JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 22/88

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	THE COMMISSIONER OF INCOME TAX	APPELLANT
A N D	SOLNAR LIMITED	RESPONDENTS

Herbert Hamilton and William Alder for Appellant

Mrs. Angela Hudson-Phillips, Q.C. for Respondent

July 25, 26, 27, 28, and November 16, 1989
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PRESIDENT (AG.):

At the conclusion of the submissions made to us last term, we dismissed the appeal and intimated that we would hand down the reasons therefor at a later date. We now do so.

This was an appeal against a judgment and order of Marsh J. made in the Revenue Court on 5th February 1988 whereby he discharged decisions of the appellant regarding chargeable income of the respondents for years of assessment 1980 and 1981. The Notices of Decision stated (so far as is material) as follows:

" **INCOME TAX OBJECTION**
SOLNAR LIMITED
YEAR OF ASSESSMENT 1980

Pursuant to the provisions of Section 75(6) of the Income Tax Act of 1976 (Section 50(6) of the Income Tax Law 59 of 1954), I hereby give you notice of my decision in respect of the above objection as under:

'that the assessment 38950/A86/80 made on you for year of assessment 1980 is hereby confirmed at a chargeable income of $1,247,904 and tax as set out hereunder:

Chargeable Income		$1,247,904
Company Profits Tax @ 35%	436,766.40	
Additional Company Profits Tax @ 10%	124,790.40	
	561,556.80	
Penalty	561,556.80	
Total Tax Payable	$1,123,113.60' "	

" **INCOME TAX OBJECTION**
SOLNAR LIMITED
YEAR OF ASSESSMENT 1981

Pursuant to the provisions of Section 75(6) of the Income Tax Act of 1976 (Section 50(6) of the Income Tax Law 59 of 1954), I hereby give you notice of my decision in respect of the above objection as under:

'that the assessment 38950/AC7/81 made on you for year of assessment 1981 is hereby confirmed at a chargeable income of $257,719 and tax as set out hereunder:

Chargeable Income		$257,719
Company Profit Tax @ 35%	90,201.65	
Additional Company Profits Tax @ 10%	25,771.90	
Net Tax Payable	$115,973.55	
Penalty	115,973.55	
Total Tax Payable	$231,947.10' "	

On the appeal, three questions were debated. Firstly, was the correct "person" assessed for income tax, secondly, assuming the proper person was assessed, were the profits earned, capital or income; and thirdly, were the penalties imposed by the appellant in accordance with the provisions of the Income Tax Act?

Before examining these questions, the facts which gave rise to this appeal should first be stated. Some time in 1979, Mr. Ivor Alexander the managing partner in the legal firm of Myers, Fletcher & Gordon, Manton & Hart, was approached by a Mr. Doyle who wished to acquire the loan portfolio of Laurentide Finance Co. Ltd. Mr. Doyle was not himself able to finance the venture. Accordingly he conceived a joint venture involving himself and some of the partners in the firm. To that end, it was agreed that an Industrial and Provident Society Company would be formed, fifty percent of the shares being issued to Mr. Doyle and the other fifty percent to the partners. For reasons which are not relevant to this appeal, it was not possible to incorporate the company in the time available. Accordingly, an existing company, the present respondents, signed the agreement with Laurentide as purchaser, the agreement providing that Solnar "or its nominee" was "the purchaser". The purchase price of $425,000.00 under the agreement was duly paid upon execution.

The purchase price for the loan portfolio was provided from a loan from Securities Ltd. a money lending company wholly named beneficiary by partners of Myers, Fletcher & Gordon, Manton & Hart. Consumer Finance Ltd. ultimately repaid those partners. Laurentide had been advised that the nominee referred to, in the agreement, was Consumer Finance Ltd. the Industrial and Provident Company Society ultimately incorporated. The respondents subsequently assigned all their

interests under the agreement with Laurentide to Consumer Finance Ltd. That document should be set out:

> "15th January, 1980
>
> Dear Sirs:
>
> This confirms our agreement to nominate your Company as Purchaser in pursuance of the terms of Agreement for Sale dated 21st December, 1979 made between us and Laurentide Finance Company Limited. We further confirm that your Company will assume all obligations of the purchaser under the Agreement of 21st December, 1979, will reimburse to us any moneys already expended thereunder and will be entitled to all benefits under the said contract and that consequently, Consumer Finance Limited indemnifies and saves harmless Solnar Limited against all actions claims and demands by Laurentide Finance Company Limited under the said Agreement. Please sign and return the enclosed copy of this letter by way of acknowledgement of these terms.
>
> Yours faithfully
> SOLNAR LIMITED
>
> By: /sgd./
> Secretary
>
> CONFIRMED AND AGREED.
> CONSUMER FINANCE LIMITED
>
> By: /sgd./ Ivor Alexander
> Committee Member"

Thereafter Consumer Finance Ltd. managed the portfolio. They collected the outstanding loans and realized a profit which it distributed as capital dividends. The appellant then raised assessments in respect of the years 1980 and 1981. The respondents objected but the appellant duly issued notices of decision which have earlier been set out. It was from these decisions that an appeal was made to the Revenue Court.

