client and determine, having regard to his concurrent duty to the Court, how best to conduct the litigation.

THE EVIDENCE

The court heard evidence from three witnesses.

Maria Andrea Alberga was employed by Retsil in 1979 or 1980 as a bookkeeper. Retsil provided the accounting services for Pedro and Mrs. Alberga kept Pedro's books until early 1985. Four ledgers of Pedro were produced to Court. Exhibit 1 was the journal entries ledger in which was recorded indirect transactions affecting the company but in respect of which no cheques were written. Entries in that ledger were made on the instructions of Lister except for certain entries which are marked as being made on the instructions of HZ. Exhibit 2 is the general ledger of the company and reflects all transactions, direct and indirect. It contains the financial history of the company. The third ledger showing Pedro's receivables, exhibit 3, records receipts from five purchasers of lots. Exhibit 4 is

the cash disbursements ledger and records cash disbursements as well as cash receipts of the company. Mrs. Alberga testified that exhibit 4 would be a complete record of Pedro's expenses and receipts. Not all of the entries therein were posted to exhibit 2, the general ledger. Exhibit 4 is a breakdown of the bank statement and records monies paid through the bank. Almost all the entries in these four ledgers were made by Mrs. Alberga. She also completed cheques and cheque stubs, and could identify the handwriting on most of the cheque stubs which were produced as exhibit 5.

Mrs. Alberga testified that when she left her employment with Retsil she left behind, in their then office at Pageant Beach, returned cheques, bills and vouchers relating to Pedro. The returned cheques would be stapled to the bank statements. A person called Freddie Seersingh, now deceased, kept the books for Spotts and Manse. She would sit down with him every so often and ensure that their books corresponded. Mrs. Alberga said that all transactions which went through Pedro's bank accounts are reflected in the ledgers. These ledgers were balanced with the corresponding ledgers of the other companies (meaning, inter alia, Spotts and Manse) on a regular basis. After she resigned in 1985 no entries were made and she had no idea what happened to Pedro after that. Up to the time she left every entry in Manse's accounts had a corresponding entry in Pedro's accounts. She recorded all billings she received from Manse up to the time she left in 1985.

Mrs. Alberga testified that HZ had access to the books and she cannot recall him making criticism or complaint of them.

Irwin is a management consultant practising in Quebec, Canada. In 1984 Fincham asked him to visit the Cayman Islands to look into his business interests here, including his interest in Pedro. Irwin's first visit was in April 1984 and he has visited many times since then armed with a power of attorney from Fincham. Irwin's first contacts were with JMB because

Fincham had only ever dealt with JMB in connection with Pedro. Irwin only discovered later that there were other shareholders in Pedro besides Fincham and JMB. In 1985 Irwin was put in contact with Lister. He first met HZ in February 1987 by which time he had been trying for almost three years to get answers about Fincham's interests in Pedro. Promises that information would be given him were never met and he decided to force a general meeting of the company. At a meeting held on 1st April, 1987, Irwin was appointed director and managing director of Pedro. Later in the same month Retsil, HZ and JMB transferred their shares to Fincham.

After the general meeting Irwin and HZ went to Retsil's office at Pageant Beach and the ledgers exhibits 1 to 4 and a box file containing correspondence and a copy of a debit advice (exhibit 6) together with cheque book stubs were handed over to them. Irwin testified that those were the only documents they received from Retsil's office. They received Pedro's minute book from the offices of McDonald, Myers and Alberga, attorneys-at-law.

Following receipt of these documents HZ went through them with Irwin and helped identify some of them. Irwin testified that HZ was familiar with the books. He said it was always his understanding that HZ was the managing director of Pedro. HZ always presented himself as such. Over the period of Irwin's subsequent investigation he received assistance and records from HZ and JMB but later he isolated himself from them. Irwin gave the court an account of the nature of his investigations. He made analyses of the commercial side of the operation and prepared various schedules which were exhibited to Court. As a result of his investigations and his instructions from Fincham this action was commenced.

Irwin gave detailed evidence on the thirteen transactions to which I have earlier referred. I need not recite his evidence in that connection. I shall deal with the relevant evidence in connection with each such transaction when I come to

recite my findings.

Irwin testified that he had been endeavouring to identify and resolve the issues with regard to Fincham's investment in Pedro and by May 1987 he was starting to press more firmly for a resolution. Several deals had not materialized but on 18th May, 1987, he set out in memorandum form an agreement he reached with HZ, JMB and Michael Alberga the attorney acting for Retsil. Pedro was not a party to this agreement. The cornerstone of the agreement was the sale of the Golf Course, which never occurred, and the agreement failed completely. Irwin on behalf of Fincham ended up making a separate agreement with JMB on 18th November, 1987, in which HZ decided he did not want to become involved. Pedro was not a party to that agreement.

The first defendant, Huig Zuiderant, testified that he first came to Cayman in 1979 when he was 31 years old. He came here to discuss the possibility of a joint venture with JMB. After negotiations which took about two months he entered into an agreement whereby he put up half a million dollars for half the share capital in Spotts. Spotts was to build the Ocean Club Development. It was to be run by JMB. HZ lived in Belgium spending one or two weeks a month in Cayman. After a short while HZ decided things were not going well from his point of view so he left one Barry Allum to oversee his investments in Cayman. Manse was undertaking the construction work on the Ocean Club and HZ started to run that side of the project. He related how he increased his investments in Cayman which in March 1980 came to include a one-third interest in Manse.

In May 1980 HZ moved to Cayman and was shortly afterwards that he first learned of Alamo and the Pedro land. He had no interest in Alamo and was not a director or officer of that company. Indeed a memorandum of his dated 24th June, 1980, contains a reference to an agreement that JMB sell him 8% of the shares in Pedro "In reference to the Alamo Pedro deal ......". These shares were in payment of a debt which JMB owed HZ. HZ was

appointed a director of Pedro on 25th June, 1980, and he said he first became aware of the document of agreement between Alamo and Pedro on the date of the agreement i.e. 26th June, 1980. He became a director of Alamo on 26th or 27th June, 1980, on being asked by JMB or Lister to do so. Transfer documents had to be signed and JMB was not available to sign them. He signed the transfer forms for the land at Fuertado's house in the presence of C.S.Gill the attorney who was acting for Pedro and Truman Bodden the attorney acting for Fuertado. JMB and Lister were also present. He asked Mr. Gill whether it was correct to include $800,000 as the consideration shown on the transfer form. He was told that this was correct because there was also an assignment of the land. The higher figure had to be reflected because that was the amount which attracted the stamp duty. However, after discussion it was agreed that the acknowledgement of receipt of $800,000 would be deleted from the form because Fuertado's attorney had difficulty accepting its inclusion. HZ relied on Lister and JMB, and there were attorneys present.

HZ said that he had no previous experience of acting as a director in an English-speaking jurisdiction. He further testified that he was never the managing director of Pedro and there never was a managing director. At the time Manse was to construct roads to the two lots which had been sold off no money was coming in to Pedro. HZ testified as to the extent of the development. Initially he said Manse constructed probably about 6000 feet of road. Later in his evidence, after he had paid a visit to the development, he revised that to a figure of 8000 feet of road. The development costs up to September 1981 would be between $400,000 and $600,000. Permission to subdivide the development would not be given until certain minimum requirements had been met. During this period the money for the development work ultimately came from Spotts.

