JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No.3/84

BEFORE: The Hon. President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN - SONNY GOBIN - PLAINTIFF/RESPONDENT

AND - MOTOR AND GENERAL INSURANCE COMPANY LIMITED - DEFENDANT/APPELLANT

C.M.M. Daley and Dr. Winston McCalla for Appellant

Dr. Lloyd Barnett and Alton Morgan for Respondent

April 24, 25, 26, 29 & June 21, 1985

ROWE, P.:

Prior to August 17, 1982, the respondent was the managing director and principal shareholder of the appellant's insurance agency in Jamaica. An agreement was made in Trinidad and Tobago on August 17, 1982, between the appellant and the respondent whereby the respondent was given the option to purchase the Jamaican and Barbadian operations of the appellant at the agreed price "of Six Hundred and Fifty Thousand ($650,000.00) Trinidad and Tobago currency, to be paid to the vendor in the Island of Trinidad, in addition to 20,000 shares valued at $7.00 per share held by the purchaser in the share capital of

of the vendor to be transferred to any nominee of the vendor." Completion date was set for a period of 90 days after the date of the exercise of the option and on completion the respondent was required to transfer Share Certificates Nos. 1101 - 1300 and Nos. 21901 - 41900 to the nominee of the appellant.

In accordance with the terms of the agreement on November 4, 1982 the respondent purported to exercise the option, paid the balance of the purchase price and tendered the relevant share certificates and instruments of transfer to the appellant. Completion did not materialise as the Superintendent of Insurance in Barbados did not approve the transfer of assets and liabilities of the appellant to the respondent. Then difficulties arose between the parties which culminated in suit E63/83 wherein the respondent sought:

(a) specific performance of the agreement of August 17, 1982 and/or an order that the Jamaican portion of the appellant's operations be transferred to him;

(b) an injunction to restrain the appellant from parting with any portion of its Jamaican or Barbados operations;

(c) damages for breach of contract;

(d) alternatively, the return with interest of the sum of $650,000.00 in Trinidad and Tobago currency paid by the respondent to the appellant.

In opposition to this claim, the appellant pleaded, inter alia, that the respondent was in breach of his fiduciary duties to the appellant resulting in considerable loss to the appellant and that the option agreement was an illegal transaction in that it provided for the appellant to purchase its own shares and as a result of that illegality the respondent was not entitled to the return of the sums paid. A counterclaim for $1,200,000 Barbados dollars and special damages found upon proper accounts and enquiries in respect of the appropriation and transfer by the respondent, was filed.

A Reply and Defence to the counter-claim filed on July 28, 1983, closed the pleadings. When the matter came on for trial before Wolfe J. the parties consented that the trial should proceed on the following bases:

> "By and with the consent of the parties the action proceeded to trial on the following basis.
>
> 1. That the question of the right of the Plaintiff to recover the down payment of T&T$650,000.00 be argued and determined in the light of the issue raised in paragraph 14 of the Amended Defence.
>
> 2. If the Plaintiff is adjudged to be entitled to recover the amounts paid that Judgment be entered for the Plaintiff against the Defendant for
>
>   (a) The sum of T&T650,000.00 plus interest at such rate and from such date as the Court may determine and until the date of repayment; and
>
>   (b) the sum of J$173,000.00.
>
> 3. That Judgment be entered for the Plaintiff on Counter Claim.
>
> 4. That Defendant discontinue Suits C.L. M277/83 filed in the Supreme Court of Jamaica and 838 filed in the High Court of Trinidad and Tobago and abandon all claims arising out of the matters referred to in the said suits."

As a consequence of the above agreement the only evidence tendered came from the respondent and related exclusively to rates of interest payable by borrowers on bank loans in Trinidad and Tobago and rates of interest paid by banks on deposit accounts. Wolfe, J. decided that the agreement was still inchoate and consequently the rule that an amount paid on an illegal contract was irrecoverable, was inapplicable. He held that section 66 of the Companies Act of Jamaica which permits a company to reduce its share capital in certain situations applied and that there was

no evidence that the appellant was not authorised by its memorandum and articles to reduce its share capital, nor that the transaction was not sanctioned by a special resolution of the Company. Wolfe, J. then went on to discuss and decide the question as to whether the judgment could be awarded in Trinidad and Tobago currency and the quantum of interest to be ordered.

Five grounds of appeal were filed. Ground 1 complained that the decision as to the entitlement of the respondent to a return of the $650,000 T.T. was wrong as that payment was made under an illegal contract. Three of the other grounds were concerned with the question of the interest awarded and one ground challenged the court's power to make the award in Trinidad and Tobago currency.

Now what was the point of law that was before the court for decision? It was said to be that contained in para. 14 of the amended defence which reads:

> "The Defendant further says that the 'option' agreement in an illegal transaction in that it provides for the Defendant company buying its own shares and as a consequence of the said illegality the Plaintiff is not entitled to the return of the sums paid thereunder."

Mr. Daley says that on this question of law no evidence was either contemplated or was properly receivable by the court except in relation to interest. Implicit in that agreement, he said, was that the parties must have assumed that what was stated in paragraph 14 had a factual basis. He submitted that Wolfe, J. was wrong to make reference to the absence of evidence as to the powers of the company to reduce its capital and as to

the absence of evidence as to the existence of the special resolution.

Motor and General Insurance Company Limited was said in argument to be a company incorporated in Trinidad and Tobago but permitted to carry on business within Jamaica under Part X of the Companies Act. Its Memorandum and Articles of Association were not in evidence. Its share-holding and the extent of its operations were never disclosed to the court. The statutory provisions extant in Trainidad and Tobago under which the appellant company is incorporated were not proved before the court.