In the interest of completion, it is as well to list the members of the companies as it will be relevant to the question of "connected companies" for the purposes of section 2(2) [illegible]

section 2(2) of the Income Tax Act. Consumer Finance Ltd. had the following members who held shares as under:

Paul Doyle	400
Ian Phillipson	67
Richard Evans	66
Gary Muir	66
Ivor Alexander	67
Patrick Rousseau	67
Noel Levy	67

As to Solnar Ltd., the members were as follows:

Louis Farren Soutar	$5,000
John Franklin Muirhead	$5,000

I can now turn to consider the questions raised. With respect to the first question Mr. Hamilton put his argument in this way. He said: "qui facit per alium, facit per se" Consumer Finance were the agents of Solnar. Income was earned Solnar, as principals are the proper persons to be assessed for tax. Solnar is liable. It is all very elementary.

The factual situation was as follows however. When Solnar Ltd. executed the agreement with Laurentide, Consumer Finance had not yet come into existence. Plainly therefore no question of principal and agent could arise to make Consumer Finance Ltd. the agent of Solnar Ltd. But an agency did arise but between Solnar Ltd. acting as agents for Doyle and certain partners of Myers, Fletcher and Gordon, Manton and Hart, who were persons in being, as principals. When therefore that joint-venture was incorporated as Consumer Finance Ltd. Solnar Ltd. as agents, were bound to transfer the assets to their principals. The letter of the 15th January 1980 whether categorized as an assignment, effectively resulted in the principals being put in possession of the assets, as a result of the oral agreement between Solnar and the joint-venture with the knowledge of Laurentide. The reverse is therefore true;

Solnar were the agents and not Consumer Finance Ltd. Liability for tax would plainly attach, not to the agents, Solnar Ltd., but to the principals Consumer Finance Ltd.

In my view, that is sufficient to dispose of this appeal. However, out of deference to some other arguments raised at the hearing, I propose to deal with another point of Mr. Hamilton. He said that Solnar Ltd. and Consumer Ltd. were "connected persons" within section 2(2)(j)(iv) of the Income Tax Act. That provision is in the following terms:

> "
>
> .....
>
> 2(2) For the purposes of this Act the following persons shall be treated as being connected with a given person ("A") and he with them, and shall be so treated notwithstanding that at the relevant time any of the persons in question (not being individuals) had not yet come into existence or had ceased to exist -
>
> (a)-(i) .....
>
> (j) where A is a body corporate (and without prejudice to the application of any of the preceding paragraphs where A is a body corporate) -
>
> (i)-(iii) .....
>
> (iv) bodies corporate under the control of a group of two or more persons which has the same membership as a group having control of A or could be so regarded by treating a member of either group as replaced by a person with whom he is connected."

The facts before Marsh J. show that Solnar Ltd. and Consumer Finance Ltd. do not have the same members. The membership of the respective companies have previously been set out. All of the members of Solnar Ltd. are partners in the legal firm of Myers, Fletcher and Gordon, Manton and Hart. But the same does

not hold true of Consumer Ltd. Mr. Doyle, who is not a partner in the firm, holds fifty percent of the shares in the latter company, and Mr. Muir is not numbered among the partners. Different partners are involved in Consumer Finance.

The term "control" is however defined by the Act. It is stated as follows:

> " 'Control', in relation to a body corporate, means the power of a person to secure by means of the holding or the possession of voting power in or in relation to that or any other body corporate, or by virtue of any powers conferred by the articles of association or other document regulating that or any other body corporate, that the affairs of the first-mentioned body corporate are conducted in accordance with the wishes of that person, ..."

Control is therefore related to voting power or the holding of some person. The evidence showed that Ivor Alexander was the managing partner in the legal firm and managed the various investment interests of the firm. He was however the chairman of both companies. But although it could be inferred that he could have some control over Solnar Ltd., the members thereof being, like himself, partners in the firm, that did not hold true of Consumer Finance Ltd. Apart from Doyle, as I have already indicated, and Muir, the other members of the company admittedly partners in the firm, could not impose their will so as to control Solnar Ltd. Alexander could not by his voting power or his casting vote carry out his wishes in regard to Consumer Finance Ltd. None of the other sub-sections are in my view apt, nor were they invoked to persuade us to acquiesce in the view that the companies were "connected persons" within the Act. The conclusion is therefore inevitable that these two companies were not connected persons.

The appellant was obliged to show that Solnar earned income in respect of which tax was payable. As a matter of fact, that was not the case. Solnar had divested themselves of all their interest under the agreement. They had done no work either by themselves or any agent. They had received no profit. Solnar and Consumer Finance Ltd. were not "connected companies" within the meaning of the Act. After the most anxious consideration of the submissions put forwarded by Mr. Hamilton in this connection, I remain unconvinced of their merit. The answer to the first question is that the Commissioner's decision that Solnar Ltd. was liable to tax was wrong.