The marketing and promotion for the sale of the lots was done by J.M. Bodden and Son and Cayman Development Company. Advertisements were drawn up. JMB owed money to the different entities he was involved in and Manse and Spotts were

doing work for which they were not getting paid. In 1981 Pedro's bank, the First Cayman Bank, began to press Pedro. JMB said he did not have the money to pay what he owed.

Michael Alberga, Pedro's attorney, had found a purchaser for the remaining waterfront land but if the proceeds of sale went into Pedro's bank then Manse would not be paid what was owed to it. HZ testified that Alberga suggested opening the new account with the Royal Bank of Canada for Manse to be paid what was owed and for the First Cayman Bank to wait for repayment of Pedro's overdraft. That accounts for the $380,000 transaction which took place through the Royal Bank of Canada. As soon as HZ received notification of the exact balances between the two companies Manse repaid $69,558.22 to Pedro.

In early 1981 HZ paid Rex Crighton $60,000 for his shares in Pedro, including those which were transferred to JMB. JMB repaid HZ $30,000 for those shares. By late 1981 or early 1982 the real estate market in Cayman was slowing down considerably so in September 1982 Lister, JMB and himself decided to liquidate their assets. By that time his relationship with JMB was bad. HZ's wife had a stud in Florida and HZ would spend half his time in Cayman and the rest of his time in Florida. On 8th March, 1983, they reached an agreement with Savannah Acres to sell to it all the remaining Pedro land. HZ testified that so far as he was concerned he did not take any part in the running of Pedro from this moment on. Pedro was finished and just had to collect the money from Savannah Acres. Spotts was finished as well.

HZ testified to meetings and memoranda in attempts to resolve matters between Lister, JMB and himself and as to the reversal of the ledger entries which he authorised in 1983. He testified as to the Greer and Phillips Electrical payments as well as to the payment of $17,500 to himself from Pedro's account. I shall consider his evidence in that connection when I deal individually with each of those transactions in my findings.

By mid-January 1984 Spotts owed the bank around $1.2 million. Lister had a proposal for restructuring the loan but as it came out Pedro was to borrow $600,000 on behalf of Spotts. HZ testified he did not agree to that transaction but Lister and JMB approved it.

HZ resigned as a director of Pedro in July 1985. By then he lived outside Cayman. In July 1986 he decided to do something about the companies. It was agreed that HZ's father Aart Zuiderant would pay off the loan to First Cayman Bank and HZ would take over the interests of Lister and JMB in Spotts. However he was only prepared to do that if he received a "clean" company and so JMB agreed to release Spotts from any liability. That led to the release which Pedro gave Spotts. This was signed by HZ in error, it being amongst a whole batch of documents for signature at the same time and by mistake it found its way into HZ's hands.

HZ testified that when Irwin collected Pedro's documents from the Pageant Beach office he is certain that there were returned cheques and bank statements and other documents amongst them. He testified in some detail about various of the transactions, which evidence I need only deal with where relevant in connection with each individual transaction.

In 1987 when Irwin was attempting to recover Fincham's investment in Pedro HZ said he took the stance that he should make no contribution because he had already released Pedro from its liability to the First Cayman Bank. He would not use his own money but would agree to the use of another company called Omega in which he , Lister and JMB each had an interest. After arguments between himself and JMB, HZ eventually signed the agreement and he performed his part of it. Thereafter he refused to take part in any further agreement regarding Pedro.

HZ testified that from 1980 to 1982 he was involved in a number of real estate ventures, each one of which lost money because of the recession. He suffered a loss of about $1.5

million.

THE DUTIES OF PROMOTERS AND DIRECTORS

In this part of my judgment I intend to state my understanding of the law as it relates to the liability of promoters and directors of companies so far as that law applies to the issues in this case. I think counsel are substantially at one on these legal principles; in this respect the disputes basically relate to the facts.

There is no doubt that HZ was a director of Pedro. I am asked by Pedro to determine that he was also a promoter of the company. This is essentially a question of fact. But it is as well to set out here the definition of the expression "promoter". Any person who "undertakes to form a company with reference to a given project, and to set it going and.... takes the necessary steps to achieve that purpose" is a promoter (per Cockburn C.J., in _Twycross v Grant_ (1877) 2 C.P.D. 469, 541). Bowen J. in _Whaley Bridge Calico Printing Company v Green and Smith_ (1880) 5 Q.B.D. 109, 111 had this to say :

> " The term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. In every case the relief granted must depend on the establishment of such relations between the promoter and the birth, formation and floating of the company, as render it contrary to good faith that the promoter should derive a secret profit from the promotion."

For an act to be an act of promotion it is not necessary that it take place at the initial formation of the company (see _Lagunas Nitrate Company v Lagunas Syndicate_ [1899] 2 Ch. 392).

A promoter stands in a fiduciary position towards the company and he must not make any profit out of the promotion without disclosing it to the company. It may be insufficient that disclosure is made to the directors of the company. Where

all the directors are involved in the making of the profit disclosure must be made to the shareholders or intended shareholders. That is forcefully stated in Gluckstein v Barnes [1900] A.C. 240 per the judgments of Lord Halsbury at p.247 and Lord MacNaghten at p.249.

The onus is upon a promoter to show that he has not made use of this position to benefit himself (per Lord Penzance in Erlanger v New Sombrero Pherphate Company (1878) 3 App. Cas. 1218, 1229-30).

The company may recover any secret profit made by the promoters, and that even though, as in this case, there is no question of rescission of the contract under which the profit has been made. The classic illustration of this is the case of Gluckstein v Barnes (supra) and it seems clear from the judgment of Lord MacNaghten (at pp.254-5) that the promoters are jointly and severally liable for any secret profit and may recover contribution as between each other.

Whether or not HZ was a promoter of Pedro there is no doubt that he was a director at all material times. Directors of a company stand in a fiduciary relationship to the company. They have a duty to act honestly and in good faith in the interests of the company and not for any collateral purpose. Sometimes directors are said to be agents of the company; sometimes they are said to be trustees. In Imperial Hydropathic Hotel Company, Blackpool v Hampson (1883) 23 Ch. D 1,12 Bowen LJ said :

> "I should wish in the first instance to begin by remarking this, that when persons who are directors of a company are from time to time spoken of by Judges as agents, trustees or managing partners of the company, it is essential to recollect that such expressions are used not as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered - points of view at which they seem for the moment to be either cutting the circle or falling within the category of the suggested kind. It

> is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall pro tanto within the principles which govern that particular class."

So it is that directors' duties have been likened to those of an agent where a conflict of interest may arise. As was stated by Lord Cranworth L.C. in Aberdeen Ry v Blaikie (1854) 1 Macq. H.L. 461 :

> "A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.
>
> "So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into ...."