Dr. Barnett said that the burden of pleading facts to substantiate an illegality rested upon the appellant as by section 178 of the Civil Procedure Code, the appellant having raised the issue of illegality, should plead facts showing illegality either by statute or common law. No statutory illegality was pleaded and indeed Mr. Daley relied wholly on the principle in Trevor v. Whitworth, [1887] A.C. 409. The only fact which was pleaded in paragraph 14 of the defence was that the appellant agreed to purchase 20,000 of its own shares. This was a contract which was made in Trinidad and Tobago, completion was due to take place in Trinidad and Tobago, the consideration was in Trinidad and Tobago currency. Therefore, the proper law of the contract is the law of Trinidad and Tobago. Proof of the law of Trinidad and Tobago is a question of fact which would require expert evidence. However, in the absence of evidence of foreign law, the court is entitled to apply Jamaican law. See Dicey and Morris, Conflict of Laws, 9th Edition p. 1133 at para. 205. Probably the interests of the parties would have been better served, had the parties applied

their minds to the statutory provisions under which the appellant company is incorporated and had included in the consent order the relevant portions of the statute governing incorporation.

I understand the point of law reserved for the court's decision to be that on the understanding that the statute law of Trinidad and Tobago is the same as the Companies Act of Jamaica, does the provision in the agreement for the respondent to transfer 20,000 shares in the appellant company to that company each valued at $7.00 T.T., as part of the consideration money for the appellant's promise to transfer substantial portions of its capital assets to the respondent, render the agreement illegal at its inception with the consequence that moneys paid under that agreement by the respondent to the appellant become irrecoverable?

If that is the proper enquiry, then one can turn directly to Trevor v. Whitworth, supra, to see the ambit of the applicability of the decision in that case. Mr. Daley says that it is a general principle of company law that a company with limited liability cannot under any circumstances traffick in its own shares. The headnote of that case in part reads:

> "A limited company was incorporated under the Joint Stock Companies Act with the objects (as stated in its memorandum) of acquiring and carrying on a manufacturing business and transactions which the company might consider to be in any way conducive or auxiliary thereto or in any way connected therewith. The articles authorized the company to purchase its own shares."

The memorandum did not authorise the company to purchase its own shares. In the course of time the company purchased 4142 of its own shares which represented considerably more than one-fourth of the paid up capital of the company. The company having gone into liquidation, a former shareholder made a claim against the company for the balance of the purchase price of his shares sold by him to the company before liquidation and not wholly paid for. The House of Lords reversed the decision of the Court of Appeal and held that such a company did not have power under the Companies Act to purchase its own shares. What Lord Watson said at p. 423 of the Report is typical of the reasons given by their Lordships for the prohibition against a limited liability company purchasing its own shares. He said:

> "One of the main objects contemplated by the Legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between a company and a shareholder, by means of which the money already paid to the company in respect of his shares is returned to him, unless the court has sanctioned the transaction. Paid-up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business."

Attention should be drawn to the fact that the prohibition is against the company upon its own initiative and within its sole discretion purchasing its own shares. Lord Watson made it plain that this total prohibition did not also extend to the court and hinted at the possibility of the court sanctioning such a purchase.

Three months after the decision was given in Trevor v. Whitworth, Kekewich J. in the Chancery Division gave judgment in Raine's case, [1887] 4 T.L.R. and following Trevor v. Whitworth he decided that as a matter of law a company cannot purchase its own shares. As in Trevor v. Whitworth, the transaction in Raine's case was completed, the shares were transferred, assets of the company were paid out as consideration for the purchase of the shares. In Raine's case it did not matter that both the memorandum and articles empowered the company to purchase its own shares. The over-riding reason for the restriction explained in Trevor v. Whitworth, still applied. Raine, the shareholder, had transferred his shares to a trustee for the company who became insolvent and the court ordered that Raine's name be restored to the register so that the liquidator could recover from him the amount he had been paid by the company for the shares.

In re Denver Hotel Company, [1893] 1 Ch. 495, Lindley L.J. said that if a company purchased shares from one shareholder only, that was not a transaction that could be sanctioned by the court, and said that nothing in the Companies Act of 1877 or in the speech of Lord Macnaghten in Trevor v. Whitworth could be construed as enabling a company to prefer one shareholder to another of the same class as himself by buying up his shares.

Mr. Daley said the position of the respondent fell four-square within the dictum of Lindley L.J.

In 1894, the year after the Denver Hotel case was decided in the Court of Appeal, the House of Lords gave judgment in British and American Trustee and Finance Corporation v. Couper, [1894] A.C. 399. Lord Herschell, L.C. referred to the dictum of Lindley L.J. in the Denver Hotel case and at p. 405 said:

> "My Lords, if all the shareholders of a company were of opinion that its capital should be reduced, and that this reduction would best be effected by paying off one shareholder and cancelling the shares held by him, I cannot see anything in the Acts of 1867 and 1877 which would render it incumbent on the Court to refuse to confirm such a resolution, or which shews that it would be ultra vires to do so."

