

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. B024/83

BETWEEN R. ANTHONY BRIDGE PLAINTIFF
AND KENNETH AIKINSON DEFENDANT

S. Shelton of Myers, Fletcher & Gordon for Plaintiff
Mrs. Ursula Khan for Defendant

heard. February 20, May 2 and 9, 1986
March 12 and 13, June 8, 9 and 10 and
November 9, 1987, July 31, 1991.

CHESTER ORR, J.

I wish to offer my profound apologies for the undue delay in the delivery of this judgment. The delay was occasioned by the fact that one of the Note Books was mislaid during the relocation of my Chambers on more than one occasion. Happily the note book has now been found together with the major portion of this judgment in draft.

THE PLEADINGS

By a specially endorsed writ, the plaintiff claimed from the defendant the sum of \$9,100.00 being the balance on a loan which was made by the plaintiff to the defendant and which said loan was due for repayment in April 1982: particulars of which had already been supplied to the defendant.

In an amended Defence and Counter-Claim the defendant averred as follows.

- "1. The Defendant denies being indebted to the Plaintiff in the sum of \$9,100.00 or any other sum or part thereof.
2. The Defendant denies borrowing the sum of \$9,100.00 or any other sum from the Plaintiff.
3. The Defendant says that he purchased certain shares from Novelty Plastics Limited and Sales Promotion (Successors) Limited on credit as an employee of the said companies and authorised the Plaintiff as Managing Director of the said companies to apply certain of his Director's fees and dividends in satisfaction of the said credit from time to time.
4. That the Plaintiff as authorised allegedly applied funds for the said purpose utilizing \$3,000.00 every year for this purpose for the years 1977/78, 1978/79, 1979/80, 1980/81 and 1981/82 but the defendant has discovered that at all material times only 151 shares in each company at \$1.00 each were issued to him and that the total number of shares

intended to be purchased by him, to wit, 15,000 shares in each company or any other number save and except 151 were never issued in his name.

5. That in addition the Plaintiff still owes the Defendant from monies collected on his behalf over and above that "allegedly" paid as authorised for the years 1979/80, 1980/81 and 1981/82 but has so far refused to give an account to the Defendant despite his many and repeated requests.
6. The Defendant repeats paragraphs 1 - 5 hereof and COUNTERCLAIMS for an Account of all Director's fee and dividends collected by the Plaintiff for the Defendant for the years 1977 - 1982, and for payment of all monies due to him."

The Plaintiff replied as follows:

- "2. Paragraph 3 of the Defence and Counterclaim is denied and in reply thereto the Plaintiff says that he loaned the sum of \$15,100.00 to the Defendant to enable the Defendant to purchase certain shares in Novelty Plastics Limited and Sales Promotion (Successors) limited in which Companies the Defendant was employed plus a share of stock and equipment valued at \$100,000.00 which was purchased from Sales Promotion International Limited and to date the Defendant has only repaid the sum of \$6,000.00 and the Plaintiff repeats the Statement of Claim filed herein.
3. Paragraphs 4 and 5 of the Defence and Counterclaim are expressly denied and the Plaintiff says that the only money he collected from or on behalf of the Defendant was the sum of \$6,000.00 aforementioned.

DEFENCE TO COUNTERCLAIM

4. By way of Defence to the Counterclaim herein the Plaintiff repeats Paragraphs 1, 2 and 3 of the Reply and further says that the Defendant resigned as a Director in July 1979 and is therefore not entitled to an account of Directors' fees or any Directors' fees and the Plaintiff further denies that he collected any Directors' fees and/or Dividends on behalf of or for the Defendant and as such the Defendant is not entitled to the account claimed."

The Rejoinder was:

- "2. The Defendant denies that he purchased or agreed to purchase a share of stock and equipment valued at \$100,000.00 or any other sum as alleged or at all or that the plaintiff loaned to him any money to purchase a share of same and says that all stock and equipment purchased from Sales Promotion International Ltd. was sold and/or transferred to Novelty Plastic Ltd., a company of which the defendant was merely a shareholder and that the said company paid for same.
3. The Defendant states that even if any debt was incurred by him as to stock and equipment purchased from Sales Promotion International Ltd. in 1977 (which said debt is not admitted) such debt is now statute barred and the defendant will rely on Statutes of Limitation and the Limitations of Actions Act."