There were also arguments as to whether Solnar Ltd. was a trustee in a resulting trust which had become spent upon the transfer of assets, but it is not necessary to come to any concluded view in this regard. I have myself the greatest doubt whether on the facts of the case any resulting trust was created, especially because there was absolutely no evidence that Doyle advanced any part of the purchase money for the transfer of the Laurentide portfolio. See Eyre C.B. in Dyer v. Dyer (1775-1802) All E.R. (Rep.) 205 at p. 206 where he said this:

> "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or lease-hold, whether taken in the names of the purchasers and others jointly, or inmthe name of others without that of the purchaser, whether in one name or several, and whether jointly or successively, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor."

The next question which arose was whether, assuming Solnar Ltd. were correctly assessed for income tax, the profit derived was capital or income. This question was one of fact for the learned judge and he declined to deal with it on the ground that there was not sufficient evidence to come to a decision. With respect I disagree. There was firstly evidence that Solnar Ltd. did trade in the relevant years, although in 1980 they incurred trading losses and while a profit was made in 1981, it was wiped out by accumulated trading losses. It was plainly part of Solnar Ltd.'s business to trade in transaction such as the purchase of a loan portfolio and the collection of the outstanding loans and interest thereon. Such income would plainly be derived from the carrying on of a trade or business. That would qualify as income not a capital gain.

I come finally to the third question with respect to the validity of the penalties imposed by the appellant. The appellant purporting to act under section 72(6) of the Income Tax Act imposed surcharge of 100% of the tax assessed in respect of the years of assessment 1980 and 1981, as under:

1980	
Additional Tax payable	561 556.80
Surcharge	561,556.80
	$1,123,113.60

1981	
Tax payable	115,973.55
Surcharge	115,373.55
	$231,947.10

In so far as the penalty imposed in respect of year of assessment 1980 is concerned, Mrs. Hudson-Phillips pointed out that the appellant acted ultra vires section 72(6) which provides as follows:

"(5)(a) If the Commissioner -

.....

(ii) discovers that a [illegible] charge to tax in respect of a sum in excess of such amount ought to be made, and an assessment is made, at any time within the year of assessment or within three years after the expiration thereof,

he may, unless the person to be charged proves to his satisfaction that the omission by him did not proceed from any fraud, covin, art or contrivance or any gross or wilful neglect, charge that person, in respect of such excess, in a sum not exceeding treble the amount of the tax on the amount of the excess.

(b) If the person to be charged has neglected or refused to deliver a return, the Commissioner may charge him in a sum not exceeding treble the amount of the tax with which, in his judgment he ought to be charged, and such sum shall be added to the assessment."

Under this provision, the Commissioner may impose a charge under certain conditions, one of which is that he must make his discovery of the excess to tax either within the year of assessment or within three years of the expiry of the year. Plainly that condition was not satisfied. That position is unarguable. The Notice of Assessment on its face shows that the Commissioner purported to act under that provision. Mr. Hamilton did not suggest that was not the position. But such arguments as he raised, could not detract from that position.

It was also submitted on behalf of the respondents, that with respect to year of assessment 1981, the Commissioner also acted ultra vires in that he imposed a penalty without affording the tax-payer an opportunity to disprove fraud.

Section 72(6)(a) confers upon the Commissioner a power to impose a fine to a maximum of treble tax on the amount of the excess in the circumstances prescribed by sub-section 6(a)(ii). The tax-payer has an onus to show that his omission to provide the return did not proceed from "fraud, covin, art or contrivance or any gross of wilful neglect." In my view, clearly implicit in this provision, is the need for an enquiry on the part of the Commissioner. There is an obligation which he must undertake if he is to put himself in any position to adjudicate on an appropriate fine, seeing that he has a discretion as to what point in the range he will fix his penalty; the penalty is not mandatory. Before he imposes an appropriate penalty he should allow the tax-payer an opportunity to disabuse his mind of any suggestion of fraud and the like. It is to my mind no answer to say as Mr. Hamilton did, that the tax-payer has a right to object. The tax-payer has a free choice whether to object to being assessed or not. But he might well take the view that the assessment was valid. The imposition of a fine without being heard, cannot be viewed in the same light. In my judgment it would be a manifest injustice not to allow the tax-payer to be heard. The rules of natural justice are not to be ignored in the collection of the revenue. On the clear construction of section 72(6)(a), the Commissioner is obliged to hear the tax-payer before he imposes any penalty allowed by the provision. The appellant I am satisfied, acted improperly and the penalties imposed must therefore be set aside.

For these reasons I agreed with my Lords, that Marsh J. came to the right decision and that the appeal should be dismissed with costs.

DOWNER, J.A.:

Is Solnar Limited liable for Income Tax and penalties for the years 1980 and 1981? The Commissioner of Income Tax, the appellant in these proceedings, demanded tax and penalties from Solnar Limited of $1,123,113.60 for 1980 and $231,947.00 for 1981. Marsh, J., in the Revenue Court discharged these assessments and penalties and as the Commissioner was aggrieved by that order, she has appealed to this Court. To resolve the issue, I must relate the facts so as to determine the points of law involved.