Lord Watson, who like Lord Herschell, was a member of the House which decided Trevor v. Whitworth in the course of his judgment in British and American Trustee and Finance Corporation v. Couper, supra, explained what he understood Lord Macnaghten to mean in his speech in Trevor v. Whitworth. At p. 409 Lord Watson said:

> "I agree with the Lord Justices in thinking that the observations made by my noble and learned friend Lord Macnaghten were not intended to have, and have not, any direct bearing upon the construction of the powers committed to the Court, with respect to reduction of capital by the Act of 1867 and subsequent statutes. They were directed to the point that the purchase of its own shares by a company, although made on terms advantageous, is in effect a reduction of its paid-up capital, and is therefore ultra vires of the company. For the purposes of this appeal the decision of the House in Trevor v. Whitworth does not appear to me to go farther than to affirm that the purchase of its shares by a company is one of the methods by which a reduction of its capital can be effected. It does not establish that reduction by that method is more deeply tainted with illegality than any other means by which the same result is attainable. To my mind the

"only substantial question arising in this appeal is whether these empowering statutes give jurisdiction to entertain proposals for reduction of capital in any manner whatever of which the Courts may approve, or whether their jurisdiction is excluded in the case of proposals to reduce it by the purchase of shares."

Lord Watson then referred to the provisions of the Companies Act of 1877 and concluded that the words "either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital" contemplated that re-payment of paid-up capital may be made either to all or to one or more of the body of shareholders.

This brings me to a consideration of section 66 of the Companies Act of Jamaica. It provides:

"(1) Subject to confirmation by the Court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorized by its articles, by special resolution reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may -

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid up share capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

> "(2) A special resolution under this section is in this Act referred to as "a resolution for reducing share capital."

By resorting to this section a company has a general power to reduce its share capital. This power is expressed in the widest terms "in any way" and it is left to the ingenuity and business acumen of the directors of a particular company to devise the means by which the reduction is to take place. The methods enumerated in section 66 (1) (a)-(c) are not intended to be exhaustive but rather to be examples of the commonest types of reduction. Section 66 of the Jamaican Statute is fashioned after section 66 of the 1948 Companies Act of the U.K. In commenting on the U.K. provision, the editor of Penninghton's Company Law, 4th Ed. at p. 166 says:

> "The three kinds of reduction of capital which are particularised above are the commonest, but the permissible modes of reduction are not limited to them. Any scheme of reduction may be sanctioned by the court."

It is clear that when it is proposed to reduce capital using the provisions of section 66 of the Companies Act, a conditional agreement between the shareholder and the company must precede the application to the court. Otherwise the special resolution required by the section would not rest on a factual foundation and approval by the court would be in vacuo.

What the appellant attempted to do in the agreement of August 17, 1982 as appears from the face of the agreement and from the pleadings was:

(a) to rid itself of an unprofitable segment of its business which it operated at substantial loss in Barbados and in respect of which there was heavy outstanding liabilities;

(b) give up its Jamaican operations which was proving to be very lucrative;

(c) separate itself from the respondent by purchasing his shares;

(d) obtain a considerable cash payment from the respondent in return for parting with a substantial portion of its capital assets.

The nominal value of the shares of the respondent was fixed at $140,000 but he was expected to inject into the Barbados operation $500,000. There is nothing on the face of the agreement to suggest that the bargain was not advantageous to the company. It might very well be that the company's decision to contract its operations in Jamaica and Barbados was with a view to using the $650,000 T.T. to strengthen its operations elsewhere. All this is speculation, as no facts were placed before Wolfe J., as to the reasons which influenced the agreement to sell.

If this agreement had been made in Jamaica, and the company had power under its articles to reduce its capital by the purchase of its own shares, then if it passed a special resolution to authorise the reduction of its share capital in the terms of the instant agreement, that agreement could be submitted to the court for its approval, and the court would have power to approve it. If not approved the agreement would be of no effect. In my opinion, based upon the provisions of the Companies Act of Jamaica, the instant agreement could have been performed in a perfectly legal manner and in the absence of allegations of fact in the pleadings to the contrary, I am of the opinion that the point of law reserved for the decision of the court was

correctly decided by Wolfe J. The effect is that the respondent in suing for the return of the $650,000 did not rely upon a contract, illegal per se.

Payments of interest at a rate to be fixed by the Judge, from a time to be fixed by the Judge and to continue until repayment of the $650,000, were agreed as issues for Wolfe J's determination. Wolfe J. ordered that the rate of interest should be 16% and that the commencement date be February 11, 1983, the date on which the sum claimed was paid to the appellant. Dr. Barnett has conceded that on the evidence of the respondent the applicable rate is 12%. I see no reason to disturb the trial judge's decision that interest should be payable throughout the period when the appellant has had the $650,000 but I would vary the order for the rate of interest and reduce it to 12%

Except for the variation in the rate of Interest proposed above. I would dismiss the appeal.

Because of the decision at which I have arrived I have found it unnecessary to traverse the large number of authorities cited on illegality and severance.

Appeal dismissed with costs to the respondent to be agreed or taxed.

CAREY J.A.

The facts and circumstances giving rise to this appeal which is against a judgment of Wolfe, J., in the Supreme Court dated 12th December, 1983 are, if I may say so with respect, admirably summarized in his reasons which appear at pages 19-20 of the Record. I am content to incorporate that summation in my own judgment, and I set it out hereunder:

> "Plaintiff and Defendant are parties to an agreement whereby the Defendant granted an option to the Plaintiff to purchase the Jamaican and Barbadian operations of the Defendant. In accordance with the terms of the said Agreement the Plaintiff on the 4th November 1982 purported to exercise the option. The Plaintiff paid to the Defendant the entire balance of the purchase price and tendered the relevant share certificates and instruments of transfer to the Defendant. Notwithstanding repeated calls upon the Defendant by the Plaintiff to effect a transfer of the operations to the Plaintiff the Defendant has failed so to do but at the same time has retained the purchase price of $650,000.00 in Trinidad and Tobago currency.
>
> The Plaintiff therefore commenced proceedings for
>
> (1) Specific Performance of the said Agreement and/or an order that the Defendant do transfer the Jamaican portion of the Defendant's operations to the Plaintiff.
>
> (2) An injunction restraining the Defendant, whether by itself or its agents or servants or otherwise howsoever, from doing the following acts or any of them, that is to say, parting with or disposing of any part of the Jamaican or Barbadian operations or business undertaking or assets of the Defendant.
>
> (3) Damages for Breach of Contract.
>
> (4) Alternatively the return with interest of the sum of $650,000.00 in Trinidad and Tobago currency paid by the Plaintiff to the Defendant.
>
> (5) Further or other relief.
>
> (6) Costs.

