JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 04344

BETWEEN	**SANCTUARY SYSTEMS LIMITED**	**1ST CLAIMANT**
AND	**PALMYRA PROPERTIES LIMITED**	**2ND CLAIMANT**
AND	**DENNIS HUGHES CONSTANZO**	**1ST DEFENDANT**
AND	**JOHNNIE WONG (aka) JOHN WONG**	**2ND DEFENDANT**
AND	**KATHERINE ELAINE CONSTANZO**	**3RD DEFENDANT**
AND	**MANGO MANOR LIMITED**	**4TH DEFENDANT**
AND	**PACIFIC CROWN INT'L CO. LTD.**	**5TH DEFENDANT**
AND	**HUANG CIANG-HE**	**6TH DEFENDANT**

Mrs. Sandra Minott-Phillips, Mr. Gavin Goffe, Ms. Ky-Ann Lee, and Mrs. Alexis Robinson instructed by Myers, Fletcher & Gordon, Attorneys-at-Law for the Claimants.
Mr. Maurice Manning and Ms. Anna Harry instructed by Nunes Scholefield De Leon & Co. for the 1st and 4th Defendants.

Heard : 15th, 16th, April, 11th May, 11th June, 19th November 2010 and 13th January 2011.

SUMMARY JUDGMENT- WHETHER NOTICE SUFFICIENT-BRIBERY-SECRET BENEFIT-BREACH OF FIDUCIARY DUTY

Mangatal J:

1. The Claimants in this case are making a number of claims and seeking different types of relief which vary from Defendant to Defendant. The claim is for declarations, accounting, tracing, restitution, rescission, money had and received, damages and monetary compensation in respect of breaches of trust, confidence, fiduciary, statutory, contractual and common law duties owed to the Claimants, bribes, conspiracy, deceit,

conspiracy to defraud, misrepresentation and unjust enrichment. The claims arise out of the development of the Palmyra Resort & Spa ("the Palmyra") in Montego Bay, St. James.

2. By a Notice of Application for Court Orders dated January 7, 2010, the Claimants seek an order for **Summary Judgment against the 1st Defendant "Mr. Constanzo" and the 4th Defendant "MML"** as follows:

    1. *Summary judgment is granted in favour of the Claimants as against the 1st and 4th Defendants on the Claimants' claim to a proprietary interest in the following money and property held by the 1st and 4th Defendants on their account and as established by the statements and/or admissions of the 1st and /or 4th Defendants and by way of equitable tracing, being:*

        (a) The sum of US $ 2,270,000 received by the 1st Defendant (whilst a fiduciary of the Claimants) being an undisclosed loan from the 2nd Defendant extended via the 5th Defendant;

        (b) The property registered at Volume 1392 Folio 140 of the Register Book of Titles being property acquired in the name of the 4th Defendant at the instance of the 1st, with money borrowed by the 1st Defendant from the Claimants and "repaid" with money the 4th Defendant derived from "kickbacks" to the 1st Defendant out of monies paid by the 5th Defendant, which the 4th Defendant, as constructive trustee of the property for the Claimants, is hereby ordered to transfer forthwith to the Claimants or their nominee subject to the interest of the registered mortgagee, National Commercial Bank Jamaica Limited under mortgage #1555389 or, if sold under the power of sale, the subject of the transfer will be the net proceeds of sale in the hands of the mortgagee, said net proceeds of sale to be paid by the mortgagee directly to the Claimants in lieu of the transfer of the property. In the event the 4th Defendant fails to execute the transfer of real property

mentioned in this paragraph within seven(7) days of the date hereof, the Registrar of the Supreme Court shall execute the transfer of the real property to the Claimants or their nominee.

(c) All monies held in account number 23-6F05-B at TD Waterhouse, Inc. in the name of the 1st Defendant have been established by equitable tracing to be the property of the Claimants and it is hereby declared that the Claimants are beneficially entitled and are the owners of all sums in that account.

2. TD Waterhouse Inc. as the custodian of the funds in account number 23-6F05-B now hereby declared to be the property of the Claimants, is hereby authorized and directed to transfer all funds from the said account at TD Waterhouse, Inc. to such account as may be specified by the Claimants solicitors in the Canadian proceedings supplemental to this action commenced in the Ontario Superior Court of Justice (Commercial List), being court file No. 09-8337-00CI.

3. Costs of this application to the Claimants for more than one attorney-at-Law to be paid by the 1st and 4th Defendants to be taxed if not agreed.

4. Special Costs Certificate granted.

3. The grounds upon which the Claimants seek summary judgment are stated to be as follows:

    1. *The 1st and 4th Defendants have no real prospect of successfully defending these issues.*
    2. *The 1st Defendant admits (and it is therefore not an issue) that, when employed, he understood that his existing contractual and fiduciary duties owed to PPL would be owed to both PPL and SSL once SSL was incorporated.*

3. *The 1st Defendant states that he recommended the 2nd Defendant to the Claimants to assist with the selection of a Chinese contractor for the Palmyra project.*
4. *Those selection services were in fact provided by the 5th Defendant (through the person of the 2nd Defendant)for a fee of US $5.55 M (paid to the 5th Defendant by the 2nd Claimant on Nov. 16, 2006) which company, in turn, "kicked back" US$ 2.1.M to the 1st Defendant 4 days later on Nov. 20 , 2008*(2006?).
5. *The 1st Defendant states in his Defence that he received a loan from the 2nd Defendant in the sum of US $2,270,000 at 6% per annum.*
6. *The 1st defendant does not aver that he received the informed consent of the Claimants to his receipt of that loan. He instead testifies that this fact was disclosed to the Claimants' Chairman, Mr. Robert Trotta, only in response to queries from Mr. Trotta, and that he (Constanzo) lied about the amount of the loan. He also states that this money went into the construction of the house on the land owned by the 4th Defendant which he controls.*
7. *All the above evidences a bribe/secret payment made to the Claimants' fiduciary, Mr. Dennis Constanzo, of which receipt of US$2.27M is admitted by the 1st Defendant.*

4. I must at the outset express my gratitude to all Counsel, on both sides, for the extraordinary level of preparation and the thoroughness and lucidity of their submissions.

Brief Facts

5. The Claimants, "SSL" and "PPL" respectively, are the developers of the Palmyra.
6. Mr. Constanzo was the President of PPL and a director of SSL at the material time. He had responsibility for overseeing all aspects of the

Claimants' activities in Jamaica, including the construction, sales and marketing of the Palmyra.