PLAINTIFF'S CASE

In March 1977, the plaintiff was the Managing Director and majority shareholder in Novelty Trading Company Ltd. (hereafter referred to as "Novelty Trading"). The defendant was then employed by the company as Sales Manager of the Merchandise Department.

The parties enjoyed a father/son relationship. The defendant addressed the plaintiff who was his sister's godfather as "Uncle Tony". The defendant's father was the godfather of the plaintiff's daughter. This cosy relationship floundered on the shoals of a dispute over the acquisition by the defendant of shares in two companies which is the subject of this action.

Novelty Trading purchased a large quantity of goods manufactured by Sales Promotion International Ltd. of which the majority shareholder was a Mr. Alexander. Mr. Alexander decided to emigrate and approached the defendant in connection with the sale of the company. The defendant in turn approached the plaintiff. There were discussions between the plaintiff, the defendant and the following employees of Novelty Trading: Keith Shervington, the Executive Director, Dennis Cardoza, the Marketing Manager and Alvin Evans, the Sales Manager for the Books and Magazines Section. Arising from these discussions a decision was taken to acquire the assets only, viz., stock, machinery and equipment of Sales Promotion International Ltd. Negotiations with Mr. Alexander resulted in an agreement for the purchase of these assets at a price of \$100,000.00.

The purchase was effected by the plaintiff who paid \$51,000.00 by a cheque drawn on the account of Novelty Trading Company and a Manager's cheque for \$49,000.00 obtained from his personal account. The assets then belonged to Novelty Trading Company and the plaintiff in the proportion 51% and 49% respectively.

The Plaintiff decided to offer his 49% to the above-named employees and Mr. Sang King Young, the Production Manager of Sales Promotion International Ltd. The offer was accepted. The employees themselves determined the allocation of 49% as follows:

4.

Defendant Atkinson	-	16.1%
Shervington	-	11.1
Cardoza	-	7.6
Evans	-	7.6
Young	-	<u>7.6</u>
		<u>49.0%</u>

It was agreed that the defendant should receive the largest percentage because he had brought the matter of the sale of the assets to the attention of the persons involved and his department would be selling goods produced by a new company to be formed. Mr. Shervington being the Executive Director should get a larger percentage than the remaining three.

Two new companies were formed:

1. Novelty Plastics Ltd. a manufacturing company (hereafter referred to as "Novelty Plastics") incorporated on 23rd March, 1977; and
2. Sales Promotion (Successors) Ltd., the Sales Division, incorporated on 26th May, 1977.

The shareholding in both companies was as follows:

Novelty Trading Company	-	51%
Defendant Atkinson	-	15.1
Shervington	-	11.1
Cardoza	-	7.6
Evans	-	7.6
Young	-	<u>7.6</u>
		<u>100.0%</u>

Each shareholder was a director in both companies.

The plaintiff made loans to the five employees to purchase shares in the companies. It was agreed that the loans would be repayable in five (5) years. The plaintiff retained the Share Certificates for the shares pending repayment. The parties then enjoyed a friendly relationship hence there was no documentation of the terms of the agreement.

The loans were as follows:

Atkinson - Defendant	--	\$15,100.00
Shervington	--	11,100.00
Cardoza	--	7,600.00
Evans	--	7,600.00
Young	--	<u>7,600.00</u>
		<u>\$49,000.00</u>

The plaintiff produced two Share Certificate -- Exhibits 12 and 13 in the name of the Defendant for 151 shares in each of the companies. He stated that he had retained these Certificates in keeping with the agreement as the defendant had not repaid the loan to him.