This duty may be waived or at least modified by the company's articles of association and this is particularly relevant in this case to those transactions where HZ maintains that a payment was made in respect of real estate agent's fees.

As trustees or quasi-trustees directors are jointly and severally liable to replace the funds of a company which they have misapplied or misappropriated (see, for example, In Re Exchange Banking Co. (Flitcroft's Case) (1882) 21 Ch.D 519). They owe a duty to apply the company's assets only for the purposes of the company. Money can only be spent for purposes reasonably incidental to the carrying on of the company's business (see, for example, Re Lee, Behrens & Co. [1932] All E.R. Rep.889.)

Kay L.J., said In Re Lands Allotment Company [1894] 1 Ch. 616, 638 :

> "Now, case after case has decided that directors of trading companies

> are not for all purposes trustees or in the position of trustees, or quasi trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust. I do not believe that there has ever been a deviation from the language of the late Sir George Jessel in the case of In re Forest of Dean Coal Mining Company (10 Ch. D.450, 453). Sir George Jessel said this : "Directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company." So that, when they get assets of the company under their control, or into their hands, and deal with them in a way which is beyond the powers of the company, they are liable as for a breach of trust."

In their fiduciary capacity the directors of a company are not allowed to make a profit by using their position without the sanction of the company, which in this context would include the shareholders. This was amply demonstrated in the case of Regal (Hastings) Ltd. v Gulliver and others [1942] 1 All E.R. 378, where it was argued with some force that the application of this rule upon a true perspective of the facts of the particular case would lead to an inequitable result. The directors had acted in good faith. Nevertheless they were held accountable for a profit they had made, which profit had not been sanctioned by the company in general meeting, even though such sanction would have been a foregone conclusion because the directors held the majority shareholding in the company.

So much for a director's duties of honesty and good faith. But HZ contends that at least in relation to some of the transactions he took no part in them - he was not on the Island when they took place or he was not in control of that aspect of the management of the company at the relevant time. He also testified that he placed trust in his co-directors, Lister and JMB, at least until very late in the day. It was pleaded in the amended statement of claim but was not the subject of any final

submission that further or alternatively to HZ's breach of trust and fiduciary duties he was grossly negligent in the conduct of the company's affairs. This averment was not formally withdrawn. If I find therefore that HZ was not in breach of his fiduciary duties to Pedro in respect of a particular transaction to follow the pleadings I would still have to determine whether his action, or inaction, amounted to a breach of his common law duty to exercise the degree of skill and diligence required of him. For reasons which will become apparent I need not expand upon the law to be applied in this connection. It is sufficient for me to say that I would apply the general propositions on the skill and diligence required of a director as stated by Romer J. in _Re City Equitable Fire Insurance Co._ [1925] 1 Ch 407.

All directors who participate in a breach of the common law duties of care or in a breach of their fiduciary duties to the company are liable jointly and severally, in damages or for compensation. It is for Pedro therefore to prove that HZ was a participant in any such breach, either actively, or passively by negligence or default. It is insufficient for Pedro merely to prove that HZ was a director of the company when any breach of duty was committed by others.

FINDINGS

(a) Credibility

Before I turn to my findings on each defence and in relation to each transaction it is as well to make some general observations on my assessment of the witnesses. I do not think the veracity of Mrs. Maria Alberga is in dispute. She gave her evidence in a forthright manner. Of course her evidence suffered somewhat from the lapse of time between her work on the books, exhibits 1 to 4, and her testimony to court. Be that as it may Mrs. Alberga was certain that exhibit 4 would be a complete record of all expenses, billings and receipts of which she had notice. She worked on the books from 1980 to January 1985, and although there were gaps in her employment and the books were kept rather intermittently, when she returned she normally

brought the books up to date. Not all postings were done as between the individual ledgers. Nevertheless I am satisfied that the four ledgers produced represent substantially the true situation in relation to the financial transactions of the company during the periods covered by them.

Irwin testified and was cross-examined at length. He presented as a straightforward and honest witness and withstood any challenge made to his veracity. He made mistakes in his evidence, but given the nature of the case it would be surprising if he did not. It was put to Irwin that he received more in the way of documents than he was prepared to produce to Court. It may well be, as Mrs. Alberga said, that other documentation was left behind at the Pageant Beach Office when she finally departed, but I believe Irwin when he said that all he received from that office was produced in Court.

On the other hand I was not impressed by HZ as a witness, engaging as he may be as a personality. At times his evidence appeared far from forthright. One example, I consider, is sufficient. It relates to transaction IV and the completion of the cheque stub 3530 in the amount of $17,500 in exhibit 5. HZ testified that he made out that stub, not on the 9th November, 1983, the date upon it but in 1987 when he went through the stubs along with the bank statements in the company of Irwin. He went on to say that he completed the stubs 3526 and 3534, again not on the dates upon them, but during the same exercise in 1987 of checking the bank statements with Irwin. But it is clear that the three stubs are written in different inks. HZ's explanation for that, in the first place that 3526 looks to be in the same ink as 3534 and then that there would be different pens on the table to be used, did not have the ring of truth about it. When set against Mrs. Alberga's evidence the explanation becomes totally implausible. Mrs. Alberga wrote "Loan to Spotts" on 3526, and "Spotts" on 3530 long before HZ went through the stubs with Irwin. She testified that had she encountered an incomplete stub she would have completed it herself. That testimony, together with the positioning of Mrs. Alberga's notes on the two

stubs, satisfies me that the stub 3530 was completed before Mrs. Alberga checked it against the accounts and long before HZ went through the stubs with Irwin.

In any area of dispute between Irwin and HZ, on matters of credibility, I prefer the evidence of Irwin.

HZ tried to give the Court the impression that he came to Cayman completely raw on Cayman business procedures, that he trusted JMB, a powerful politician, and that he acted with trust and under the guidance of JMB and Lister. He, like others, was afraid of JMB's power and when it became apparent that JMB was dealing with the company's assets in an unconventional way he did what he could, given their respective positions, to have matters set right.

In fact HZ came to Cayman with a great deal of business experience for his age. The curriculum vitae at pp.50-51 of the bundle may not be strictly accurate in every detail and may not have been prepared by HZ himself but it gives an idea of his business background. He also came here with the responsibility for protecting substantial assets.

HZ took on the responsibilities of directorships. He had a duty to ascertain what those responsibilities entailed. Before me he sought to minimise the nature of his involvement with Pedro. That is not borne out by the documentation. For example in June 1981 the chairman of Pedro's bank was writing to HZ as managing director of the company. Irwin gained the impression, in 1987, that HZ was Pedro's managing director. HZ had sufficient interest in and control of Pedro's financial records in 1981 to be instructing the reversal of journal entries in Exhibit 1. The documents show that well in to 1983 HZ was involving himself in Pedro's activities even after he had become disenchanted with JMB. He participated in the Spotts rescue (to want extent I shall revert) in early 1984.