7. MML is a company registered in the British Virgin Islands and is the registered owner of the parcel of land registered at Volume 1392 Folio 140 of the Register Book of Titles upon which land is located Mango Manor Villa, where Mr. Constanzo resides when in Jamaica. Mr. Constanzo is the sole owner of MML.
8. The 2nd Defendant "Mr. Wong" was appointed the Claimants' consultant/agent to find and select a Chinese company to act as general contractor for the Palmyra. A company known as Shanghai COSCO was identified and recommended by both Mr. Wong and Mr. Constanzo and a contract for the construction of the resort was entered into. Mr. Wong, through the 5th Defendant "PCI", was paid US $5.55 M by the Claimants, through Shanghai Cosco for his assistance in the form of a finder's fee.

SSL and PPL 's Claim

9. In their written submissions, the Claimants' basic case is stated as being that Mr. Constanzo owed them fiduciary duties. They contend that Mr. Constanzo breached those duties by fraudulently persuading the Claimants to appoint Mr. Wong as a consultant and agent to provide the service of finding a suitable general contractor for the Palmyra, while concealing the fact that he had a previous business relationship with Mr. Wong, misrepresenting the identity of Shanghai COSCO, and conspiring to take secret payments to the detriment of the Claimants.

Mr. Constanzo and MML's Defence

10. Mr. Manning submitted that Mr. Constanzo has by way of his Defence filed on October 28, 2009, and by his 4th Affidavit filed on October 6 2009, disputed the several allegations of conspiracy, collusion and fraud and amongst other matters, has in particular denied that he was in breach of any fiduciary duties to the Claimants. Mr. Constanzo has indicated that :

a. Some of the sums he received from Mr. Wong that the Claimants complain about were loans.
b. Mr. Constanzo and Mr. Wong explored and/or participated in ventures other than The Palmyra out of a spirit of entrepreneurship, and Robert Trotta was made aware of these ventures and of funds Mr. Constanzo received from Mr. Wong in respect of these ventures. Further, Mr Trotta was invited to participate and actually did contemplate participating in a number of these ventures.
c. Mr. Constanzo actively ensured that Shanghai COSCO only performed those works which it had contractually undertaken to do, and even awarded some of those works which Shanghai COSCO had contractually undertaken to perform to other contractors where that course of action was in the best interests of the Claimants;

SUMMARY JUDGMENT PRINCIPLES

11. Rule 15.2 (b) of our Civil Procedure Rules "the CPR", which provides the test for determining whether a Court ought to enter summary judgment against a Defendant states that "The Court may give summary judgment on the claim or on a particular issue if it considers that the defendant has no real prospect of successfully defending the claim or issue."
12. The meaning of "real prospect of success" was considered by the House of Lords in **Swain v. Hillman** [2001] 1 All E.R. 91, where, at page 92(j), Lord Woolf MR indicated:

> *The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects*

of success or,…..,, they direct the Court to the need to see whether there is a "realistic" as opposed to "fanciful" prospect of success.

13. The approach propounded in **Swain v. Hillman**, has been adopted and applied in a number of local cases-see for example **Supreme Court Civil Appeal No.02/05 Gordon Stewart, Andrew Reid and Bay Roc Ltd. v. Merrick(Herman) Samuels**, delivered November 18, 2005. In my judgment, a realistic or real "prospect" of success means a real chance of success. A real "prospect" of success must also be distinguished from a real "likelihood" of success.

14. Although Rule 15. 2 (b) of the C.P.R. is not explicit on the burden of proof, Mrs. Minott-Phillips and Mr. Manning are in agreement that the Claimant must file Affidavit evidence and put its material before the Court, and hence has the overall burden of proving that there are grounds to believe that the Defendants have no real prospect of success. Having done so, i.e. provided the material it relies upon, that puts the onus on the Defendants, and they become subject to an evidential burden, of proving some real prospect of success. Sitting in the Commercial Court, Moore-Bick J. expressed similar views at paragraph 5 of **International Fund for Agricultural Development v. Jazeri** [2001] EWHC 513. See also Stuart Sime's well-known work A Practical Approach To Civil Procedure, 5th Edition, page 216, paragraph 19.6.1.

THE CLAIMANTS' ARGUMENTS

15. The Claimants' Attorneys refer to the fact that in the Defence filed on behalf of Mr. Constanzo there is no pleading that the benefit of the alleged loan was not obtained secretly.

16. It is contended that these Defendants have no real prospect of successfully defending the Claimants' claim for breach of fiduciary duty/ knowing receipt and that the ultimate result based on the evidence before the Court would be judgment for the Claimants. They further submit that, indeed,

their application for summary judgment is based upon Mr. Constanzo's own admissions in his Affidavits and in the Defence filed on behalf of himself and MML.

17. The Claimants' assert that Mr. Constanzo has made the following admissions:

    a. He owed both Claimants fiduciary duties;
    b. He recommended Mr. Wong (a person who, unknown to the Claimants, he was in several business relationships with prior to his engagement with the Claimants) to the Claimants to assist with the selection of a Chinese contractor for the Palmyra project;
    c. Those selection services were in fact provided by the 5th Defendant "PCI" (through the person of Mr. Wong) for a fee of US $ 5.55 M (paid to PCI by Shanghai COSCO through the Claimants on November 15, 2006);
    d. He received over US $ 2.44 M in secret cash payments from Mr. Wong;
    e. He failed to disclose those payments to the Claimants prior to receipt and failed to obtain their prior informed consent to his receipt of them;
    f. That secret cash was used to acquire and construct a villa called Mango Manor which is held in the name of his company, MML;
    g. He is the sole owner of MML.

18. It was further submitted that these factual admissions amount in law to Mr. Constanzo admitting that he breached the fiduciary duties he owed the Claimants. Those duties included that he was under an obligation not

to receive undisclosed benefits by virtue of his position and, in particular, to not put himself in a position where his own interests conflicted with the Claimants' by, for example, receiving benefits from such parties as Mr. Wong and PCI who were in a contractual relationship with the Claimants.

19. The Claimants' attorneys referred to the decision of the English High Court in **Daraydan Holdings Ltd. v. Solland International** [2005] 4 All E.R. 73 as being an instructive authority on the issue of the liability of a fiduciary to his principal in respect of bribes and secret profits. In that case, after a trial in which the Defendants led no case, the trial judge was left to decide whether the Claimants had proved their claim against the fiduciary.