THE FACTS

During December 1979 Laurentide Finance Company Limited (Laurentide) decided to sell off its portfolio and Mr. Paul Doyle made an acceptable offer of $425,000.00. Laurentide's line of business was to provide loans for the purchase of motor vehicles and items of household furniture. The book value of the portfolio was $1,930,480.00 and it was secured by Bills of Sale and mortgages. Profits, therefore, would be handsome if the deal could be financed. Mr. Doyle had friends at Myers, Fletcher and Gordon, Manton and Hart - the partnership, and as he was not in funds, he put a proposal to some of the partners in that firm. A company, Consumer Finance Limited was to be formed pursuant to the Industrial and Provident Society Act presumably for the tax advantages attainable under that Statute. See Section 46 of the Income Tax Act. The registration of the company would take some time, and Mr. Beares who was Laurentide's man of business wished to complete the deal as he was leaving Jamaica before the end of 1979 for Canada. So a convenient

arrangement was implemented. This arrangement involved Solnar Limited and its involvement through the eyes of the Revenue is at the heart of this dispute. An examination of the Record and Supplementary Record suggests the Revenue would have been in a better state had the Commissioner of Income Tax concentrated on what Consumer Finance Limited was doing. Solnar Limited, the respondent in this appeal, is a company registered under the Companies Act. Its members were Messrs. Muirhead and Soutar of the partnership and each one holds shares to the value of $5,000.00. As Solnar Limited was in existence, it was that company which was deputed to sign the agreement on behalf of the consortium of Doyle et al for the purchase of Laurentide's receivables. The evidence makes it clear and the learned judge so found that Solnar Limited played no further part in the transaction. It is, however, necessary to relate what were the further actions taken so that Solnar Limited's minimal role is highlighted.

Firstly, the financial provisions which are at the heart of these matters, both for the participants and the eagle eyes of the Revenue. Mr. Doyle was to have 50% of the shares in the company to be formed and five members of the partnership and one Muir were to have the other 50%. The other financial aspect was the provision of $425,000.00 for the purchase of the loans portfolio. This sum was paid by Myers, Fletcher and Gordon, Manton and Hart who loaned the consortium of Mr. Doyle and his co-partners. The $425,000.00 was provided by Securities Limited, another of the corporate entities formed to carry out business ventures for the partnership and the consortium in turn secured a loan of $300,000.00 from Jamaica Citizen's Bank which they used to repay the partnership who in turn, presumably, repaid Securities Limited. It should be noted that the total amount of

$440,649.31 which included interest was repaid by Consumer Finance Limited to the partnership on March 12, 1980. Be it also noted that Marsh, J., accepted Doyle and Alexander as witnesses of truth and no doubt they were. It would have been helpful, however, since the corporate entities, Consumer Finance Limited and Securities Limited, had had some members of the partnership as members of the respective companies if the cheques and receipts used in these transactions had been exhibited. However, it was by these means that payment to Laurentide was completed on 21st December, 1979. So stated Mr. Alexander, and Marsh, J., accepted it. The loan from Jamaica Citizen's Bank Limited was sought on 8th January, 1980 and Consumer Finance Limited was incorporated on the same day. The unchallenged evidence of Ivor Alexander who is a partner of Myers, Fletcher and Gordon, Manton and Hart, a Director of Solnar Limited and on the management committee of Consumer Finance Limited, is that from the outset it was intended to use Solnar Limited merely as the means to make the payment to Laurentide and that thereafter Solnar Limited did nothing as regards either the payment to Laurentide or the management of the portfolio.

It is instructive to note that agreement for sale between Laurentide and Solnar Limited specifically makes provision for a nominee of Solnar Limited to be the real purchaser and that as early as January 8, Laurentide was informed that Consumer Finance Limited was the nominee mentioned in their agreement. Henceforth, Solnar Limited drops out of the arrangement and it is Consumer Finance Limited which plays the central and only role.

From an accounting point of view, Consumer Finance Limited kept the books, paid off the loan borrowed from the partnership to meet the purchase price and made full

disclosure of their accounts to the Revenue. An important item in their accounts is their Capital Reserve and it seems that it is this healthy figure of $1,253,725.00 that has attracted the revenue. Be it noted, however, this figure has never appeared in Solnar Limited accounts. The Revenue regarded Solnar Limited as the true owner of this reserve and avers that it has been controlled by Solnar. So in their eyes there is both liability for tax and penalties in respect of Solnar Limited, since Solnar Limited failed to disclose these reserves when they made up their returns. Moreover, the Revenue regards the money as income to Solnar Limited and not capital. As for the distribution of this sum, just over 50% went to Mr. Doyle and the rest to some members of Consumer Finance Limited and others who the evidence indicates were of the partnership. Significantly, no payment was made to Muir. These payments were made as a capital distribution. A tax advantage was that this capital distribution attracted a transfer tax of 7½% rather than the thirty-three and one-third ($33^{1}/3$) per cent which dividends would attract. These discrepancies although unconcealed did not attract the attention of the Revenue. The evidence suggests (see supplementary record) that this transfer tax was paid and the inference must be that those who received the capital distribution paid their income taxes also. Why then is it sought to tax Solnar Limited on this transaction when the consortium specifically formed to carry out was Consumer Finance Limited. Yet another factor is worth mentioning. Consumer Finance Limited intended, from the outset, to wind up and did wind up the business of providing finance for the purchase of consumer durables.