"By and with the consent of the parties the action proceeded to trial on the following basis.

(1) That the question of the right of the Plaintiff to recover the down payment of T&T $650,000.00 be argued and determined in the light of the issue raised in paragraph 14 of the Amended Defence.

(2) If the Plaintiff is adjudged to be entitled to recover the amounts paid that Judgment be entered for the Plaintiff against the Defendant for

(a) The sum of T&T $650,000.00 plus interest at such rate and from such date as the Court may determine and until the date of repayment.

(b) and the sum of J$173,000.00.

(3) That Judgment be entered for the Plaintiff on the Counter Claim.

(4) That Defendant discontinue Suits C.L. M277/83 filed in the Supreme Court of Jamaica and 838/83 filed in the High Court of Trinidad and Tobago and abandon all claims arising out of the matters referred to in the said suits.

Paragraph 14 of the amended Defence is recited below:

'The Defendant further says that the 'option' agreement is an illegal transaction in that it provides for the Defendant company buying its own shares and as a consequence of the said illegality the Plaintiff is not entitled to the return of the sums paid thereunder'. "

In the result, the learned judge found in favour of the plaintiff and duly entered judgment in terms of the consent order.

We are therefore concerned with an option agreement for the purchase of the Jamaican and Barbadian operations of the appellant company and more particularly with the legal implications of clause 1 thereof which provides as follows:

946

"WHEREBY IT IS AGREED as follows:

1. In consideration of Five Hundred Dollars ($500.00) this day paid by the Vendor (the receipt whereof to Vendor acknowledges) the purchaser shall have an option of purchasing the Jamaican and Barbados operation of Motor and General Insurance Company Limited, inclusive of the right to use the vendor's name, its Goodwill, Assets and Liabilities existing outstanding and/or due to or from the Company in the Islands of Jamaica and Barbados, West Indies, together with all furniture, fixtures, office equipment and stationery at the price of SIX HUNDRED AND FIFTY THOUSAND DOLLARS ($650,000.00) Trinidad and Tobago currency, to be paid to the vendor in the Island of Trinidad, in addition to 20.000 shares valued at $7.00 per share held by the Purchaser, in the share capital of the vendor to be transferred to any nominee of the Vendor."

The appellants strongly contend that this agreement is illegal because it offends a common law rule prohibiting a limited liability company from purchasing its own shares. Further since the Court will not lend its aid to enforcing an illegal contract, the company cannot be compelled to return the consideration therefor, i.e. the sum of $650,000.00 T&T. Learned counsel for the appellants pins his flag to the mast of Trevor v. Whitworth [1887] 12 A.C. 409 as authority for his proposition that a contract by a company for the purchase of its own shares is illegal and void.

I turn then to consider this authority to see whether counsel's faith is justified and his formulation correct. The facts in summary, are, that a former shareholder made a claim against a company to recover the balance of the price of shares sold by him to the company before it went into liquidation. The company was incorporated under the Companies Act 1862 with the objects as stated in its memorandum of acquiring and carrying on a manufacturing business, and any other business and transactions

which the company might consider to be in any way conducive or auxiliary thereto or in any way conducive therewith. The articles authorized the company to purchase its own shares. The company went into liquidation. The questions for the consideration of the House were succinctly stated in the speech of the Lord Chancellor, Lord Herschell at page 412 of the report, where he said:

> "first, whether certain shares in James Schofield & Sons Limited were purchased by G.W. Schofield on his own account, or as agent for the company; secondly, whether, assuming that they were purchased for the company, and that the company had power to buy its own shares, the purchase had taken place in accordance with the articles of association; and thirdly, whether the company had power to purchase the shares."

It is the third question which is wholly relevant to this appeal and which the learned Lord Chancellor regarded as "the main question which is one of great and general importance." In dealing with the consequences of the purchase of its own shares by a company Lord Herschell explained the matter thus at page 416:

> "If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor, whose interests, I think, sects. 8 and 12 of the Companies Act were

> "intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors."

He considered the reasons which would induce a company to purchase its shares and observed at page 416:

> "If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorized, If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company."

He then suggested that the intention of the resolution was to enable the company to buy its shares for the purpose of re-issuing them and then said:

> "That seems to be a trafficking in shares and a carrying on of the business which is not within the terms of the memorandum of association."

He finally declared at page 420 that:

> "The transaction here is inchoate, and the Court is asked to compel its completion. This I think, for the reasons I have given, they would not be justified in doing."

In his speech Lord Watson at page 423 under-scored the limitation placed on the purchase of its shares by a company, by pointing out that:

> "One of the main objects contemplated by the legislature, in restricting the power of limited companies to reduce the amount of their capital as set forth in the memorandum, is to protect the interests of the outside public who may become their creditors. In my opinion the effect of these statutory restrictions is to prohibit every transaction between a comapny and a shareholder,

> "by means of which the money already paid to the company in respect of his shares is returned to him, unless the Court has sanctioned the transaction."