20. Lawrence Collins J. stated at paragraphs [51],[52][53] and [54]:

> [51] An agent or other fiduciary who makes a secret profit is accountable to his or her principal as cestui que trust……
>
> *[52]An agent should not put himself in a position where his duty and his interest may conflict, and if bribes are taken by an agent, the principal is deprived of the disinterested advice of the agent, to which the principal is entitled. Any surreptitious dealing between one principal to a transaction and the agent of the other is a fraud on the other principal…*
>
> *[53] In proceedings against the payer of the bribe there is no need for the principal to prove (a) that the payer of the bribe acted with a corrupt motive; (b)that the agent's mind was actually affected by the bribe;(c) that the payer knew or suspected that the agent would conceal the payment from the principal; (d) that the principal suffered any loss or that the transaction was in some way unfair; the law is intended to act as a deterrent against the giving of bribes, and it will be assumed that the true price of any goods bought by the principal was increased by at least the amount of the bribe, but any loss beyond the amount of the bribe itself must be proved;(e) that the bribe was given specifically in connection with*

> *a particular contract, since a bribe may also be given to an agent to influence his mind in favour of the payer generally (eg. In connection with the granting of future contracts).*
>
> *[54]The agent and the third party are jointly and severally liable to account for the bribe, and each may also be liable in damages to the principal for fraud or deceit or conspiracy to injure by unlawful means. Consequently, the agent and the maker of the payment are jointly and severally liable to the principal (1) to account for the amount of the bribe as money had and received and (2) for damages for any actual loss…*

21. Further, it was submitted that the evidence before the Court shows that PCI, after receiving the US $5.55M on November 16, 2006, in turn "kicked-back" US$2.1M to Mr. Constanzo's HSBC account and US$170,000 to MML's account 4 days later on November 20,2006.
22. The Claimants submit that these undisputed facts illustrate bribery and that where a fiduciary acts in breach of his duties in this manner the principal is entitled to recover the full amount of the bribes so paid to the fiduciary, including all increases in such sum. They submit that the secret benefits in this case consist of bribes because each and every one of them was paid to Mr. Constanzo by Mr. Wong as an inducement by them to betray the Claimants' trust.
23. The Claimants refer to the Privy Council decision in **Attorney General for Hong Kong v. Reid** [1994] 1 All E.R. 1 at page 5[e] where Lord Templeman stated:

> *When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value*

of the bribe because he is not allowed by any means to make a profit out of a breach of duty.

24. They submit that even if Mr. Constanzo can prove that the monies received from PCI amounted to a loan, he would still be liable to account for them to the Claimants as secret profits. The Claimants aver that the sum which Mr. Constanzo secretly received was US $3.548 Million.

25. The Claimants' further submission is that Mr. Constanzo's knowledge is attributable to MML, which beneficially received a portion of these funds as a result of Mr. Constanzo's breaches of his fiduciary duties to the Claimants and thereby had knowledge of the traceable nature of the funds received, which knowledge makes it unconscionable for it to retain the benefit of the receipt. Reference was made to the decision of Nourse LJ in **Bank of Credit and Commerce International (Overseas) Ltd. v. Akindele** [2001] Ch 437 at 448. 44. **Akindele** and **Belmont Finance Corpn Ltd. v. Williams Furniture Ltd. (No.2)** [1980] 1 All E.R. 393, are clear authorities for the proposition that dishonesty is not a necessary ingredient of liability in knowing receipt.

26. With regards to the purchase of Mango Manor Villa, the Claimants state that the land where Mango Manor Villa was constructed was purchased in October 2006. To fund that purchase, the Claimants (through a group company Mayfair Overseas Limited) loaned Mr. Constanzo the sum of US$ 225,000 in August 2006 which he repaid on January 2 2007,from his HSBC account in Hong Kong. These funds they say came from PCI's account with Chinatrust bank in Hong Kong.(See paragraph 54 of the Claimants' original submissions and the documents and exhibits there referred to). The Claimants say that it is abundantly clear that Mr. Constanzo repaid the $225,000 from monies that he received from PCI. They aver that Mr. Constanzo did not disclose that fact to the Claimants either beforehand, or at the time. They submit that they are therefore entitled to trace this sum and any increases in its value into Mango Manor Villa.

27. The Claimants therefore submit that they are entitled to all of the reliefs sought in their application.

Defendants' Arguments

28. Mr. Manning raises as part of the 1st and 4th Defendants response to the substantive application, a matter which I had raised with Mrs. Minott-Phillips, and which Mr. Manning had argued in a preliminary way before I embarked upon the hearing of the application. This had to do with the question of whether the application complied with Rule 15.4(4) of the CPR which requires that a notice of application for summary judgment must identify the issues which it is proposed that the court should deal with at the hearing.

29. The contention of Mrs. Minott-Phillips was that the claim on which summary judgment is sought and the issues relating to that claim are all contained in numbered paragraphs 1 and 2 of the application. It was also her alternative submission that the application for summary judgment here is concerned with "a claim" which is a term that is used disjunctively from "a particular issue" in CPR Rule 15.1. She also indicated that the Claimants are not proceeding in this application on the basis of conspiracy, which would involve allegations and issues to do with the other Defendants named in the Law Suit. Rather, the claim and application here is proceeding strictly on the basis of breach of fiduciary duty.

30. I did not rule on the matter as a preliminary point, because frankly, I was of the view that I did not have sufficient background information to make that decision in respect of what seems to be, as the Claimants' Attorneys themselves describe it in their submissions, a (fairly) complex case . It therefore seems quite appropriate for this matter to be treated, as Mr. Manning has done, as part of the 1st and 4th Defendants' response to the substantive application. He submits that the Court will still have to determine whether the application satisfies the Rule and the authorities and he submits

that this is one basis upon which the Court should dismiss the application, that is, that the issues which Mrs. Minott-Phillips argues are so clear, are not and are not compliant with the law. I agree that this is the first point that I will have to decide. He cited our Court of Appeal's decision in **Margie Geddes v. Messrs. McDonald Millingen** S.C.C.A. No. 44/2009 where at paragraph [18] Harrison J.A. stated:

> *…It is abundantly clear that the purpose of the Rules is to allow the Court and the party meeting the application to have adequate notice of the issues raised by the application. This is not only desirable but also necessary, as the Court has to consider the appropriateness of the application before embarking on the hearing.*

31. In the **Geddes** case, Harrison J.A. rejected an argument that the issues could be gleaned from the affidavit evidence as he indicated that the affidavit evidence did not state with the clarity demanded of the Rules any of the issues which arose for the consideration of the Court. The learned Justice of Appeal also held that the case was not one in which the judge at first instance could have exercised the powers under Rule 26.9 of the C.P.R. which pertains to the general powers of the Court to rectify matters where there has been a procedural error. In my own recent unreported decision in Claim No. 2007 HCV 03483, **Adolph Brown v. West Indies Alliance Insurance Company Limited** , delivered 4th June 2010, at paragraphs 16 and 17, where I held that the notice sufficiently stated the issues, I indicated that Counsel for the Defendant-Applicant referred me to the actual Notice of Application which had been filed in the **Geddes** case, and that Notice merely stated "The application is made pursuant to Part 15 of the C.P.R." . In my judgment, there is no need for the word "issues" to actually be stated in the Notice; it is sufficient if the issues, or claim, are in fact clearly delineated.