A comment ought to be made on the evidence presented by the Revenue. It was superficial despite the fact that

investigations were made. There does not seem to have been any resort to the statutory powers of the Commissioner to require cheques used in payments, books of account of Solnar Limited, Securities Limited, Minute Books or receipts of the three companies concerned and what was the precise role of Muir. In a case of this nature it is on the basis of detailed investigation and presentation of evidence that successful assessment and recovery proceedings must be based. It is true that there was affidavit evidence of Income Tax Officer, Woodrow Moore, who examined Solnar's file, but although he was tendered for cross-examination Solnar Limited did not trouble him. Further, since the Revenue alleged that Solnar Limited was a "connected person" in relation to Consumer Finance Limited one would have expected evidence as regards how one controlled the other since in law the connection was not established. Also the supplementary record prepared by Instructing Attorneys for Solnar Limited contained most useful information, but the Revenue does not seem to have made any use of it at the Revenue Court or before. For instance, we know from this record that Gary Muir is an Accountant and is on the Committee of Members of Consumer Finance Limited and that he even made returns to the Commissioner of Income Tax. Why was he not questioned as to why there were seven shareholders, yet even in 1980 seventeen received capital distributions? Are shares transferred to them, if so, on what bas and for what consideration? Did they receive share certificates? Moreover, Mr. Alexander gave this evidence in court yet there was no cross-examination on it. (see page 103 of record) Consumer Finance Limited was candid and the Revenue chose not to speak to them. Solnar Limited had no custody of any records pertaining to this transaction yet the Revenue

concentrated on them. It was the Revenue who exhibited the Auditor's Report (page 68 of the record) to the members of Consumer Finance Limited, yet they made no attempt to peer behind that report. Those concerned in the administration of companies should note the effect of Bank voor Handel en Scheepvaart N.V. v. Slatford (1953) 1 Q.B. 248; and Section 25 of the Larceny Act.

THE LAW APPLICABLE - IS (a) SOLNAR A TRUSTEE?

Mrs. Hudson-Phillips has contended on behalf of Solnar Limited that from the very inception of this transaction the sale agreement between Solnar Limited as purchaser and Laurentide as vendor expressly mentioned that a nominee instead of Solnar Limited may have been the real purchaser. Moreover, the nominee was Consumer Finance Limited as indicated in the letter of 8th January from Solnar Limited to Laurentide. It is of sufficient importance to quote it in full:

> "Laurentide Finance Co. Ltd.,
> Park Plaza,
> Kingston 9.
>
> Dear Sirs,
>
> Re: Agreement for purchase of Assets from you
>
> Please be advised that the nominee referred to in the said Agreement is Consumer Finance Limited, an Industrial and Provident Society of 21 East Street, Kingston.
>
> Yours faithfully
> SOLNAR LTD
>
> .....
> I.N.L. ALEXANDER
>
> INLA/Ljb."

Additionally, the evidence of Ivor Alexander was that this

arrangement was contemplated and was resorted to as the Executive Officer of Laurentide insisted on the deal being contemplated promptly as he was to return to Canada by December 21, 1979.

It is against this background that it is pertinent to say whether this factual situation raises a presumption of a resulting trust. A convenient starting point for this doctrine is the statement of Eyre, C.B., in Dyer v. Dyer [1775-1802] All E.R. Rep. 205 at 206. It reads thus:

> "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser, whether in one name or several, and whether jointly or successively, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a court of equity that this resulting trust may be rebutted by circumstances in evidence."

The presumption of a resulting trust is also applicable to personalty and is illustrated in the case of In re A policy No. 6402 of the Scottish Equitable Life Assurance Society (1902) Ch. 282. The following passage at 285 from the judgment of Joyce, J., makes the point clear:

> "I think the law is correctly laid down in Lewin on Trusts, 10th ed. p. 1 ..., where it is stated: 'Not only real es ..e, but personalty also, is governed ... these principles, as if a man take a ... d, or purchase an annuity, stock, or other chattel interest, in the name of a stranger, the equitable ownership results to the person from whom the consideration moved.'
>
> The authority cited with reference to a bond is the case of Ebrand v. Dancer (1680) 2 Ch. Cas. 26, where a grandfather had taken a bond in the name of his grandchildren, their father being dead. The Lord Chancellor said:

> " 'There is difference in the case, where the father is dead and where he is alive; for when the father is dead, the grandchildren are in the immediate care of the grandfather; and if he take bonds in their names, or make leases to them, it shall not be judged trusts, but provision for the grandchild, unless it be otherwise declared at the same time.' In other words, that means that, if the grandfather in that case had not been in loco parentis to the grandchildren in whose name the bond had been taken out, then they would have been trustees for the grandfather, who took the bond."