Lord Macnaghten makes it clear that the purchase of its shares by a company is impermissible even were the company to take such power by its memorandum of association. At page 436, he expressed the view that:

> "......if a power to purchase its own shares were found in the memorandum of association of a limited company, it would necessarily be void."

But he went on to emphasize that that course was permissible under certain conditions for at page 437 he said:

> "...; but I may say that the Act of 1867 as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares, except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed."

In concluding his speech at page 441, he stated:

> "Here the applicants are seeking to enforce against the company a contract which has not yet been fully performed and which was beyond the powers of the company."

Lord Herschell, L.C., in British & American Trustee and Finance Corporation Limited and Reduced v. Couper (1894) A.C. 399 at page 405 in commenting on Lord Macnaghten's judgment in Trevor v. Whitworth (supra) said:

> "His remarks were made to enforce his view that, apart from the Companies Act, 1867 and 1877, it is ultra vires of a limited company to buy its own shares, even if its memorandum and articles expressly authorise it to do so."

In Kirby v. Wilkins (1929) 2 Ch. 444 at page 447 Romer J., approved as correctly representing the true principles of law to be deduced for Trevor v. Whitworth the view of the learned author of Buckley on the Companies Act in the following excerpt at page 140 of the 10th edition of that work, where it was stated:

> "The grounds of the decision in Trevor v. Whitworth (1), and the principles which it affirms may be summarized thus: (1) Purchase by a company of its own shares is not forfeiture or surrender or anything like it. Forfeiture is valid, the Act recognizes it: the company parts with no money, but resumes dominion of a share upon which something has been paid, and this because a further payment cannot be obtained. Surrender may be valid, e.g. where the company could forfeit and the member dispenses with the formalities. Each case of surrender must be determined upon its merits. Where money is paid or consideration given by the company it is a purchase, and purchase is neither forfeiture nor surrender."
>
> The reference there to consideration given by the company as opposed to money paid by the company has reference, no doubt, to the decision of the Court of Appeal in Bellerby's case (1) [1902] 2 Ch. 14 in which the Court of Appeal pointed out that where shares are surrendered to a company which are not fully paid up, and in consideration of the company purporting to release the transferors or surrenderers from their further liability in respect of the shares, it is in effect the equivalent of a purchase by the company of its shares, and is invalid. To go on with the statement in Buckley on the Companies Acts the second principle is stated to be this: '(2) The company cannot be a member of itself. (3) The purchase of its own shares is a reduction of capital. The Act, in sanctioning reduction of capital under certain conditions and with certain restrictions, impliedly prohibits it unless the prescribed conditions and restrictions are observed. (4) The Act impliedly prohibits the return of capital to members. The payment of capital to one shareholder is just as much a reduction of capital and just as detrimental to the interests of creditors as the payment of the same amount to all the shareholders rateably. (5) The transaction cannot be justified as 'incidental'

"to the company's objects, e.g. in a private company where it is desired to keep the shares in the hands of a few. To the creditor whose interests the Act intends to protect it makes no difference what the object of the purchase is."

The Court in Trevor v. Whitworth it should be noted did not compel the company to pay the balance of the purchase price because the purchase of the shares amounted to a trafficking in the shares, a course not authorized by the Companies Act.

The principles enunciated above persuade me to the view that a purchase of its shares by a company is not within the powers of the company even where it has taken such a power under its articles or memorandum of association. It is prohibited because it is ultra vires the company. But such a purchase amounts to a reduction of capital and that can be sanctioned by the Court. The bald proposition that the purchase of its shares by a company is illegal, is not in my view, supportable by a reliance on Trevor v. Whitworth. Some explanatory addendum is needed in the interests of accuracy. It would not be incorrect to say that such a contract is invalid unless sanctioned by the Court. I am well aware of the observation of Lindley L.J. in In re Denver Hotel Co (1893) 1 Ch. 495 at p. 505 where he said in relation to the purchase of its shares by the company that the Court would not sanction it. I do not think the learned Lord Justice was intending to lay down any inflexible rule of general application. His observation must be understood in a context where the purchase would enable the company to prefer one shareholder to another of the same class as himself.

Reduction of capital is today governed by section 66 of the Companies Act. It provides as follows:

"Reduction of Share Capital

66 -- (1) Subject to confirmation by the Court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorised by

"its articles, by special resolution reduce its share capital in any way, and in particular, without prejudice to the generality of the foregoing power, may --

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid up share capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as 'a resolution for reducing share capital'. "

This enactment identifies three specific situations in which the Court's sanction is required for the reduction of the share capital of a limited liability company, but it is to be noted that if the preconditions particularized in Section 66 (1) are fulfilled, a company may reduce its share capital 'in any way'. It has become settled that the jurisdiction to sanction reduction extends to every mode of reduction which is not inequitable, Poole v. National Bank of China Ltd [1907] A.C. 229.

In my opinion, the law stands altogether on a different footing where the company gives financial assistance for the purchase of its shares. Such conduct on the part of the company is in terms stigmatized as "unlawful." Thus section 54 of the Companies Act provides as follows:

"54. (1) Subject as provided in this section, it shall not be lawful for a company to give whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or

"otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company, or, where the company is a subsidiary company, in its holding company:

Provided that nothing in this section shall be taken to prohibit --

(a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;

(b) The provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company;

(c) the making by a company of loans to persons, other than directors, bona fide in the employment of the company with a view to enabling those persons to purchase or subscribe for fully paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(2) The aggregate amount of any outstanding loans made under the authority of provisos (b) and (c) to subsection (1) shall be shown as a separate item in every balance sheet of the company.