32. Mr. Manning argued that a point that relates to the question of whether the issues have been inadequately raised, is that the Claimants are impliedly saying that other parties are involved in the bribery. Therefore the Claimants

must of necessity rely upon interactions amongst the parties that they are proceeding against as well as the other Defendants against whom they are not seeking summary judgment at this time. He submitted further, that the reference by the Claimants to bribery imports the allegation of conspiracy and that the Claimants have in this summary judgment application trespassed upon other issues which relate to the other parties who have been sued in this Law Suit and who are not parties to the present application. He submitted that the Claimants are impliedly asking me to rule upon the issues of conspiracy and bribery allegations, "since one could hardly have a "kickback" to one's self". He submitted that the justice of the case requires, not only that the 1st and 4th Defendants be afforded a trial, but also that all of the other Defendants should have the opportunity of presenting their respective cases at trial.

33. As stated in **Swain v. Hillman** , the summary process is not meant to dispense with the need for a trial where there are issues which are capable of being investigated at trial. Mr. Manning submits that the authorities make it clear that cases which involve allegations of breach of fiduciary duties or bribe or secret profit are fact-sensitive and require the trial process to determine issues of fact and credibility, and he cited **Foster Bryant Surveying Ltd. v. Bryant and anor** [2007] EWCA Civ 200, paragraph 76.
34. The Defendants claim that there are facts in dispute and that cross-examination is required.
35. Mr. Manning submitted that the Court cannot shut its eyes to Mr. Constanzo's explanation that he obtained a loan from Mr. Wong. He submits that it is not within the purview of the Court to seek to try this issue of fact at this stage and therefore there is no obligation on Mr. Constanzo to lead evidence at this stage to prove this assertion. In response to a question from the Court in relation to this alleged loan, Mr. Manning argued that his client had put sufficient evidence before the Court in relation to this issue, and

although it is for the Defendants to show the real prospect of succeeding at trial, this does not mean that they have to put before the Court or deploy all that they will be putting forward at trial.

36. The Claimants will need, it is contended, to establish not only that the loan was a consequence of Mr. Constanzo's employment and in conflict with his duties, but also that Mr. Constanzo has no equity in the real estate registered at Volume 1392 Folio 140 allegedly acquired by the alleged improper payment. The Claimants have pleaded that they loaned US $225,000.00 to Mr. Constanzo to assist in acquiring the property comprised in Certificate of Title registered at Volume 1392 Folio 140 of the Register Book of Titles. That sum was repaid from, Mr. Mannning submits, amongst other sources, Mr. Constanzo's bonus for 2006. There is no pleaded case that any of the money paid to Mr. Constanzo was used to acquire the land in question(which is a different transaction from the construction of the villa).

37. Mr. Manning further submits that the Claimants admit that they gave Mr. Constanzo a loan of US$75,000 to finish construction and that this was repaid through salary deduction. If therefore, the Claimants were to satisfy the Court that a secret profit was used to benefit MML, it does not automatically transpire that the entire property becomes a trust asset.

38. Mr. Manning relies upon the decision in **Datafind Services Ltd. v. Sugden** [2007] EWHC 3135 as an authority which indicates that in order for summary judgment to be granted in respect of only some aspects of a case, there must be some useful point in doing so. See also page 546 h-j of **Three Rivers** and **Blackstone's Civil Practice 2002**, Paragraph 34.17. If the grant of summary judgment will not advance the litigation very much, particularly where there are other issues which require a trial to be determined, summary judgment ought not to be granted. Further, where there are a multiplicity of issues raised by the Claimant, the trial is the appropriate place to deal with all of them.

39. Mr. Constanzo contends that he acted reasonably on the Claimants' behalf in all his dealings with Mr. Wong, PCI and the 6th Defendant. Mr. Manning submits that this raises a statutory defence under section 389 of the Companies Act, in which case the court must consider whether Mr. Constanzo ought to be excused for any breach of duty to the Claimants. The reasonableness or otherwise of Mr. Constanzo's actions must be assessed based on the prevailing circumstances at the time the actions were done, and Mr. Manning submits that a trial is necessary for those circumstances to be fully elucidated.

Some Authorities cited by the Claimants

40. In **Attorney General v. Reid** a bribe was defined as "a gift accepted by a fiduciary as an inducement to him to betray his trust."

41. At pages 10-11, the House of Lords cite with approval **Boardman v. Phipps** [1966] 3 All E.R.721, as a demonstration of :

> *The strictness with which equity regards the conduct of a fiduciary and the extent to which equity is willing to impose a constructive trust on property obtained by a fiduciary by virtue of his office…a fiduciary acting honestly and in good faith and making a profit which his principal could not make for himself becomes a constructive trustee of that profit…*
>
> In **Boardman** the fiduciary had acted in good faith throughout. **Boardman** applied **Regal (Hastings), Ltd.v.Gulliver** [1942] 1All E.R. 378.

42. In **PMC Holdings v. Smith, Lee and International Specialty Chemicals** (QBD) (LTL 23/4/2002), the Court awarded summary judgment in relation to a claim for breach of fiduciary duty against an employee. The employee had become a shareholder and director of another company and had diverted contracts away from the claimant. The court found that he did owe fiduciary duties to the claimant, and that he had breached those duties. At paragraphs

15, 17, Burton J. sitting in the Queen's Bench Division of the English High Court, delivered his judgment as follows :

> *15. Making the utmost allowance for the evidence of the Defendant, at this Part 24 stage, the following is quite clearly established:*
>
> *…..)*
>
> *3. iii) Even on his latest account in his affidavit, given his positive obligation to disclose and not to mislead, a situation in which he asserts that Mr. Lieberman did not "specifically" know of his involvement or that his involvement was not "disclosed specifically" or that Mr. Lieberman "nominally might not have known", or even that he had some involvement the nature, and indeed in his case the beneficial nature, of which was not disclosed, would have been wholly insufficient.*
>
> ……

43. In **Ostrich Farming Corp Ltd. v. Wallstreet LLC & Others** [2009] EWHC 2501 (Ch), the court awarded summary judgment in relation to directors who received secret commissions. At paragraphs 31, and 34, the learned judge in the English High Court's Chancery Division stated:

> *31. I have already indicated Mr. Walker's and Mr. Ketchell's lame explanation of the commission payments that led to them, in addition to their ordinary remuneration, obtaining substantial payments from Wallstreet into their off-shore accounts. As I have indicated, I cannot see such payments in any other light than as a serious breach of fiduciary duty. Whatever else I did with this summary judgment application I should have been very reluctant to have to send to trial such clear breaches of fiduciary duty. At the very least it seemed to me that judgment in respect of the specific credits to the off-shore accounts out of the monies paid by the plaintiff company to Wallstreet for the ostriches should issue, and issue against all three defendants as having participated in and facilitated that breach….The…application is predicated not upon the pretty obvious case of breach of fiduciary duty in diverting the £1,139,810*

away from the plaintiff company but upon the much more difficult assertion in an application for summary judgment that the entire interposition of Wallstreet was a sham. However, it will be apparent from this judgment so far that, difficult or not, and bold though this application may have been, I have been totally unsatisfied that there is a reasonable or likely defence to the allegation concerning the interposition of Wallstreet, and I think it would be quite wrong to put the plaintiff company to the no doubt considerable cost it would have to incur in order to take this claim to trial.

….

34. This is quite a story and these defendants' hope no doubt is that it is so complex and that there are so many uncertainties and conflicts that it ought to go for trial. That would certainly be the easiest course for the Court. It is always a matter for concern when the Court rejects the evidence of defendants on untested affidavits. But I think it was incumbent upon the defendants to do much more than they have done to satisfy me that there is really a triable question. Between the three of them they know precisely what happened and what the commercial justification for the interposition of Wallstreet was. If it was all above board I would have expected in all this time to have a simple straightforward account of what transpired and one that was offered when they were first confronted with the allegations of wrongdoing.

Some of the authorities cited by the Defendants

44. Mr. Manning in his submissions says that the Claimants contend that their application for summary judgment against Mr. Constanzo and MML is simple, and "open and shut". He submitted that I should be guided by "the cautionary sentiments" expressed in **Bolton Pharmaceutical Company Limited v. Doncaster Pharmaceuticals Group Ltd.** [2006] EWCA 661 :

Summary judgment …..

1. *Although the test can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment … than in trying the case in its entirety….*

. The court has to be alert to the defendant, who seeks to avoid summary judgment by making a case look more complicated or difficult than it really is.

The court also has to guard against the cocky claimant, who, having decided to go for a summary judgment, confidently presents the factual and legal issues as simpler and easier than they really are and urges the court to be "efficient" ie. produce a rapid result in the claimant's favour.

In handling all applications for summary judgment the court's duty is to keep considerations of procedural justice in proper perspective. Appropriate procedures must be used for the disposal of cases. Otherwise there is a serious risk of injustice….

Take this case. Although it was described by the claimant's counsel as an open and shut case in which "a smoke screen" defence was being raised, it was rightly accepted in the court below that the evidence "looks quite lengthy". It certainly is lengthy for [an application of this nature].The papers look to me more like a set of trial bundles rather than interlocutory application bundles.

45. After I had reserved my judgment, I asked the parties to come back and make further submissions, in particular in relation to the law of bribes and as to the distinctions, if any, between secret benefits, commissions, and bribes. I asked the parties to deal with these matters specifically in the context of the statement by Lord Templeman at page 4d of **AG for Hong Kong v. Reid** that " A fiduciary is not always accountable for a secret benefit but is undoubtedly accountable for a secret benefit which consists of a bribe". I also asked them

to comment on the contents of paragraphs 105-107 of Halsbury's Laws of England, Volume 1(2), 4th Edition Reissue, referred to by the Editors of the All England Reports, in **AG for Hong Kong v. Reid**, particularly paragraph 107, and the cases referred to in the relevant paragraph. This in the context of Mr. Manning's submission that the Claimants cannot in this summary judgment application establish a case of bribery without trespassing on the allegation of conspiracy and the allegations being inextricably linked to the matters alleged against the parties who are not before the Court. In particular I asked them to comment about the concept of an "irrebutable presumption" discussed in the paragraph and some of the cases there cited.

46. Paragraph 107 states:

> ***107. Bribe or Secret commission.***
>
> *A bribe or secret commission is a profit or benefit received by the agent from the third person with whom the agent is dealing on his principal's behalf without the knowledge or consent of the principal, or which was not contemplated by the principal at the creation of the agency. The receipt of a bribe,* ***whether in money or otherwise,*** *is a breach of duty.* ***The motive of the donor is immaterial since there is an irrebutable presumption that the gift was made with the intention that the agent should be influenced by it, and the court will not inquire whether the agent was influenced by the bribe in a way prejudicial to his principal's interest. It is immaterial that the principal's interest is not involved.*** (Emphasis mine).

47. It was Mr. Goffe's submission on behalf of the Claimants that secret commissions and bribes are the same in the civil law, although not necessarily so in the criminal law.

48. In **Hovenden & Sons v. Millhoff** (1900) 83 LT 41, CA, Romer L.J. sitting in the English Court of Appeal, at page 43, describes what a bribe is for the purposes of the civil law:

The courts of law of this country have always strongly condemned and, when they could, punished the bribing of agents, and have taken a strong view as to what constitutes a bribe. I believe the mercantile community as a whole appreciate and approve of the court's views on the subject. But some persons undoubtedly hold laxer views. Not that these persons like the ugly word "bribe" or would excuse the giving of a bribe if that word be used, but they differ from the courts in their view as to what constitutes a bribe. It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent-that is to say, without the knowledge and consent of the principal-then the gift is a bribe in the view of the law. If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the court will presume in favour of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable. Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe.

Hovenden, although of some vintage, is referred to in the more recent cases of **Daraydan** and in the **AG for Hong Kong** .

49. Reference was also made to the decision of Slade J. in **Industries & General**

Mortgage Co. Ltd. v. Lewis [1949] 2 All E.R. 573. At page 575 F, His Lordship stated:

Sometimes the words "secret commission" are used, sometimes 'surreptitious payment", and sometimes "bribe". For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i)that the person making the payment makes it to the agent of the other person with whom he is dealing;(ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing ; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent. Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes. I emphasize " civil purposes" because the Prevention of Corruption Act, 1906, s.1.(1), introduces the adverb "corruptly", and, except in the cases provided for in s.2 of the amending Act of 1916, the onus is put on the prosecution of showing that the payment has been made corruptly. I hold that proof of corruptness or corrupt motive is unnecessary in a civil action, and my authority is the decision of the Court of Appeal in Hovenden and Sons v.Millhoff . See also page 578.