On these principles can it be said that Consumer Finance Limited held the beneficial interest and that the respondent was merely a trustee? If the respondent was a trustee, the inference was that once the notification was sent to Laurentide that Consumer Finance Limited was the nominee then the trust was at an end. The fact that it was Consumer Finance Limited who collected the receivables and kept the accounts are further factors to be taken into account in deciding that the trust was terminated if there was indeed a resulting trust.

Who advanced the purchase money? That was the critical fact to be decided. The consortium of Doyle and Muir, together with the partners Alexander, Rousseau, Phillipson, Levy and Evans, sought a loan from the partnership for $425,000.00. The partnership in turn secured this sum from Securities Limited and paid it directly to Laurentide Limited. Who repaid the loan? Consumer Finance Limited whose shareholders were the consortium. They repaid it from a loan of $300,000.00 secured from Jamaica Citizen's Bank Limited. This loan was sought on 8th January, 1980 when Consumer Finance Limited was incorporated and approved on 28th January, 1980. For completeness, it is to be noted that disbursement was made on March 10, 1980. These transactions are to be inferred from the evidence and exhibits tendered by

Mr. Alexander and they were never weakened in cross-examination. The learned judge accepted the evidence against the background of the inquisitorial powers accorded by statute to the Commissioner and no doubt he took into account that she could have elicited all the information she required before a hearing in the Revenue Court. The upshot of all these transactions is that Marsh, J., found that there was a resulting trust and that the beneficiaries were either the consortium or Consumer Finance Limited. The reality was that the consortium was the immediate beneficiaries as they advanced the money for the purchase price. Although the partnership paid the money directly to Laurentide, they did so because they had loaned the consortium the money. If it were not so, why would Consumer Finance Limited have repaid the partnership? The beneficial and legal interest devolved on Consumer Finance Limited on 8th January, 1980. This was the result when the consortium incorporated itself and vested the property in the corporate entity on that day.

Even on the assumption that the resulting trust continued, that would not be a reason to assess Solnar Limited for taxes and impose penalties. For no income came Solnar's way. The Income Tax Act, Section 2(1) states that "'chargeable income' means the aggregate amount of income of any person from all sources after allowing the appropriate deduction and exemption under this Act." Further, in St. Lucia Usines & Estate Company, Limited v. Colonial Treasurer of St. Lucia [1924] A.C. 508 at 512, Lord Wrenbury stressed that "there must be a coming in to satisfy the word 'income'." The Income Tax Act recognises that even as regards Trustees, for Section 55 reads:

> "55.—(1) Every trustee, guardian, committee, receiver, attorney, agent, or other representative shall be chargeable to income tax in like manner and to the like amount and shall be answerable for the doing of all such acts, matters or things as are required to be done by virtue of this Act for the assessment of any person for whom he acts and for the payment of income tax chargeable on him in respect of the income of any incapacitated or non-resident person."

This section contemplates that a trustee is liable to pay when there is an "assessment of any person for whom he acts." Clearly, on the evidence in this case, Solnar Limited did not act for Consumer Finance Limited in the manner envisaged by the Act.

(b) Is Solnar a "connected person" by virtue of the Income Tax Act?

The relationships giving rise to "connected persons" are stipulated in Section 2 (2) of the Income Tax Act. If Solnar Limited is regarded as "A" the given person, the Revenue has failed to establish that Consumer Finance Limited was connected with "A" or "A" with them. The relationships contemplated are either family or partner relationships or where one body is a corporation as Solnar Limited, it is able to control the operations of the other corporate body. No such relationship existed between Solnar Limited and Consumer Finance Limited. The only relationship is that Soutar and Muirhead, the shareholders in Solnar Limited, are partners in Myers Fletcher and Gordon, Manton and Hart and over 50% of Consumer Finance Limited was owned by Doyle (400 shares), the maximum number of shares permitted by the articles, and Muir (66 shares) and the rest by the partners Alexander (67 shares), Rousseau (67 shares), Phillipson (57 shares), Levy (67 shares) and Evans (66 shares). It is true that Mr. Alexander manages the partners' investments and

so overseas both Solnar Limited and Consumer Finance Limited as well as Securities Limited; but this is a partnership arrangement and does not give rise to the relationship contemplated by the definition "connected person". What would have given rise to the relationship of "connected person" is the relationship between a Holding company and its subsidiaries. As for the management of the portfolio, the evidence is that, Mr. Doyle was in charge of that aspect of Consumer Finance Limited operations. To understand the information in the Supplementary Record, it is necessary to point out that in late January 1981, Consumer Finance Limited sold out the remainder of Laurentide's portfolio.