(3) If a company acts in contravention of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding two hundred dollars."

The result of any agreement to provide such assistance is, that such an agreement, would properly be categorized as illegal and void. In the present appeal which relates to a contract between a company incorporated outside this country to wit Trinidad and Tobago but carrying on business in this country and a national of

the country of incorporation, the consideration being expressed in Trinidad and Tobago currency, completion to take place in Port of Spain, Trinidad, it is, I think clear, that the proper law of the contract is that of Trinidad and Tobago. In the absence of any evidence as to that law, we must assume that it is the same as Jamaican or English law. The learned judge was undoubtedly correct when he said at page 25 of the record:

> "There was no evidence before me to suggest that the Company was not so authorised by its Articles and that the course of action was not so authorised by special resolution. The burden would be upon the Defendant to establish this having raised the matter of illegality."

The form of the question as framed, I fear, left much to be desired for it assumed a factual basis of illegality which was never even pleaded. On the basis that the law of Trinidad and Tobago is the same as ours, then the clause in the agreement does not offend any principle of commom law. At its worst, hthe clause may be ultra vires the company and invalid but I know of no legal principle which obliges me, without proof to accept that the company is not minded to comply with the law. I decline to impute conduct in breach of the Act to the company. In the light of the view I have formed, it becomes quite unnecessary to consider the question of severability, but it is, I think, right to point out that even had I concluded that the agreement was illegal as contended, I would, nevertheless, hold that Wolfe J., was right in giving judgment for the plaintiff. I would uphold the submission of Dr. Barnett that where a party to an executory contract has transferred property under it, he may recover that property where the illegal purpose has not yet been substantially put into effect.

There are well recognized exceptions to the rule against restitution in the case of illegal contracts, and among them is the rule that a party to an illegal contract is allowed a <u>locus</u>

poenitentiae, that is a period of time to repent or retract during which the Court will lend its aid to recover goods transferred under the contract. For the rule to apply as well, the illegal purpose must not have been substantially performed. In the present case, the plaintiff had paid over his money and signed a transfer for the shares, but no transfer ever took place. I would not accept that in those circumstances, it could be suggested that the illegal purpose had been substantially performed.

The learned judge in the course of his judgment pointed out that the option agreement was subject to a condition, viz., "the approval of the Superintendent of Insurance in Jamaica or such other relevant authorities as may be necessary." He then said at page 23:

> "It is common ground that the approval of Superintendent of Insurance in Barbados, a relevant and necessary authority for purposes of the agreement, was never obtained. It therefore means that in the absence of such approval no contact has come into being and the question of the amount having been paid under an illegal contract must of necessity fall flat. On the basis of the foregoing I hold that the agreement is still inchoate and it cannot therefore be said that the amount has been paid under an illegal contract and therefore irrecoverable. I hold that the option not having received the approval of the Superintendent of Insurance in Barbados the amount is recoverable."

In my view, for this additional reason which I think to be correct, the sum of T&T$650,000.00 should be returned to its depositor, the plaintiff.

I would like now to turn to those grounds of appeal which challenged the learned judge's award of interest and the date from which it was made to begin to accrue. The judge awarded interest at the rate of 16% from 11th February, 1983, that was the date from which the plaintiff paid over his $650,000.00 T&T. It was argued by Mr. Daley for the defendants that the

plaintiff was not entitled to interest because any such award would amount to damages for breach which was neither alleged or proven.

As Dr. Barnett pointed out, the parties made the decision to have the case tried on certain specific bases. There was never any dispute that if judgment were entered in favour of the plaintiff, interest would be paid; the dispute related to the appropriate rate. This is plainly right. The question recited that:

> 2. If the plaintiff is adjudged to be entitled to recover the amounts paid, that judgment be entered for the Plaintiff against the Defendant for
>
> (a) the sum of T&T $650,000.00 plus interest at such rate and from such date as the Court may determine and until the date of repayment.
>
> (underlining supplied)

The rate fixed by the learned judge was 16% but that cannot be right. The rate should be that at which if the money were invested, it would earn. The only witness on this point, said it was 12% and indeed Dr. Barnett accepted that as being the appropriate rate to be awarded. But for that variation, I for my part, would accordingly affirm the judgment of Wolfe J., and dismiss the appeal with costs.

CAMPBELL J.A.

The respondent by a claim dated 16th March, 1983 sought specific performance of an option contained in an agreement dated 17th August, 1982 which option he claimed to have exercised on November 4, 1982.

The agreement of 17th August, 1982 admittedly gave to the respondent the option to purchase the appellant's insurance operations including its goodwill, assets and liabilities in Jamaica and Barbados for a consideration comprising $650,000.00 in Trinidad and Tobago currency and 20,000 of the appellant's shares held by the respondent at a valuation of $7.00 per share.

The respondent claims that not only had he exercised the option, he had in addition performed his obligation under the option by paying over the sum of $650,000.00 in Trinidad and Tobago currency to the appellant and had tendered to the appellant his share certificates with instruments of transfer.

The respondent however limited his claim for specific performance to the Jamaican operation. He alternatively claimed the return to him of the $650,000.00 with interest.

The appellant admitted the agreement of 17th August, 1982 and the receipt of T&T$650,000.00 and the share certificates from the respondent though not the instruments of transfer. It however denied that the option was exercised in that the exercise thereof was subject to a condition precedent namely that of the respondent obtaining the approval of the transfer of the appellant's business operation in Jamaica and Barbados from the Supervisor of insurance in Jamaica and from the appropriate authority in Barbados and the approval of the latter has admittedly not been obtained.