50. Mr. Goffe makes the soundly reasoned point that both the inference of motive and the presumption of influence are linked so that for example, the briber cannot be heard to say, although I had the intention to influence, it did not in fact have that effect. Correspondingly the bribee cannot say, even though the briber may have had that intention, it did not have any influential effect upon him. This is because to allow such assertions to be entertained would defeat the deterring purpose of the law in relation to bribes, and thus there are also public policy considerations. Reference was also made to **In re a Debtor** [1927] 2 Ch. 367, a decision of the English Court of Appeal. At page 373, Master of the Rolls, Lord Hanworth stated:

> ……. *Mr. Wallington has suggested that there is nothing to show that the commission paid by the lender to Latter was not paid as a matter of*

> *generosity, or that it altered, to the debtor's disadvantage, the terms of the loan, or induced Latter to act against the interests of his principal, the debtor, and that such a commission was not fraudulent unless paid with the object of inducing Latter to act in the interest of the lender only; but it seems to me, following* ***Shipway v. Broadwood****, that if a sum is offered by the money –lender to the borrower's agent, it can only be accepted with the knowledge and assent of the borrower.*

Then at page 376, Scrutton L.J. stated:

> *….. It seems to me a dangerous thing to say : "Although you did not know it, I was also agent for the other party."*

51. Mr. Goffe went on to submit that if the Court should at any time allow the donor of the gift to put forward evidence of his or her intention, which evidence the principal or "victim" would never be able to contradict, its firm stance of deterring the practice of bribery would be undermined.

52. Mr. Goffe argued, on the authority of **Hovenden**, that if the Court is not going to enquire into the motive of the donor, for the public policy reasons already discussed, then covered under that principle would be any alleged conditions relating to a payment of the bribe. So therefore a condition that the bribe is repayable would be such a condition. He further submitted that if the Court were to relax the rule about not enquiring into the donor's intention, that would entirely undermine the deterrent aspects by pointing fiduciaries in the direction of labeling their transactions in a particular way to avoid what the Court already would have deemed a corrupt payment. A loan is first, he continued, a payment, with a condition for repayment. Once the payment occurs, even though there may be this condition for repayment, all the criteria set out in the authorities, including the relationship, the secrecy, the fact of the payment itself, then all the conditions are satisfied.

53. Mr. Manning responded in his usual well-articulated and thorough way. He

submitted that the **Hovenden** decision arose in circumstances where the payment was received by the agent acting in the course of his position. He was paid a commission and that was not in dispute in **Hovenden**. On the contrary in the instant case, Mr. Constanzo has raised issues; such as that the payment arose by virtue of the pre-existing friendship and business relationship between Mr. Wong and Mr. Constanzo and was outside of the agency with the Claimants. Mr. Manning further submitted that when in **Hovenden** Romer L.J. says the words "once a bribe is established", it must mean that the money is received qua agent, by virtue of that position. If one looks at the learning from **Hovenden** in that way, he submits, then it does not fall afoul of the authority in **AG for Hong Kong**.

54. **Reading v. AG** [1951] 1All E.R. 617, a decision of the House of Lords, is authority for the proposition that the irrebutable presumption applies irrespective of the fact that the principal's interest is not involved. In that case the appellant was a sergeant in the British army who received large sums of money from a civilian for escorting the civilian's lorry through an area without being inspected by the civilian police. It was held that the appellant was using his position as sergeant in the army, and the uniform to which his rank entitled him, to obtain the money which he received, and therefore the Crown, his Master, was entitled to that money. Mr. Manning submitted that this case demonstrates that the gain or profit must be achieved by means of the relationship of agency. One still has to establish that the money received is a bribe. He submitted that none of the cases are saying that if you are in receipt of a benefit, you cannot be heard to say that it is not referable to the position qua agent. He submitted that Mr. Wong would also be entitled to respond that when he made the payment it was not in respect of the employer-employee relationship, that it was an unconnected, innocent transaction which took place.

RESOLUTION OF THE ISSUES

55. **WHETHER NOTICE ADEQUATE-** In my view, the Notice and grounds set out in this application sufficiently identify the matters which the Court is being asked to adjudicate upon. This is because numbered paragraphs 1 and 2 in the application along with the grounds clearly identify that the issues which the court is being asked to deal with are the allegations of bribe or a secret payment received by Mr. Constanzo in breach of his fiduciary duties. I also agree with the Claimants' submissions that alternatively, this application is concerned with "a claim" against the 1st Defendant in respect of bribe and breach of fiduciary duty, and of knowing receipt against the 4th Defendant. This alternative aspect of a summary judgment application being concerned with a claim, as opposed to issues, does not appear to have arisen for consideration in **Geddes**. As evidenced by the decisions in **Federal Republic of Nigeria** and **The Ostrich Farming Corp** , courts can and do on similarly worded provisions, grant summary judgment in respect of select, as opposed to all, claims, against select, as opposed to all, parties. In my view, there is nothing in the way in which the Notice spells out the issues or claim that could take, or did take, the Defendants here by surprise.

BRIBE

56. A crucial admission in this case is Mr. Constanzo's admission that he owed fiduciary duties to both Claimants. In my judgment, the Claimants' Attorneys are correct in arguing that by accepting monies from Mr. Wong/PCI without first securing the Claimants' fully informed consent, Mr. Constanzo clearly breached his fiduciary duties owed to the Claimants. This is because any surreptitious dealing between one principal to a transaction and the agent of the other is a fraud on the other principal. The law assumes that any profit or benefit or gift received by the agent from the third person with whom the agent is dealing on his principal's behalf without the knowledge or consent of the principal, or which was not contemplated by the principal at the creation

of the agency is a bribe -See **Daraydan** -paragraph 53 and **Halsbury's Laws of England, 4th Edition, Re-Issue Volume 1(2), paragraphs 105-108**, This is because "the law is intended to act as a deterrent against the giving of bribes, and it will be assumed that the true price of any goods bought by the principal was increased by at least the amount of the bribe"-**Daraydan**. Although a fiduciary is not always accountable for a secret benefit(for example when, in certain circumstances, not derived from a third party), he is always accountable for a secret benefit which consists of a bribe. Whenever a secret commission or profit or benefit, whether in money or otherwise, is received by the agent from the third person without the knowledge or consent of the principal, the law appears to deem such profit, benefit or commission to be a bribe for the purposes of the civil law and makes the irrebutable presumptions discussed above.