HZ left the Island when the recession began to

bite. He returned in 1985 when, according to his own testimony, the recession had eased. He was not back in Cayman for any altruistic reason or to tie up loose ends; he was back in business. I do not believe that Cayman stripped him bare and he returned so that Cayman could repeat the process. He was confident enough of his position by 1987 to be openly rowing with JMB, whatever may have been the gap between them in terms of power in these Islands.

I find that HZ came to Cayman with assets and was intent on increasing those assets. He acquiesced in and at times actively joined JMB in his unconventional business behaviour. The companies in which HZ, JMB and Lister were involved were not regarded as separate and distinct entities in many of these transactions and regard was not paid to the independent nature of each entity. Assets flowed freely between the companies without regard being had to whether a transaction was in a particular company's best interest. HZ's primary interest was self-centered and his other duties, as a director, were often ignored or forgotten. I do not consider that he brought to his duties as director of Pedro the standard of principle and care which he ought to have done.

I shall discuss later how this general finding affects and is applied to the defences and the individual transactions.

Now let me turn to the individual defences.

(b) Release

The defence contends that the agreements dated 18th May, 1987, (pp 290-296 of the agreed bundle) and 18th November, 1987, (pp 306-307 of the agreed bundle) as read with the deed of release (p 318A) operate to release HZ of any liability to Pedro.

The purpose of the agreement of 18th May, 1987, was to resolve any claim Fincham had against Pedro, its directors and

Retsil. The parties to that agreement were JMB, HZ, Retsil (through its attorney) and Fincham (through Irwin). Pedro was not a party to that agreement so any release emanating from that agreement cannot affect Pedro. In any case the agreement wholly failed. Although HZ may have endeavoured to carry out his part of the agreement JMB not certainly did not. An agreement of the 6th November, 1987, (pp 319-323 of the agreed bundle) to which neither Fincham nor Pedro were parties shows JMB and HZ dealing with shares of Grand Cayman Golf Resorts in a manner totally inconsistent with the way the shares were to be dealt with by the agreement of 18th May, 1987.

In November, 1987, Irwin was still pursuing his claims on behalf of Fincham. By the 18th May agreement Retsil was to assign to Fincham its interest in a company called Omega Properties. It had not done so by 17th November but on that date its directors resolved so to do. The consideration for that assignment was the following release :

"DEED OF RELEASE

THIS DEED OF RELEASE is made the 17th day of November, 1987 between the parties executing the same.

WHEREAS

(1) By agreements dated the 19th May, 1987 Retsil International Investments Ltd. assigned all its interest in Omega Properties Limited to Ian Fincham.

(2) In consideration of such assignment Pedro Developments Ltd. agreed to grant a full release of any claim whatsoever it may have had or has against Retsil International Investments Ltd. its officers or directors or the Estate of its former managing director Georver(sic) V. Lister.

NOW THIS DEED WITNESSETH that in consideration of the premises herein Pedro Developments Ltd., and Ian Fincham hereby release Retsil International Investments Ltd., its officers and directors and the Estate of its former managing director George V. Lister from any claims whatsoever, all sums of money, actions, proceedings, accounts, claims and demands whatsoever which any of them may have had or now has against them in relation to anything whatsoever."

It is the defence contention that by this deed Pedro, in releasing the estate of George Lister from any claims Pedro may have against the estate, released Lister's co-directors from any such claims. A release given to one of a number of persons who is jointly or jointly and severally liable discharges the others even though the person released may have died.

This whole transaction was intended to dispose for consideration of any claim Fincham may have had against Retsil. It was between Fincham and Pedro on the one hand and Retsil on the other, and no other person or body was involved. Retsil was never a director of Pedro. I accept the plaintiff's contention that this was a release of any claims which may be made against Retsil, its officers, and the estate of Lister so far as it related only to Lister's capacity as an officer and director of Retsil. It was not a release of any claim against Lister in his capacity as director of Pedro, or any other capacity for that matter. I cannot accept that the other directors of Pedro could be released from liability by this sidewind.

One matter has occurred to me which has not been argued. In granting a release on behalf of Pedro, Irwin cannot have been acting in Pedro's interests, for no consideration passed to the company. The only consideration which passed was to Fincham. Was Irwin not doing precisely that which he complains the earlier directors were doing, in treating the company's assets as their own? However, that Irwin failed to appreciate on this occasion the difference between Fincham's interests and those of Pedro does not derogate from the principle that directors must act in the best interests of the company. It is merely another example, viewed from a different angle, of how Pedro's interests were neglected.

The day after the release was signed, the 18th November, 1987, Irwin was attempting to settle matters between Fincham and JMB and they signed the agreement to which I have earlier alluded. This, I find, was a new agreement and is not to

be read together with the agreement of 18th May. It was between Fincham and JMB only and Pedro was not a party. Part of the consideration was that Fincham release and discharge Omega Properties and JMB from all claims and demands arising out of the assignment of Retsil's interest in Omega and in connection with Fincham's investment in Pedro. These discharges flow from Fincham personally and do not affect Pedro.

My view of the May and November, 1987, agreements is that Fincham was attempting to obtain satisfaction from his investment in Pedro. In the May agreement there was a stated acknowledgement that he had a claim against Pedro. Whether that is so or not, the statement demonstrates what Fincham was intending to achieve. Initially he attacked Pedro's directors and Retsil in his capacity as shareholder of Pedro. The May agreement failed, so Irwin attempted to renegotiate on Fincham's behalf, again as shareholder, in November. With Retsil the basis of negotiations was Retsil's obligations under the May agreement and Fincham was content with Retsil's contribution to the overall settlement. Hence the reference in the deed of release to the May agreement. JMB was also prepared to treat with Irwin to settle Fincham's claim in respect of Pedro. He did so by the agreement of the 18th November, which was an agreement with Fincham and not with Pedro.

HZ, on the other hand, was not prepared to co-operate. He felt he had done enough by taking over Spotts and paying off Pedro's bank loan to secure control of Spotts, not appreciating that he had a separate duty to Pedro.

Pedro has filed this action. It is not Fincham's action, although he may as the sole shareholder have had to instruct that the action be filed. Fincham is not claiming against HZ; Fincham is not a party to this claim. HZ has to answer claims by a corporate entity, and not claims by an individual shareholder. All this may have been blurred in the negotiations in May and November 1987. The separate persona of Pedro may have been blurred in the minds of the directors past

and present. But as was stated by Harre J., in Prospect Properties Ltd. (In Liquidation) v William V. McNeill and another (cc 276 of 1989) :

> ".....a company is a separate entity with rights and liabilities distinguishable from those of its shareholders."

I find the this defence of release fails HZ.

(c) Limitation

Although limitation was pleaded by both HZ and Spotts, in his final submissions counsel for the defendants accepted that there is no statutory bar to the present action in so far as it relates to breach of trust and/or fiduciary duty. In Prospect Properties Ltd. v McNeill (supra) Harre J., considered this question and concluded that the statutes applicable to the limitation of actions in these Islands are the Limitation Law and the Imperial Statute 21 James 1 Cap. 16. That the benefit of statutory limitation afforded to directors in respect of company property over which they stand in the position of trustees which has applied in England since the Trustee Act 1888 does not apply in Cayman. Accordingly we look back to the pre-1888 equitable principles that there is no statutory bar to a claim against a director of a company in breach of his fiduciary duty.