In 1978 Mr. Lester Shirley an Accountant in the firm of Pannel, Kerr and Foster carried out an audit of the accounts of the companies and made certain recommendations which were adopted. As a result the assets were revalued and a partnership formed which acquired the fixed assets, machinery and equipment valued at an arbitrary figure of \$41,000.00 and the non-fixed assets, stock in trade valued at \$59,000.00.

The partnership embraced the five employees who were shareholders in the company. The name of the partnership CASEY was derived from the initial letters of their surnames thus --

C ardoza
A tkinson
S hervington
E vans
Y oung.

The machinery and equipment were rented by the partnership to Novelty Plastics and later sold to the said company at a price of \$101,000.00. The profit of \$60,000.00, the difference between \$41,000.00 and \$101,000.00 was distributed among the members of the partnership free of tax except for 7½% stamp duty. This was a Capital gain, a perfectly legitimate device.

At the distribution each member of the partnership signed a receipt and payments on account of the amounts loaned were made to the plaintiff. The payment was noted on the back of the receipts and the balance indicated and initialled by the payee. The defendant received 15.1% of \$60,000.00 = \$9,060.00. He paid the plaintiff \$3,000.00 on account of his loan of \$15,100.00.

This is reflected on Exhibit 10.

On March 1, 1979, there was a distribution of Management Fees in respect of both companies, Novelty Plastics and Sales Promotion (Successors) Ltd. The defendant received payment as follows:

from Novelty Plastics	--	\$3,020.00
Sales Promotion (Successors) Ltd.	--	<u>2,945.00</u>
		<u>5,965.00</u>

Again he signed a receipt - Exhibit 11, for this amount from which he repaid the plaintiff \$3,000.00 on account of the loan \$15,100.00. The payment is indicated at the back of the receipt, Exhibit 10, and the balance of \$9,100.00 due and owing is initialled by the defendant.

By letter dated the 18th May, 1979, Exhibits 6 and 7, the defendant tendered his resignation as a director of both companies effective 27th July, 1979, and migrated to Canada.

On 16th November, 1979, the plaintiff wrote the defendant a letter, Exhibit 1.

"Dear Kenneth.

Re: NPL & SPL SHARES

Enclosed are four Transfer Forms in connection with the above.

Please sign the ones for 91 Shares in each Company relating to the unpaid shares which have been transferred back to me.

The two forms for 60 shares in each Company relates to the paid up shares which are presently registered in your name. Paul Barber is agreeable to purchasing these from you for the J\$6000 that you paid for them.

If you wish to accept his offer - please also sign these transfer forms AND advise to whom the money is to be paid.

NPL has been faced with extremely heavy expenditures to purchase raw materials which were out of stock and/or in short supply, have had to replace two burnt out Air Conditioning units, purchase a replacement for the van that was stolen and given an overall increase in salaries.

In the circumstances, it is not possible to declare any dividends."

The defendant replied by letter dated 14th December, 1979 - Exhibit 2 as follows:

"Dear Mr. Bridge,

With regard to your letter dated November 16th, 1979, I must point out that its not unusual for air condition units to burn out as this has always occurred in the office area from 1977, reason being Lithographic Printers Ltd. exhaust fans are located beneath the backs of our small units thus they overheat constantly.

In the factory area the units always wear out very quickly because of the severe heat from the heat sealing machines, which by name alone suggests what happens to cooler units (they have to work so much harder.)

As a director of both Novelty Plastics Ltd. and Sales Promotion (Succs.) Ltd., I would at this point again respectively request for the third time that the financial statements for both Companies for the year 1978 be delivered to my mother, Mrs. Lilla Atkinson.

I am not interested in selling my already paid shares in any of the companies.

I have paid for shares in 1977 and 1978 for both Companies and three more years are available to me to pay the balance of shares making a total of 15.1% in both Companies.

Enclosed please find the four transfer forms I am returning."

The plaintiff replied to this letter by Exhibit 3.

"Dear Kenneth:

Re. NPL & SPL SHARES

The Transfer Forms in connection with the above Companies were sent because you had indicated in your May 18, 1979 letters of resignation as a Director of both Companies that you wished to dispose of ALL shares.