THE REVENUE'S STANCE

The approach of the Revenue was that Consumer Finance Limited was the agent of Solnar Limited. So that there would have to be a novation for Solnar Limited to divest itself of the responsibility for the portfolio. On that assumption, the profits would, in reality, be that of Solnar Limited. It was contended that the consequence which flows from that position was that the profits made by agents were income rather than capital. However, since the agency could not exist before Consumer Finance Limited was registered, then Solnar Limited could not be the corporation liable for assessment. Also, there are facts upon which Marsh, J., in the Revenue Court, could properly decide the issue of whether the earnings of Consumer Finance Limited was capital or income. Even if the gains which accrued to Consumer Finance Limited were income, I would give no opinion on this issue as the cases cited, Punjab Co-operative Bank, Ltd., Amritsar v. Income Tax Commissioner, Lahore [1940] 4 All E.R. 87; Ditchfield (Inspector of Taxes) v. Sharp and Others [1983] 3 All E.R. 681, held that any such decision ought to

be based on findings of fact. It is curious that the Revenue wished a ruling on this aspect of the case but neither in the Revenue Court nor on appeal did they seek to explore the facts. In fact, it was the Respondent in a Supplementary Record who commendably produced the evidence in this Court.

We could turn the Revenue's submissions on agency on its head, but would it have been a legitimate exercise for the respondent? The evidence of Mr. Alexander is clear that from the inception of the conferences with Mr. Doyle, they intended that Solnar Limited would merely sign the agreement with Laurentide as it would take some time for Consumer Finance Limited to be incorporated. This evidence was accepted in the Revenue Court; such a limited arrangement was capable of constituting an agency with Solnar Limited being the agent and the consortium being the principal. Solnar Limited being the agent would be in a fiduciary relationship with the consortium between 21st December, 1979 when Solnar Limited signed the contract as agent for the consortium and 8th January, 1980 when the consortium was incorporated as Consumer Finance Limited. At that date the fiduciary relationship would be at an end and the legal estate would be vested in Consumer Finance Limited because the consortium put it there by the creation of share-holdings. If this contention is sound, could the respondent rely on it in the Revenue Court? It seems so as in their Notice of Appeal in that Court, they averred at 3(1) at page 33 of the record:

> "By Agreement made on the 21st day of December, 1979 Between Laurentide Finance Company Limited (the vendor) of the one part and Solnar Limited or its nominee (the purchaser) of the other part, the purchaser agreed to purchase certain loans outstanding at the close of business on the 5th day of December, 1970 and specified in the Computer Report dated the 31st day of December, 1979."

Further, the Sale Agreement of 21st December between Laurentide and Solnar Limited or its nominee was exhibited. So the evidence

was there also and there was the opportunity to cross-examine. Could the respondent rely on this interpretation of the evidence in the absence of a Respondent's notice; in this Court, may be not, but they could have sought leave to do so. In any event, the appellant has already indicated that she plans to take this case on a further appeal so it is appropriate to decide the issue as Solnar Limited may wish to rely on that point.

With regards to the contention advanced by the Revenue, it was that since Solnar Limited is a "connected person" within the intendment of the Income Tax Act, its relationship to Consumer Finance Limited made it obligatory to comply with Section 17(3) of the Income Tax Act and also to disclose particulars of any transaction with connected persons when making its return. It was by this indirect way that the Revenue expected to get at the capital reserves and show that it was income liable to tax. Such a contention was not well founded as there was no connection between Solnar Limited and Laurentide or Solnar Limited and Consumer Finance Limited which comes within the definition of "connected persons". Also, it was never pointed out in the Revenue's submissions by what process Solnar Limited could compel Consumer Finance Limited to supply the information. Nor was the purchase of the portfolio other than one at arms length as there is uncontradicted evidence that there was an offer to purchase by National Commercial Bank for $300,000.00 which was somewhat less than th price paid by the consortium. It is perhaps convenient to out the relevant section of the Income Tax Act, namely, Section 17(3) and (4) which governs a possible breach. They read:

> "17.—(3) Where a return of income is submitted to the Commissioner under this Act the person in respect of whose income it is submitted shall certify whether to his knowledge the accounts or information upon which the return is based include particulars of any transactions carried out between connected persons and if so what those particulars are."

> "(4) If any person fails to certify as required by sub-section (3) or wilfully gives a false certificate, he shall be liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding twelve months."

Be it noted that before the criminal sanction can be imposed for either breach, knowledge, or wilful intent, must be proved by the Crown.

With respect to the assessment, if the Commissioner's assessment is in excess of that contained in the return of the person to be charged, before a penalty is imposed in conformity with Section 72(6) of the Income Tax Act, the person on whom it is proposed to impose the penalty must have had an opportunity to prove that any omission by him did not proceed from any fraud, covin, art, contrivance, or wilful neglect. In short, there must be a hearing as this is a safeguard provided by the statute. Solnar Limited was not liable for any penalty pursuant to Section 72(6) of the Income Tax Act. Furthermore, even if they were liable for the tax, they would have to be given a hearing before a penalty could be imposed.