57. Indeed, in **Daraydan**, it is stated that there is no need to prove that the bribe was given specifically in connection with a particular contract. It is the Claimants' case that Mr. Constanzo received all these monies dishonestly and corruptly as bribes for procuring the Claimants to enter into contracts with PCI and/or Shanghai Cosco. There is evidence upon which I find that the 1st and 4th Defendants have no real prospect of succeeding in their denial that the payments of U.S.$2.27M were bribes and in proving that there was any bona fide and genuine loan discussed below.

58. Mr. Constanzo has admitted to receiving over US $2.27 M from Mr. Wong without first disclosing this to the Claimants in paragraph 69 of his 4th Affidavit. He kept the alleged loan secret until specifically asked about the funding for the building of Mango Manor Villa. He stated:

> *I admit that I received over US $2.27 million from John Wong as a participating loan towards the construction of Mango Manor Villa. This fact was disclosed to Mr. Trotta in response to queries*

from him[i.e. after the fact], *though I did not disclose the full amount of the loan.*

59. I am left to ponder, why didn't Mr. Constanzo disclose the full amount of the alleged loan, and why not before being asked? Why, in other words, has he not provided a straight-forward explanation of the loan relationship between himself and Wong/ and/or PCI either when first taxed by Mr. Trotta or upon any other occasion since. Why does the amount of this alleged loan keep shifting? This against the backdrop that there has been no documentary evidence put forward, or indeed, even said to exist, in relation to such a substantial sum. Incredible!

60. The 1st and 4th Defendants' bank statements and other assets obtained by search orders and disclosure injunctions both in Jamaica and abroad do not show any sums paid by Mr. Wong to Mr. Constanzo. Instead they show that PCI, and not Mr. Wong, made payments in excess of US $3.5Million from its account held with Chinatrust Bank in Hong Kong to Mr. Constanzo as follows:

Date	**Amount (US$)**	**CONSTANZO ACCOUNT RECEIVING THE TRANSFER**
20/11/06	2,100,000	HSBC Guanghou, China
20/11/06	170,000	MML US$ account, NCB Jamaica
17/01/08	107,853	MML US$ account, NCB Jamaica
07/08/08	250,000	TD Canada Trust
20/08/08	250,000	TD Canada Trust
03/09/08	300,000	TD Canada Trust
23/09/08	200,000	TD Canada Trust
13/07/09	120,000	TD Canada Trust
07/08/09	50,000	TD Canada Trust
TOTAL	**$3,547,853**	

61. These payments emanated from PCI's account out of the very US $5.55 M

which the Claimants had paid to PCI. This is clear to see from the Table and references set out at paragraphs 33- 36 of the Claimants' Written Submissions dated 15th April 2010, because the balance in that account was a mere US$1,204 before that payment of US$5.55M was received from the Claimants. Further, the timing of sums drawn from PCI's account substantially correspond with deposits made to Mr. Constanzo and MML's various bank accounts. I am of the view that this is a reasonable inference for the Court to make on a balance of probabilities , particularly based upon the detailed bank account and asset information obtained by court orders across a number of jurisdictions.

62. Mr. Constanzo has not denied this; he acknowledges that he received US $2.44 Million, but simply states that he does not know whether the loan proceeds came from the funds which Mr. Wong had received from the finder's fee or Shanghai COSCO through the Palmyra project, or where the money came from to finance the alleged loan –Paragraph 72 of his 4th Affidavit . These alleged loan proceeds were not provided to Mr. Constanzo, until after the finder's fee had been received by Mr. Wong, and indeed, a mere 4 days after their receipt by Mr. Wong from Shanghai Cosco, U.S.$2.1 Million and U.S.$170,000 of these funds were being disbursed or made available to Mr. Constanzo and MML respectively

63. Mr. Constanzo has given inconsistent indications about his sources of finance for Mango Manor Villa and in his accounts of the amounts of money he received from PCI/Wong in the following ways:

    (i) In Paragraph 70 of Mr. Trotta's 1st Affidavit sworn to on August 24 2009, he states that Mr Constanzo initially told him that he had received U.S. $1M as a loan from Mr. Wong himself. He then told Mr. Trotta that he had paid the U.S.1$M back to Mr. Wong but in his Defence at paragraph 28 Mr. Constanzo states that the loan has not been repaid;

(ii) In his 4th Affidavit sworn to on the 5th of October 2009, Mr. Constanzo at paragraph 69 states that the amount of the loan was over U.S. $ 2.27 M and does not deny Mr. Trotta's averment that he had initially said it was for U.S.$1 Million. Indeed, he says that he did not disclose to Mr. Trotta the full amount of the loan. As I have commented before, he has not said why he did not do so.

(iii) Mr. Constanzo says that the loan was from Mr. Wong personally when it in fact came from PCI, as demonstrated by the bank statements;

(iv) Mr. Constanzo initially told Mr. Trotta that he had received a loan of US $ 1M from Mr. Wong. In his 1st Affidavit he said he had received a loan of US $ 2.1 M from Mr. Wong-paragraph 9. In paragraph 28 of his Defence he states that he received US $2.27 M as a loan from Mr. Wong. In his 4th Affidavit at paragraph 69 he states that he received a loan of over 2.27 M from Mr. Wong.

64. I am also of the view that it does not help Mr. Constanzo's assertion that the payment was a loan, that he admits, in paragraph 28 of his Defence that this alleged loan has never been repaid. Not even a dollar of it. Further, in paragraph 70 of his 4th Affidavit, Mr. Constanzo swears that the loan had an interest rate of 6.0% yet not one iota of documentary evidence has been put forward in support of this alleged participatory investment loan. Mr. Constanzo claims that it was his intention and that of Mr. Wong "that, upon selling the house, the loan principal and interest would be the first deduction from the net proceeds of sale, after which I would attempt to recover the capital that I had injected into the construction of the house, before sharing the balance of the proceeds of sale equally between Wong and I ." To my mind, this is exactly the type of assertion that can aptly be described as "a

smoke-screen Defence" and, as stated in **Datafind** "strains credulity to and beyond breaking point".

65. Mr. Constanzo has never sought to explain or clarify the difference of US$1,107,853 between the sum he admits receiving as an alleged loan, (in the region of US$2.44 Million) and the sum of $3,547,853 which he appears to have received from PCI. Mr. Constanzo was obliged to sufficiently raise a triable issue with a real prospect of success in relation to the sum of US$ 1,107,853 also, since the source appears to have been his employer's payment out of US$5.55 M to PCI. The documentation shows on a balance of probabilities that over US$1 Million was banked in TD Waterhouse Inc in Canada and invested in shares and not used for the funding of Mango Manor Villa (see paragraph 11 of Mr. Constanzo's 3rd Affidavit and the 5th Affidavit of Shauna-Kaye Hanson).