Insofar as the unpaid balance of J\$9,100.00 on your allowance is concerned, when the repayment time span of five years was offered implicit therein was the understanding that the persons enjoying such benefit would be staying with and actively contributing to the growth and progress of the Companies.

You having elected to leave - this changes the basis of those conditions and you cannot therefore reasonably expect this concession to still obtain.

At the last meeting held, it was agreed that the unpaid portions of the original allotments would revert to me. Both Dennis and Alvin have fulfilled this agreement.

In the event that you have changed your mind about doing so - then you must make immediate arrangements to reimburse me for the outstanding balance of J\$9,100.00 which I advanced on your behalf."

and the defendant replied by letter - Exhibit 4.

"Dear Mr. Bridge,

I am in receipt of your letter dated January 16th, 1980. I must point out that after I wrote you the letter dated May 18/79, you asked me, in conversation, if I seriously thought that you would buy additional shares, in an economy such as Jamaica. You went on to ask me drawing Mr. Keith Shervington's attention to the matter, if I would like to purchase yours.

Mr. Bridge, I must admit that I am confused, for now I am being asked if I am interested in selling my paid-for shares in both Companies. With regard to the unpaid balance for my allotment of shares. I would like to see a copy of the Articles of Association and Memorandum of Novelty Plastics and Sales Promotion (Succs.) Ltd., as my right as a Shareholder in these Companies.

If and when the above are forwarded to my mother, along with the 1978 (final accounts) balance sheet for both Companies, (which now makes this the fifth request for them) plus the other requests in my letter dated Dec. 17th, 1979, then I will certainly entertain the possibility of the last paragraph in your letter.

I am confident that 1979 proved to be as good a year as 1978, so I hope that when dividends are paid, I shall be able to finalize the outstanding balance of my share allotment. Therefore, I now request that as soon as you obtain the 1979 Balance Sheet for both Companies, you forward a copy to my mother. I enclose herewith the four unsigned transfer forms."

On 1st September, 1982, the plaintiff wrote the defendant - Exhibit 5.

"Dear Kenneth.

Re: YOUR SHARES IN NPL & SPL

The five year grace period for the full and complete repayment of the amount of J\$15,100.00 advanced by me to purchase your 15.1% shareholding in both Companies expired in April 1982.

As you are aware there is an outstanding balance of J\$9,100.00 in connection with this transaction and I must now request that you either:

- 1) send me this amount of J\$9,100.00 not later than September 30, 1982

OR

- 2) sign the enclosed transfer forms and return them to me not later than September 30, 1982."

The defendant has not replied to this letter.

Keith Shervington and Alvin Evans gave evidence in support of the plaintiff's case. They stated that they had repaid the loans made to them by the plaintiff and identified their receipts for capital gain and management fees on which there are notations of repayments - Exhibits 21 to 24.

Mr. Shervington testified that the partnership decided that the plaintiff should partake in the capital gain distribution and received \$30,000.00 therefrom.

All the shareholders resigned as directors in 1979 and all emigrated except Mr. Shervington. Cardoza, Evans and Sam King Young repaid a portion transferred of their loans and/the unpaid portion of their shares to the plaintiff.

The defendant is the sole defaulter who has not repaid the loan or transferred

the unpaid shares to the plaintiff. The companies had never declared any dividends from 1980 and had operated at a loss from 1980 to 1982.

The defendant subsequently purchased the share in Novelty Trading Company and is in possession of all the books of that company. No Director's fees were due to him.

Mr. Shirley, the Accountant was cross examined at length but he was unable to establish the contention of the defence that Novelty Plastics purchased the stock and equipment from Sales Promotion International Ltd.

THE DEFENCE

The defendant was the sole witness for the defence. He agreed that he was instrumental in effecting the sale of the assets of Sales Promotion International Ltd. These assets were purchased by the plaintiff with two cheques both drawn on the account of Novelty Trading Company Ltd. for \$51,000.00 and \$49,000.00 respectively. The plaintiff obtained a Manager's Cheque in exchange for the one for \$49,000.00. He was unable to give any explanation for this unusual procedure.