The appellant by paragraph 14 pleaded further that "the option agreement was an illegal transaction in that it provided for the appellant purchasing its own shares and that as a consequence of the said illegality, the respondent was not entitled to the return of the T&T$650,000.00 paid thereon.

The respondent's reply to the appellant's Defence and counterclaim impliedly admitted that the securing of the necessary approval was a condition precedent to the exercise of the option. He however pleaded that the responsibility for obtaining the necessary approvals was originally on the appellant and that he thereafter after exercising the option undertook to obtain the required approval only by virtue of an agreement with the appellant entered into on 17th November, 1982. He further pleaded that the absence of the approval from the Supervisor of insurance in Barbados was due to no default on his part.

On the matter coming on for hearing before Wolfe J., on December 8, 1983 the record discloses a consent order in the following terms so far as is relevant.

By consent of the parties it is ordered that the trial of the action proceed on the following basis:

1. That the question of the right of the plaintiff to recover the downpayment of Trinidad and Tobago $650,000.00 be argued and determined in the light of the issue raised in paragraph 14 of the amended defence.

2. If the plaintiff is adjudged to be entitled to recover the amounts paid, that judgment be entered for the plaintiffs against the defendants for

   (a) The sum of T&T $650,000.00 plus interest at such rate and such date as the court may determine until the date of payment;

   (b) and the sum of J$173,000.00

3. That judgment be entered for the plaintiff on the counterclaim.

The learned judge gave judgment for the respondent. He did not however give judgment as a result of the determination by him of the issue of illegality, though he did say that in his view the option was not illegal. He gave judgment on the basis that no contract had come into existence, that is to say the option had not been exercised hence no issue of illegality arose.

Before us Mr. Daley argued supplemental grounds of Appeal as hereunder namely:

> 1. The learned trial judge misdirected himself in law in grounding his judgment on matters not open to him for determination being outside the scope of the order by consent of the parties on the basis of which trial was to proceed and on which there was no issue joined namely in holding that 'agreement subject of suit' had not come into existence as there was no approval of the Superintendent of insurance of Barbados.
>
> 2. The learned trial judge erred in law in holding that an agreement which was subject to condition subsequent could not at the same time be an illegal transaction so as to render money paid thereunder irrecoverable.
>
> 3. There was no sufficient basis on which the Court could adjudicate and come to the decision reached having regard to the scope of the consent order on the basis of which the trial proceeded.

The learned trial judge's ratio for his judgment is stated thus:

> "Before embarking upon the merits or demerits of the arguments for the defence let me say that the matter can be disposed of by a simple examination of the Agreement dated the 17th August, 1982 and which is set out herein. Clause 7 of the Agreement states as follows:
> 'This option is subject to approval of the Superintendent of insurance in Jamaica or such other relevant authorities as may be necessary.'
>
> It is common ground that the approval of Superintendent of insurance in Barbados, a relevant and necessary authority for purposes of the agreement,

> "was never obtained. It therefore means that in the absence of such approval no contract has come into being and the question of the amount having been paid under an illegal contract must of necessity fall flat.
>
> On the basis of the foregoing I hold that the agreement is still inchoate and it cannot therefore be said that the amount has been paid under an illegal contract and therefore irrecoverable. I hold that the option not having received the approval of the Superintendent of insurance in Barbados the amount is recoverable. This view, it is submitted is supported by the very pleadings of the Defendant. At paragraph 6 of the amended Defence Counter-claim it is pleaded as follows:
>
> > 'The Defendant further says that the obtaining of the approvals referred to in paragraph (sic) 3 and 4 hereof were a condition precedent to the exercise of the said option and that by letter dated 16th February, 1983 addressed to M.E.S. Hewitt & Co. Attorneys-at-law acting on behalf of the Plaintiff the Supervisor of Insurance in Barbados indicated that he would not give his approval.'
>
> In passing let me state that there is nothing in the terms of the agreement which could remotely support the contention of the Defendant as set out in paragraph 3 of the amended defence and Counterclaim, namely that the Plaintiff had undertaken to obtain the necessary approvals."

Mr. Daley in his submission on grounds 1 and 3 of the supplemental grounds complained that whether or not the agreement had come into existence was not an issue before the Court. The respondent in his Statement of Claim had affirmed the existence of the contract with all approvals given and in any case having regard to the consent order on the basis of which the trial proceeded this aspect of the matter was no longer a live issue.

I cannot agree with Mr. Daley that the consequence of the order on the basis of which the trial proceeded precluded the learned trial judge from considering the issue whether the option agreement had crystallised into a contract.

In this regard the submission of Mr. Daley in relation to ground 1 of the original grounds of appeal is apposite. He complained that the learned trial judge erred in law in holding that the respondent was entitled to the return of $650,000.00 Trinidad and Tobago dollars as the payment of the sum was under an illegal contract. In relation to this ground he cautioned that it was important to consider and always to bear in mind what was implied in a trial on a point of law which was in effect what the consent order necessitated. He went on to say that implicit in the consent order, the parties must assume the correctness of paragraph 14 of the Statement of Defence. But if Mr. Daley is correct in this latter submission there would be no need for any trial at all since the respondent would be assumed to be admitting the point of law which is stated in paragraph 14. The true view of the law as I understand it, is that where a point of law is raised by a defendant for determination as a preliminary issue, the facts stated in the adversary's pleading are treated for purposes of the legal arguments as correct. If such facts are not clearly identifiable, there must be put before the trial judge an agreed set of facts. In the absence of an agreed set of facts, the trial judge must himself ascertain by reference to the pleadings as a whole, what may fairly be regarded as agreed facts. In the present case, there is no agreed set of facts, nor are the facts in the respondent's claim readily identifiable.. The respondent had initially pleaded the exercise by him of the option and the subsequent performance by him of all that he had to perform under the option.