CONCLUSION

At the end of the day the simple question posed by this case was who received the income or capital gains from the contract between Solnar Limited and Laurentide? The evidence was that Consumer Finance Limited received monies from the debts they collected, and if there was tax liability they should pay it and not Solnar Limited. The doctrine of resulting trusts fits this situation so that in law, Solnar Limited would be exonerated from tax liability in this situation. The Revenue sought to apply the concept of agency to the facts of this case. They made Consumer Finance Limited the agent of Solnar Limited. As Consumer Finance Limited did

not exist until January 8 and the contract was entered into on December 21, this theory does not fit the facts. On the other hand, nothing was wrong with recognising Solnar Limited as the agent of the consortium and that this relation being of a fiduciary nature, protected the consortium. Equally, on this version, the fiduciary relationship would have ended on January 8, 1980 and Consumer Finance Limited would be liable for any income tax.

It does seem odd that the Revenue has apparently ignored making a thorough investigation of the basis on which Consumer Finance Limited paid out capital distributions in 1980 to no less than seventeen persons while being involved in a futile investigation of Solnar Limited accounts. However, this was not directly before the court, although the Revenue tried to introduce it by using the definition of "connected persons" to link Consumer Finance Limited to Solnar Limited and then bring Consumer Finance Limited accounts for income tax assessment. This attempt has also failed. So this Court had to affirm the order of Marsh, J., and these are the reasons for dismissal of the appeal on 28th July, 1989. We ordered the Revenue to pay the costs of this appeal which are to be taxed if not agreed.

Morgan J.A.

I have had the advantage of reading the judgments of the President (Ag.) and Downer, J.A. and agree that the appeal should be dismissed and for the reasons given.

I wish however to add my own view to the third question raised by the Appellant, whether the penalties imposed by the Commissioner were done in accordance with the Income Tax Act.

The penalties were imposed by virtue of Section 72(6) which states:

> "(6) (a) If the Commissioner -
>
> (i) has made a charge to tax in respect of a sum in excess of the amount contained in a return of a person to be charged; or
>
> (ii) discovers that a charge to tax in respect of a sum in excess of such amount ought to be made, and an assessment is made, at any time within the year of assessment or within three years after the expiration thereof,
>
> he may, unless the person to be charged proves to his satisfaction that the omission by him did not proceed from any fraud, covin, art or contrivance or any gross or wilful neglect, charge that person, in respect of such excess, in a sum not exceeding treble the amount of the tax on the amount of the excess.
>
> (b) If the person to be charged has neglected or refused to deliver a return, the Commissioner may charge him a sum not exceeding treble the amount of the tax with which, in his judgment, he ought to be charged, and such sum shall be added to the assessment."

These sections clearly give power to the Commissioner to make a charge as a penalty to the assessment in two situations. The first concerns circumstances where a return has already been made - then there is no time limit. The second concerns circumstances where he makes a discovery that an assessment ought to be made and uses his power to

make one. In this instance there is a restriction on time i.e. "within 3 years." In respect of this matter before us it is unchallenged that for the year 1980 the assessment is out of time, the penalty is ultra vires, should not have been imposed, and cannot stand.

In respect of the year 1981 it is my view that it was not imposed in accordance with the Act. The Act speaks of "a person to be charged proves" etc. and not "a person charged proves" which means that enquiry as to proof (or lack of it) of fraud covin etc. must be completed before the Commissioner makes a charge. Allegations of fraud, covin, art are serious allegations in law, and because of their nature should require a hearing from the person to whom these allegations are pivoted before any such punitive penalty is imposed. To impose on a taxpayer by adding to the assessment a sum up to treble the tax, gives to the Commissioner an awesone authority. It could only be right and it is my view so expressed in the statute, that a decision as to its imposition can and should only be made subsequent to a hearing. Once a decision is made if there is any dispute by the objector as to its validity he may appeal and the onus of proving that the assessment is excessive becomes that of the objector himself. (Section 76 of the Act under the heading "Appeals," reads:

> "(2) The onus of proving that the assessment complained of is excessiv. shall be on the objector."

The appellant cannot argue as it has - that the right under this section exists to the objector; this section controls appeals to the Revenue Court which has the power to ratify or invalidate the decision of the

Commissioner, so in cases where a penalty is imposed under Section 72(6) after a hearing, the taxpayer then has a right to object, the onus now being upon him to satisfy the Court that he ought not to be penalized.

The Revenue Court is a Court of review and to satisfy the Act it must perforce look on facts that have already been aired and on which the decision of the Commissioner was based, in order to conclude whether or not there was fraud covin etc. to satisfy the charge.

Neither can the applicant submit that the assessment and charge are saved by Section 72(3) of the Act. These sections make valid, assessments and charges that would otherwise be deemed invalid in the circumstances as specified therein e.g. mistake, defect or omission etc. in the assessment charge. It makes no provision for penalty as has been charged in the assessments of the appellant. This submission clearly fails.

It was suggested by the Appellant that a hearing before charge under Section 72(6) would have serious consequences for the administration of the Act. Inasmuch as this suggestion is not one for judicial consideration, still it is an incorrect approach as the section clearly applies only to cases where in the Commissioner's discretion the penalty - up to treble the amount - ought to apply - id est - it is only done in limited cases.

For these reasons it is my view that the penalties were not imposed in accordance with the Act.