With respect, I adopt Harre J's findings.

It was not argued, but it could be that if I found in respect of any transaction that HZ was not in breach of his fiduciary duty but that he acted negligently in the performance of his duties then the defence of limitation may be set up for those negligent acts performed outside the statutory limitation period. Be that as it may, it transpires that I shall not have to trespass in areas upon which there has been no argument.

(d) Laches

> " A defence based on staleness of demand renders it necessary to consider the time which has elapsed and the balance of justice or injustice in affording or refusing relief." (per Lindley L.J., In Re Sharpe [1892] 1 Ch. 154, 168).

An important factor in determining the balance of justice is whether any change has occurred in the defendant's position during the lapse of time between cause of action and the commencement of proceedings.

Of course we must not lose sight of the fact that the action is Pedro's but the delay is that of the major (and now sole) shareholder. The directors whose actions are complained of were the only ones in control of the company's accounts and activities until 1987. It was not unreasonable for Fincham to wait until 1984 to set in motion enquiries about this company in which he invested in 1979 or 1980. He would not expect any return on his investment in the early days of the company. From 1984 to 1987 Irwin was endeavouring on Fincham's behalf to obtain details of Pedro's activities. This is perhaps a fairly lengthy delay but given the distance from which he was operating and given the difficulties he encountered and complexity of the investigations I am unable to say it was undue delay. Irwin only obtained the books of accounts in April 1987 and by May of that year he was endeavouring to settle matters with, among others, HZ. By November 1987 it had become apparent to him that HZ would not settle. The lapse of time between then and the filing of the suit in mid-1989 is not unreasonable given the complexity of the investigations and the nature of the claim.

The defence has pointed to various changes in the position of HZ due to lapse of time but it has been rightly argued by Pedro's counsel that some of these changes have occurred since suit was filed. Manse's accountant has died, but after suit was filed. The limitation period for an action for contribution against the estates of Lister and JMB may have passed, but only after suit was filed. Reference has been made to the absence of documents to support the defence but all in all I am unable to attach responsibility for their absence solely or even substantially to passage of time.

In all the circumstances I do not think Pedro's delay in filing suit was such as to afford a defence.

(e) Acquiescence

Although pleaded the defence of acquiescence was not argued by the defendants' counsel. I agree with Pedro's counsel that the application of this defence has no place in this suit.

(f) Indemnity

HZ contends that Article 127 of Pedro's Articles of Association relieves him of liability in this suit. Article 127 reads:

> "The Directors, auditors, secretary and other officers for the time being of the company and any Trustee for the time being acting in relation to any of the affairs of the company and their heirs, executors, administrators and personal representatives respectively shall be indemnified out of the assets of the Company from and against all actions, proceedings, costs, charges, losses, damages and expenses which they or any of them shall or may incur or sustain by reason of any act done or omitted in or about the execution of their duty in their respective offices of trusts, except such (if any) as they shall incur or sustain by or through their own wilful neglect or default respectively and no such officer or trustee shall be answerable for the acts, receipts, neglects or defaults of any other officer or trustees or for joining in any receipt for the sake of conformity or for the solvency or honesty of any bankers or other persons with whom any monies or effects belonging to the company may be lodged or deposited for safe custody or for any insufficiency of any security upon which any monies of the company may be invested or for any other loss or damage due to any such cause as aforesaid or which may happen in or about the execution of his office or trust unless the same shall happen through the wilful neglect or default of such officer or trustee."

In Prospect Properties Ltd. v. McNeill (supra) Harre J., considered an article, in that case Article 129 of Prospect Properties' articles, which was in exactly the same form as Article 127 above. He considered the meaning of "wilful neglect and default" and applied to the meaning of those words the construction placed upon them by Romer J., in Re City Equitable Fire Insurance Co. Ltd. [1925] 1 Ch. 407. He said :

> "....Romer J.,.... placed upon those words the construction which

> appeared to him to be warranted by the authorities in which the meaning of "wilful default" and "wilful misconduct" had been determined in other connections. Having read the relevant parts of his judgment I adopt the definition of "wilful neglect or default" as recorded in the headnote to the case. It is that an act, or an omission to do an act, is wilful where the person who acts, or omits to act, knows what he is doing and intends to do what he is doing, but if that act or omission amounts to a breach of that persons duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty."

With respect I follow that finding. Applied to the present case it will be clear from my earlier remarks that I find that, in general, HZ did not bring to his duties as director the degree of care and probity which he ought. However, I must set the above test against his actions, or inaction, in respect of each transaction complained of to determine whether Article 127 affords HZ a defence in any particular case.

I shall now turn to my findings on each individual transaction.

<u>(a) Transaction I - The land purchase.</u>

HZ states that he was not a shareholder of Alamo when any of the transactions relating to the land took place. JMB dealt with Fincham and he, HZ, had no knowledge of what was discussed between them. He was only appointed a director of Alamo for the purpose of signing the transfer forms and the assignment from Alamo to Pedro. When he signed the transfer form showing consideration $800,000 he questioned the form and was advised by the attorneys for both Pedro and the vendor, Fuertado, that it was proper to sign it.

Be that as it may HZ clearly admitted that he knew Alamo had bought the land for $400,000 and was purporting to sell

it to Pedro at twice that price. Putting his admissions at their lowest and accepting for the moment that he did not himself gain out of the transaction (and I shall come to my findings on that later) he knew that JMB and Lister stood to gain a substantial profit from the deal. He also knew Fincham was not a director of either Alamo or Pedro. He rationalized his position by telling the Court that what happened to Fincham in regard to his investment in Pedro happened to him in regard to his investment in Spotts; that the Ocean Club land had been bought for less than Spotts paid for it. But that does not affect HZ's duty to act in good faith towards Pedro. To my mind it puts in perspective his attitude to his business dealings. That HZ accepted for himself and his colleagues low standards of business behaviour does not affect the standards which this Court expects of him when performing duties of a fiduciary nature.

There is not one jot of evidence to show that the majority shareholder was informed that Pedro was purchasing the land for double the amount paid for it by Alamo, a company in which Pedro's directors were involved. I find he was not so informed.

On the same day that the Alamo-Pedro transaction was concluded HZ wrote a memorandum to Fincham (p.102 of the bundle) which was patently a misrepresentation of the financial position of Fincham vis-a-vis the other shareholders. HZ knew it was a misrepresentation.

I find that HZ was fully involved in a transaction in which there was a conflict of interest between the directors of the vendor company and the directors of the purchasing company. In fact this was a totally incestuous transaction which was designed to profit some of those involved, at the expense of Pedro. Any director involved in that transaction, including HZ, is liable to account to Pedro for it.

I find that HZ is also liable as a promoter of Pedro. Although he was not involved in the birth of the company

he was involved in the birth of its business activities and in the operation of those activities. HZ was involved in setting the company's business going from share allotment to business enterprise.