He stated that Novelty Trading Company was buying the Assets of Sales Promotion International Ltd.

He was allotted 151 shares in Novelty Plastics for which he paid \$151.00. More shares were to have been issued for which he would have had to pay \$15,100.00. He had originally requested \$25,000.00 worth of shares but when Sales Promotion (Successors) Ltd. was formed he got a total of \$15,100.00 in both companies for which he should pay over a period of five years. This amount was to be paid from his salary, commission and Director's fees. He received no commission nor Director's Fees in 1977.

The partnership CASEY never existed nor was he a member of this partnership. Casey was a device invented by Mr. Shirley to save taxes and to pay monies owed to individuals tax free.

Exhibit 10 which he signed as a receipt for distribution of Capital gain was in fact for monies which the plaintiff said was on account of salary, commission and Director's fees. The amount of \$3,000.00 which the plaintiff retained was for the plaintiff to purchase additional shares on his defendant's behalf in the companies. This was by agreement.

As regards Exhibit 11, he had received the amount of \$2,900.00 odd. The plaintiff had retained \$3,000.00 to purchase shares in the companies on his behalf. Although the plaintiff indicated that the payment was for Management fees, in reality it was on account of salaries, commission and Director's Fees.

The plaintiff and himself had agreed that the plaintiff would retain Director's Fees and dividends from the company due to him, the defendant, and apply them from time to time for the purchase of additional shares in the two companies.

He had left his Share Certificates with the plaintiff for safe keeping.

Under cross-examination he admitted that there was nothing in the documents he had to show that Novelty Trading Company acquired the machinery and equipment from Novelty Plastics. He claimed Director's fees because his name was on the company's books up to 1983 and his resignation had not been accepted.

The payments to Shervington and Evans on receipts 21 to 24 were for Director's fees and salaries. He did not know why they received payment for salaries, although they were not on the payroll. He could not say if it was coincidental that the payments were in certain percentages of \$60,000.00. It was coincidental that Mr. Shirley chose the names for the partnership CASEY.

FINDINGS

I accept the evidence of Mr. Bridge, the plaintiff and his witnesses as to the arrangements for the purchase of the assets of Sales Promotion International Ltd. and the subsequent sale thereof to Novelty Plastics Ltd.

I find that the plaintiff loaned the defendant the sum of \$15,100.00 and that by agreement repayment was due in 1982.

I am unable to appreciate the submission of Mrs. Khan that this debt is statute-barred. The letters from the plaintiff to the defendant - Exhibit 3 and 5 indicate that the date for repayment was April 1982 extended to September 30, 1982 and the defendant himself admits in his letter dated

14th December, 1979 - Exhibit 2, that he had three more years to pay for the balance of shares - this balance the plaintiff contends is the balance on the loan.

I find that the partnership CASEY existed, that a capital gain of \$60,000.00 was paid to the partners including the defendant who received the sum of \$9,000.00 from which he paid the plaintiff \$3,000.00 on account of the loan of \$15,100.00.

I find that the defendant paid the plaintiff a further sum of \$3,000.00 on 2nd March, 1979 on account of the said loan and that there is due and owing a balance of \$9,100.00 to the plaintiff.

I do not accept the defendant as a witness of truth. He prevaricated and made futile and clumsy attempts to explain away cogent evidence given against him.

I find that the defendant resigned as a director in Novelty Plastics Ltd. and Sales Promotion (Successors) Ltd. with effect from the 27th July, 1979 and that the resignation was accepted by the companies and that no Director's fees are due and owing to him.

That no dividends or other monies were collected by the plaintiff on behalf of the defendant for the years 1979/80, 1980/81 and 1981/82 and that no monies are due to the defendant from the plaintiff.

That the defendant is not entitled to an account of Director's Fees.

There will therefore be judgment for the plaintiff on the Claim for \$9,100.00 and on the Counter-Claim with Costs to be agreed or taxed.