The appellant's pleading did not confess and avoid the respondent's averment of due exercise of the option, rather it expressly pleaded that the option had not been exercised because it was subject to a condition precedent which to date had not been performed or fulfilled. In paragraphs 2, 5 and 6 the appellant pleaded thus:

"2. The Defendant denies paragraph 2 of the Statement of Claim and says that the said option was 'subject to the approval of the Superintendent of Insurance of Jamaica or such other relevant authorities as may be necessary.'

5. The Defendant will at the trial of this action refer to the aforesaid agreements for their full terms and effect.

6. The Defendant further says that the obtaining of the approvals were a condition precedent to the exercise of the said option and that by letter dated 16th February, 1983 addressed to M.E.S. Hewitt & Co., Attorneys-at-Law acting on behalf of the plaintiff the Supervisor of Insurance in Barbados indicated that he would not give his approval."

The reply of the respondent implicitly admitted that the securing of the approval, inter alia, of the Supervisor of Insurance in Barbados was a condition precedent to the exercise of the option. He merely raised therein, issues as to who had responsibility for securing the necessary approvals as also conduct of the appellant designed to frustrate the securing of such approval which matters are not relevant to this appeal.

The agreement dated 17th August, 1982 on which both parties expressly stated that they would rely at the trial, stated in paragraph 7 that:

"7. This option is subject to the approval of the Superintendent of Insurance in Jamaica or such other relevant authorities as may be necessary."

Thus on the pleadings as a whole the plain and undisputed facts were that firstly the approval necessary under paragraph 7 of the Agreement had not been obtained and secondly this approval as pleaded by the appellant and not disputed by the respondent was a condition precedent to the exercise of the option. This is the composite set of facts in relation to which paragraph 14 of the appellant's defence had to be considered. A plea of illegality

of contract necessarily presupposes the existence of a contract and since the parties each relied on the option agreement of 17th August, 1982, it was vitally necessary for the learned judge to ascertain in limine whether it had crystallised into a contract before pronouncing on its legality or illegality. The learned judge found that the option agreement had not materialized into a contract. In so finding the learned judge was correct both in his approach and in his construction of the agreement of 17th August, 1982.

The option agreement dated 17th August, 1982 was an agreement whereunder the appellant made an irrevocable offer to sell the undertaking in question during a stated period, when this irrevocable offer is accepted by the respondent manifested by the exercise by him of the option, a contract of sale and purchase is thereupon constituted just as if there and then a perfectly ordinary contract of purchase and sale had been constituted without a prior option agreement. If the constitution of the contract of purchase and sale is by the terms of the option agreement expressed to be incapable of materializing in the absence of the necessary approvals, this simply means that no acceptance of the irrevocable offer is legally competent prior to the securing of the aforesaid approvals and therefore no contract comes into existence which is to be considered with reference to the issue of illegality. For this reason the appeal ought to be dismissed.

In the view which I have taken, it is not really necessary for me to consider whether the option if exercised would constitute an illegal contract. However in deference to the submissions made thereon I am prompted to say that in my opinion and having regard to the decision in British and American Trustee and Finance Corporation v. Couper [1891-4] All E.R. (Rep.) 667 the option agreement albeit involving the purchase by the appellant of its shares held by the respondent is not per se illegal since it

964

does not amount to trafficking by the appellant in its shares nor in a reduction in its capital wholly unconnected with the proper conduct of its business as was the case in Trevor v. Whitworth [1886 -90]All E.R. (Rep.) 46. In Trevor v. Whitworth the company had prior to the date of the liquidation purchased considerably more than a fourth of its paid up capital from its shareholders in consideration only of their ceasing to be shareholders. Lord Herschell at p. 50 said thus:

> "What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be trafficking in the shares, and clearly unauthorised. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be among this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the Company's' money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the business to be more profitably or satisfactorily carried on." (Emphasis mine)

From the above excerpt it appears that the purchase by a company of its shares as part of a wider transaction enabling it to carry on the business more profitably as for example by reducing the geographical sphere of its activity, as in the instant case, would not necessarily be ultra vires and illegal and so could be sanctioned by the court. In British and American Trustee and Finance Corporation v. Couper, supra, a company carried on business in the United Kingdom and in America, and a portion of its investments and some of its shareholders were in that country. Differences having arisen between

965

the Directors in England and the American Committee it was agreed that the American shareholders should take over the American investments upon the terms that the company should cease to carry on business in America and that the capital of the company should be reduced by the amount of the shares held in America. A special resolution for carrying out this agreement was passed and confirmed. All the creditors of the company had either been paid or had assented to the agreement.

It was held that the arrangement was not ultra vires the company and should be sanctioned by the court. In the present case it cannot and ought not to be assumed that the appellant in entering into the option agreement intended to act in a manner inconsistent with its Memorandum and or Articles of Association and without the sanction of the court where appropriate. If to the contrary, such was in fact its intention, the pleadings do not establish that the respondent was privy thereto. Consequently in my opinion the appeal would also fail on this ground.

With regard to the question of interest, I am in entire agreement with the reasoning and conclusion of the President whose draft judgment I have had the benefit of reading.