What is the extent of HZ's liability? I am prepared to accept that the purpose of the profit on the transaction was to obtain for Pedro's directors a shareholding equivalent to that of Fincham without paying for that shareholding. The appropriate measure of damages is the sum which puts the plaintiff in the same position as he would have been if he had not sustained the wrong. In the circumstances I assess that measure as the amount equivalent to Fincham's contribution to the share capital ie. $255,000. This is the amount which would have gone into Pedro from its directors had the land purchase been conducted in a bona fide manner.

(h) Transaction II - Alleged misappropriation or conversion of Fincham's paid-in share capital

In his written defence HZ puts Pedro to strict proof that Fincham paid the sum of $255,000 for his shares. Yet there is clear acknowledgement by HZ himself in at least two of the documents produced that such amount was paid in by Fincham. (see pp 102 and 123 of the agreed bundle). And this is reflected in the company's ledgers. I find Fincham paid $255,000 into Pedro as his share capital.

I should perhaps add here that I do not accept that HZ paid for his shares in Pedro. He alleges that he paid for 8% of such shares direct to JMB, as Fincham paid for his shares direct to JMB. But HZ was in a position to control where his money was directed. Fincham was not. There may have been some private deal between HZ and JMB over how HZ acquired his shares and it may be that he thought he was purchasing shares direct from JMB. But the circumstances of the share allotment are such that HZ knew that JMB had not put money into the company and HZ

should have ensured his payment to JMB, if there was one, was properly appropriated. In cross-examination HZ was extremely vague and shifty over how he acquired a 10% shareholding when only paying for 8%. The preponderance of evidence is that the profit of $400,000 on the Alamo/Pedro land sale was used to fund the directors' shares.

The ledgers also reflect and HZ acknowledges at p 123 that $60,000 of Fincham's $225,000 went to JMB and $60,000 went to Manse; in other words of the $255,000, $120,000 did not find its way into the company's coffers. I shall deal with HZ's defence to the claim for $120,000 and my findings on liability in that connection when considering transactions IV and XII.

<u>(i) Transactions III and IV - Alleged misapplication of Pedro's funds from the land sales and payments to Manse</u>

I can conveniently deal with the two transactions together because the claims overlap.

The breakdown of the monies received by Pedro from land sales is contained at p 137A of the bundle. It shows that $1,272,489.59 was the total consideration for land sold by Pedro. It is the plaintiff's case that of this amount only $736.638.80 found its way into Pedro's treasury and $535,850.79 was diverted to other persons or entities.

Let me deal with the payments to Manse first. HZ had an interest in and was substantially involved in the running of Manse. There can be no doubt that he would know of the payments from Pedro to Manse. His explanation for the payments is that Pedro owed money to Manse for development costs and it was in Pedro's interests to maintain the development so that income could be derived from the sale of the lots so developed. However, there was not one piece of documentary evidence produced to support HZ's contention that such large sums were spent on and owed by Pedro for the development of the land. HZ testified as

to the extent of the development work carried out, but there was nothing to support that testimony. On the other hand there are clear entries in Pedro's ledgers showing that $554,700 was directed to Manse from Pedro's funds. There are entries to show that Pedro owed Manse $161,021.58 for work done and that $69,558.22 was paid to Pedro by Manse. Mrs. Alberga's testimony shows that Pedro did not receive bills or details of billings from Manse during the period she worked on the books. She compared her figures with the person responsible for keeping Manse's books. I am driven to the conclusion that the figures reflected in Pedro's ledgers are correct and that HZ is misleading the Court when he says Manse was owed money by Pedro. I do not believe him in that regard. I am fortified in my finding by Irwin's evidence. It was put to him that he was told that the $379,900 payment to Manse through the Royal Bank of Canada was a payment in respect of development work and he stated quite firmly that he was not. I find that HZ's explanation for these payments is an afterthought and is untrue. Development work was carried out but not to the extent and at the cost testified to by HZ.

Look at the manner in which he diverted the $379,900 in respect of sale of the land to Brown. He was responsible for carrying out this transaction involving the opening of a new bank account and the immediate transfer of Pedro's funds to Manse. That HZ was not acting in good faith is demonstrated by the three different explanations put forward for the subsequent payment of $69,558.22 to Pedro by Manse. If it was a bona fide transaction why did HZ not wait until the true balances between the companies were calculated before transferring almost the total deposit from the newly-opened account. I am satisfied that HZ was involved in a wrongful diversion of Pedro's fund, to Manse, a company in which he had a substantial interest, to the ultimate extent of $324,120.20. Included in this amount is the $60,000 diverted from Fincham's paid-in share capital as referred to in transaction II, and that amount is accordingly deducted from the award on this transaction.

The balance of the claim in transaction III relates to diversions of Pedro's funds to JMB, Spotts and Cayman Development Company. These diversions are adequately reflected in Pedro's ledgers. HZ testified that the amount of $10,349.34 stated as diverted to Spotts was in fact paid to Cayman Development Company. There is nothing to support that evidence and I accept Pedro's ledgers in this connection. HZ was alive to Pedro's ledger entries and he had a substantial interest in Spotts. I am satisfied that he would know of this diversion of Pedro's funds and that his failure to do anything about it is all part of his general attitude to the movement of funds from Pedro's coffers. He is in breach of his fiduciary duty in connection with this amount.

It was argued for the defence that the diversions to JMB and Cayman Development Company were in respect of commissions on land sales properly earned. I shall deal with the transactions relating to Cayman Development Company when I consider transaction X. I have given anxious consideration to whether the amounts claimed in respect of payments to JMB are properly claimed or whether they could be in respect of commissions earned. However, in the first place there are no documents to support a finding that they were commissions due or billed. In the second place Pedro's ledgers show a portion at least of the amounts claimed as receivables from JMB. There were two entities - JMB as a person and JMB and Son as a company acting as real estate agents. The ledger exhibit 2 reveals entries in a commission account for the company. The account for JMB personally is not so titled. I am driven to the conclusion that where JMB received money personally he simply diverted it to his use.

I have also given consideration to whether HZ should be held responsible for sums of money diverted by JMB and others. Could it be that HZ was in the dark in respect of these activities? Could it be that at most he was careless or negligent in failing to spot any wrongful diversions by the other

directors? I find that to come to either of these conclusions would be importing into the situation an innocence which did not exist. From very early days HZ knew that JMB was using Pedro's money and failing to account for it promptly. It would have become apparent from very early on that JMB was not behaving towards Pedro and its treasury as a responsible director should. So at the same time HZ himself was diverting money to Manse. He must have known from his involvement with Pedro and its ledgers what was happening to Pedro's funds and he was an active participant in substantial diversions of funds. It would be an unrealistic exercise to sift through these transactions and create a false distinction between those which HZ actively participated in and those which he simply acquiesced in. All the directors had their fiduciary duties towards Pedro and it is clear that all were grossly in breach of those duties, at times actively diverting funds and at times by turning a blind eye to the others' diversion of funds. True it is that later in Pedro's life HZ started to complain to JMB of his failure to repay some amounts owed, but I find he did that only when it became apparent that his own interests were likely to be affected. By that stage it was too late.

HZ is liable for the amounts claimed by Pedro in transactions III and IV, save for the amount of $6000 as against Cayman Development Company to which I shall return.

<u>(j) Transaction V - The Spotts Rescue</u>

Irwin testified to this claim for $236,947.70 in respect of Pedro's outlay in servicing the Spotts loan and produced at p.210 of the bundle his computation of the amount.

Dealing with the figures first, HZ produced his own computation as exhibit 5. However he did accept that Pedro had paid a total of $236,947.70 in respect of Spotts' loan account. Initially he queried a figure of $64,500 which was an extension of the loan. In cross-examination he had to admit that the $64,500 could not have been for Pedro's benefit but maintained

that as he did not sanction that extension he could not be held liable for it. On balance I prefer Irwin's computation.

HZ also maintained that he was against the creation of the loan at Pedro's expense but that he was outvoted by JMB and Lister. This does not conform to the other evidence. There is no note on the minutes of the company of any dissension on HZ's part. Indeed he signed the resolution authorizing Pedro to loan Spotts the sum of $600,000 and he signed the loan agreement with the bank. I am satisfied that HZ acquiesced and took part in the execution of Pedro's rescue of Spotts.

It is argued that Pedro's memorandum and articles of association permitted this loan and that at most the taking of the loan was an error of judgment on the part of the directors. HZ had a substantial financial interest in Spotts. He had put a considerable amount of money into that company. Clearly his co-directors desired Spotts' rescue. HZ's desire to safeguard Spotts or please his fellow directors took precedence over his duties to Pedro. The directors of Pedro would only be justified in lending money to Spotts if Pedro would benefit thereby in some way. Pedro's memorandum and articles of association do not authorize the directors to loan money in contravention of their general duties as directors to look after Pedro's interests. The directors permitted their duty to Spotts to conflict with their duty to Pedro and the interests of Spotts prevailed; and HZ was a party to that resolution. It was not a case of mere neglect or error of judgment on the part of the directors; they pursued a course of reckless disregard for their duties to Pedro. Pedro lost substantially by this transaction and the directors who authorized it, including HZ, are liable to make good that loss.

I am satisfied that HZ is liable to make good the money lost by Pedro in rescuing Spotts by way of the loans. I am satisfied that the amount claimed by Pedro, which includes the interest on the extension of the loan by $64500, is the amount for which HZ is liable.

(j) Transaction VI - The Elsa Greer judgment.

There can be no doubt, indeed it is not in dispute, that $58,100 of Pedro's funds were used to pay Mrs. Elsa Greer in respect of a debt she was owed, not by Pedro but by Spotts. HZ avers that he was not a party to these payments and that at the time they were made he was not a signatory to the company's bank account; that Lister had control of the accounts at the relevant time.

The documentary evidence does not support that defence. In April 1983 HZ signed an agreement on behalf of Spotts to compromise the debt with Mrs. Greer and he guaranteed payments under the agreement. He obviously had an interest in ensuring the debt was cleared. The cheque stub 3526 is made out to "Maples & Calder Re: Mrs. Greer" and was written in HZ's hand. It is dated 11th July 1983. I do not believe HZ when he says he wrote that stub in 1987 after he and Irwin had recovered the Pedro documents from the Pageant Beach office. Mrs. Alberga has written on the stub but not in the space reserved for the payee. I find it more likely that the stub was completed by HZ and that Mrs. Alberga made her note on the stub subsequent to that completion and prior to her departure in 1985.

In May 1984 (see p 227 of the bundle) Lister wrote to the First Cayman Bank that he would pay an amount to Mrs. Greer from Pedro's account. He copied that letter to HZ.

I find that HZ was a party to this misapplication of Pedro's money. He may subsequently have complained that it was not made good, but Spotts, in which HZ had a substantial interest, gained from this misapplication and HZ did no more than make complaints in a later endeavour to rectify the position.

Again HZ's involvement in the transaction amounts to more than mere negligence. It amounts to a breach of his fiduciary duty to Pedro. He is responsible, along with his fellow directors, to make good this misapplication of $58,100.

(k) Transaction VII - The Phillips Electrical payments

HZ admitted in evidence that $81,162.47 of Pedro's funds went to Phillips Electrical. He knew Manse owed money to Phillips Electrical under court judgments. HZ admitted he discovered from the balance sheet in November 1983 that a payment had been made by Pedro to Phillips. HZ says he had no part to play in this misapplication of funds and he did not authorize it.

I have given careful consideration to HZ's defence and evidence in this regard as indeed I have been careful to give separate consideration to each transaction. Nevertheless I am driven to the conclusion that as director HZ did not pay regard to Pedro's interest in this transaction, and that his involvement amounts to a breach of his fiduciary duties. He was at very least recklessly careless in relation to his duties to Pedro.

HZ must have known that Pedro's money was going to Phillips Electrical in this way. He had a large stake in Manse, which company stood to gain from this misapplication of funds. A minute from JMB to HZ and Lister (pp 239-40 of the bundle) shows that on 21st October, 1983, they discussed the Greer debt and the Phillips Electrical debt in terms of payments being made from "the sale of Savannah". Whilst it may be true that this did not refer to the sale of land by Pedro to Savannah Acres it is clear evidence that the directors of Pedro were in communication with each other on the debt to Phillips Electrical. HZ had a duty to ensure that once he know of the misapplication of Pedro's money in November 1983 there were no further misapplications. I do not believe that his failure to so do was based on his trust for his co-directors.

All in all I am satisfied that these payments were as a result of the directors' attitude to Pedro's funds that they were readily available for other companies in which they had an interest. Only when HZ's own interests were in jeopardy, and much later, did he start to complain about failure to repay the

monies.

HZ is as responsible for this misapplication of $81,162.47 as his fellow directors.

(l) Transaction IX – Payment of $17,500 to HZ

There is no doubt that HZ received cheque number 3530 for $17,500 drawn on Pedro's bank account. HZ alleges that this was given to him by Lister in repayment of a loan to Lister personally and that he, HZ, did not know the cheque was drawn on Pedro's account.

I have already given reasons in my general findings why I conclude that HZ completed the cheque counterfoil and that he did so before Mrs. Alberga checked the stubs against the bank statement. In short I simply do not believe HZ's explanation in regard to this payment and I am satisfied he made out the cheque stub on the date it was completed. I am driven to the conclusion he knew where the money was coming from when he received it. It was a straightforward misappropriation of Pedro's money. HZ is liable to make good the money

(m) Transaction X – Alleged diversion of monies to Cayman Development Company

The amount claimed of $29,846.09 is made up of $6000 claimed in transaction III, a $15000 payment on 14th August 1981 and a $8846.09 payment made on 20th October, 1983. There is some question of whether this latter payment was made to Cayman Development Company or to Concorde Development Corporation, but for the purposes of my findings under this head I am content to accept Pedro's contention and the ledger entry in exhibit 2 that it was paid to Cayman Development Company.

It is clear from Pedro's ledger exhibit 2 that Cayman Development Company earned commissions on land sales and that the amounts claimed in these transaction are amounts set off

against those commissions. They were amounts earned by Cayman Development Company. Pedro now argues that because the two companies had common directors a conflict of interest situation arose which should cause the court to order the directors to return the commissions earned. There is some force in the argument that although the Articles of Association of Pedro in Articles 70,73 and 74 may have permitted the directors to market and sell Pedro's land through another company in which they had an interest they should have done so only on strict terms, clearly laid down and with notice to Pedro's shareholders. However there is no suggestion that the commission paid to Cayman Development Company amounted to other than the usual fees charged by estate agents. Furthermore I accept that HZ did not to any extent involve himself with the sales and marketing.

The company's Articles of Association did waive the usual requirements for the avoidance of conflict of interest in the directors. The circumstances of these transactions and the lack of proof that HZ was involved in any of them satisfy me that HZ was not in breach of his fiduciary duty in regard to the payments to Cayman Development Company. I do not consider HZ was negligent in failing to identify and secure a return of these commissions.

I dismiss the claim under transaction X.

<u>(n) Transaction XI - Payment of fees for Grand Cayman Golf Resorts.</u>

The defence maintains that the cheque 3531 for $812.50 to the Registrar of Companies for fees for Grand Cayman Golf Resorts, Spotts and Pedro was under Lister's signature and that HZ knew nothing of the payment. That may be so at the time it was completed but I am satisfied that HZ handled the cheque book immediately before and after the cheque was made out. His handwriting is on cheque stubs 3530 and 3534. Furthermore Grand Cayman Golf Resorts is a company in which HZ had an interest and now controls.

On balance I find that HZ knew of this improper payment of $270.80 and is in breach of his fiduciary duty in failing to secure its repayment.

(o) Transaction XII – Further alleged diversions to JMB

The amounts in this transaction comprise the sum of $24,801.45 paid to JMB from the sale of three lots of land and the sum of $60,000 diverted by JMB from Fincham's paid-in share capital.

I have dealt with the $24,801.45 in transaction III. I merely pause here to emphasize that there is no documentary evidence that these were amounts earned by JMB as commission. The totality of evidence leads me to conclude that these were improper diversions of Pedro's funds which HZ must have come to know about much earlier than when he started to complain about monies not being repaid to Pedro.

So far as the $60,000 diversion of Fincham's share capital is concerned HZ maintains that he neither authorised nor approved of that diversion. It is inconceivable, given HZ's involvement with Pedro, that he did not know from a very early stage that JMB owed this money to Pedro. I find that it was all part of the general atmosphere which HZ was all too ready to breathe, which led to JMB dealing with Pedro's money in a manner inconsistent with Pedro's interests. HZ's involvement in these misuse of funds and lack of interest in securing their repayment amounted to a breach of fiduciary duty from which Article 127 of the Articles of Association will not provide relief. Only when it became obvious to HZ that he stood to lose by the general misuse of Pedro's funds did he complain. He is liable along with his fellow directors to make good the losses to Pedro occasioned by this general misuse, including the $60,000 converted by JMB.

(p) Transaction XIII - Further alleged diversion of monies to Spotts

This amount comprises $10,349.34 which is reflected in the ledgers as being diverted from one of the lot sales and $270.85 being part of the cheque 3531 relating to fees paid to the Registrar of Companies.

I have already dealt with the $10,349.34 in my findings on transaction III. Suffice it to say here that I am satisfied that the amount was improperly diverted to Spotts and that the defence contention that it was paid to Cayman Development Corporation is unsupported. HZ was in breach of his fiduciary duties in permitting this payment to be made.

The findings I made in relation to Cayman Golf Resorts' portion of the cheque 3531 relate to the claim for $270.85 in respect of Spotts. HZ is liable for that payment.

(q) Credit of US$350,000

The agreement of 18th November, 1987, between JMB and Fincham was designed to clear JMB's indebtedness to Fincham in respect of Fincham's investment in Pedro. The amount of that indebtedness was fixed at $350,000. HZ is jointly and severally liable with his co-directors in respect of their breaches of fiduciary duty to Pedro and it is contended by HZ that he should be given the benefit of his co-director, JMB's, contribution to the settlement of the claims of Pedro's sole shareholder Fincham.

At first blush it appears unjust that HZ, the sole surviving director of Pedro, should be saddled with the claims by Pedro in respect of these joint breaches of fiduciary duty. That HZ is the sole director who is a defendant to this suit is an unfortunate result of the demise of Lister and JMB and the impecuniousness of their estates. Would it not be more equitable

for HZ to be given a credit for JMB's contribution of $350,000 which strictly ought to have gone to Pedro?

To endeavour to arrive at a more equitable result this Court would have to do violence to the principle underlined in Harre J's decision in Prospect Properties Ltd. v McNeill (supra) and further emphasized in this judgment, that a company is a distinct and separate entity to its shareholders with separate rights and liabilities. It should not be forgotten that HZ had every opportunity to seek sound legal advice when Irwin was pressing these claims on behalf of Pedro's sole shareholder. He now pays the price for his recalcitrance. He cannot seek to benefit out of a settlement which was not entered into by Pedro and which, to all intents and purposes, did not affect that company.

(r) The alternative claim against Spotts

Because I find against HZ on the main claim it does not fall to me to not make any award on the alternative claim.

(s) Interest

The last finding I have to make concerns interest. I do not think there is any dispute as to the law applicable to interest on the plaintiff's claim. The principle is succinctly stated in the judgment of Buckley L.J., in Wallersteiner v Moir (No.2) [1975] 1 All ER 849, 863 :

> "It is well established in equity that a trustee who in breach of trust misapplies trust funds will be liable not only to replace this misapplied principal fund but to do so with interest from the date of misapplication."

In this respect directors in breach of their fiduciary duties are likened to trustees (see In Re Alexandra Palance Co. (1882) 21 Ch. D. 149). The interest payable, in cases such as this, would normally be compound interest with yearly rests (see Wallerstenier v Moir (supra)). My jurisdiction

to follow these principles rests in sections 13 and 18 of the Grand Court Law.

Irwin produced, as exhibit 13, a useful document giving a fair assessment of what Pedro would claim as interest year by year. The plaintiff chose to claim simple interest and not compound interest. It was not challenged and I adopt the computations contained therein.

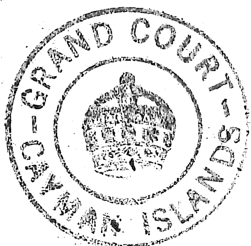
THE AWARD

I enter judgment for Pedro against HZ as follows :-

Transaction I	255,000.00
Transaction II	120,000.00
Transactions III & IV	299,270.99
Transaction V	236,947.70
Transaction VI	58,100.00
Transaction VII	81,162.47
Transaction IX	17,500.00
Transaction XI	270.80
Transaction XIII	270.85
Total US$	1,068,522.81

On this amount will be payable the interest claimed to date of payment in full in accordance with the computation in exhibit 13, ie. simple interest at seven per cent per annum from the date each sum in the award accrued.

Pedro will have its costs in the suit.



D. Schofield

Judge

25th February, 1990