66. Of course I am aware that the easier course for the Court to take would be to say that the case should just proceed to trial. However, as in the **Ostrich Farm** case, it strikes me that it was incumbent on Mr. Constanzo to do much more than he has done to satisfy me that there is really a triable issue in relation to this alleged loan or all of the sums received. It is, as recognized in **Bolton Pharmaceutical**, vital that the Court be alert both to cocky Claimants brimming with over-confidence of success, as well as to the Defendant who seeks to avoid summary judgment by making a case look more complicated or difficult than it really is. However, though difficult, the Court cannot shirk from the task and must make a judgment call. This is such a case. Although indeed the papers in respect of this application were plentiful, and the submissions and hearing time quite lengthy, (factors which I readily acknowledged to the parties during the hearing), the issues of the 1st Defendant being in receipt of bribes and /or in breach of fiduciary duty, and the 4th defendant being in knowing receipt, are not issues which require any elucidation at trial, particularly having regard to the admission by Mr.

Constanzo as to his fiduciary duties and to the secrecy of the payments . This takes place against the backdrop of admitted inconsistent and incomplete answers and evidence supplied by Mr. Constanzo to Mr Trotta before the commencement of these proceedings and since then, for which no explanation has been proferred.

67. It was Mr. Manning's submission that the Defendants may well elicit answers that are favourable to them in cross-examination. That may be true in relation to some matters, eg. whether the Claimants and Mr. Trotta knew that Mr. Constanzo had had previous dealings with Mr. Wong. However, not having denied in the pleadings that this loan took place in secret, I can not see how cross-examination of the Claimants' witnesses or any other witnesses will help the Defendants on this issue. In **PMC Holdings v. Smith, Lee and International Specialty Chemicals** (QBD) (LTL 23/4/2002), the Court awarded summary judgment. At paragraph 17 the learned judge roundly dismissed the fiduciary's argument that his principals knew or agreed that he could have other business relationships. He did not think that could be established on the case before him, but went on to indicate that even if that were so, that would in fact seem to emphasize the obligation for the fiduciary to disclose his own exact and personal interest. The same in my judgment obtains here, where Mr. Constanzo's own interest was in obtaining the alleged loan, or other payments received, and should have been disclosed, particularly as the loan proceeds only materialized out of contract funds originally emanating from the Claimants.
68. Mr. Manning also submitted that it is not only the emergence of evidence on cross-examination at trial that is important, but also the question of assessing credibility. However, what these Defendants have put forward to the Court in their quest to convince that summary judgment ought not to be granted, is to my mind, wholly insufficient.
69. Some of the authorities establish that there is an irrebutable presumption that

a gift made to the principal's agent by a third person without the knowledge and consent of the principal, was made with the intention that the agent should be influenced by it, and the court will not inquire whether the agent was influenced by the bribe in a way prejudicial to his principal's interest. However, I agree with Mr. Manning that this does not mean that the law has imposed any strict liability. It does not mean that once an allegation of bribe is made, that there is a presumption that a bribe exists. In order to find the agent qua agent liable to account, the payment must be received by him in my judgment whilst he is an agent of the principal or the gain or profit must be achieved by reason of the relationship of agent.

70. If Mr. Constanzo could demonstrate or convince a court that there was a genuine loan from Mr. Wong to him, that would mean that he would have succeeded in demonstrating that he received the payment dehors his position as agent for the Claimants, that he received it in his own right and separate capacity. However, Mr. Constanzo was not simply an agent of the Claimants. He has admitted that he owed them fiduciary duties. Every fiduciary is an agent of his principal, but not every agent is a fiduciary. The significance of this is that Mr. Constanzo as an admitted fiduciary of the Claimants should not have placed himself in a position where his duty to the Claimants and his own interest may conflict. He should not have acted for his own benefit without the informed consent of his principal. As indicated in **Reading v. AG** , at page 620 H, the existence of the fiduciary relationship is but another ground for succeeding where a claim for money had and received would fail.

71. In his submissions, Mr. Manning has said that the allegation of bribe/fraud that has been made and 'which is the pillar on which the suggestion of breach of fiduciary duty stands", is that Mr. Constanzo conspired to and did pre-select Shanghai Cosco. He asserts that the Claimants' argument means that payment of monies to Mr. Constanzo by Mr. Wong was just the consummation of that conspiracy and as a result of same should be

characterized as a bribe or secret profit. He therefore submitted that these issues cannot be dissected. Further, that the nature of the payment and its characterization is inextricably linked to the allegations of mala fides, fraud and breach of his fiduciary duty as a Director of Sanctuary. I disagree with Mr. Manning as to the capability of the issues being properly extricated. It appears to me that, because the law has such a stern countenance and deterring objective in relation to bribery, the Claimants do not have to first make out a claim of any conspiracy before alleging bribery. The civil law in relation to bribes will assume a corrupt motive. In my judgment, the 1st and 4th Defendants have no real prospect of succeeding in averting the claim that the payments of the U.S. $2.27 M, indeed of the US$3.547,853 Million represent a bribe or kickback. As to the nature of the alleged agency relationship of Mr. Wong and the Claimants, it matters not that the exact parameters of that relationship have not been outlined to the Court; the important consideration is that Mr. Constanzo was at the time the Claimants' agent and fiduciary and Mr. Wong was an agent, or third party with whom the Claimants had had business dealings in relation to the Palmyra project. The circumstances and timing of the payments of US$2.27 Million, from PCI to Mr. Constanzo and MML, shrouded in secrecy as they were, and the subsequent payments, followed by a lack of straightforward explanation when confronted upon several occasions, taken together with unexplained inconsistencies, speak volumes by themselves. I reject the argument that the Court should allow Mr. Wong to have his say at trial as to what the payments were for. This is because his motive in making the payments is irrelevant. It is Mr. Constanzo who introduced Mr. Wong to the Claimants as discussed in **Industries and General Mortgages**, page 578, and the payment has been made in secret. In any event, at the commencement of this matter I was advised by the Claimants' Attorneys-at-Law that to the date when this application commenced, neither the 2nd, 5th or 6th Defendants had complied

with certain orders of the Court and so it is not clear whether they would have in any event been allowed, or will be allowed in the future, to defend the case.

72. It is true that in **AG for Hong Kong v. Reid** , there was a conviction of the "bribee" for accepting bribes given to him in the course of his position as a public prosecutor in Hong Kong as an inducement to exploit his official position by obstructing the prosecution of certain criminals. The facts in **Federal Republic of Nigeria** are also to be contrasted because in that case, the Claimant was only granted summary judgment on a second application, based on a material change in circumstances. However, it is not clear to me whether in the first application, the principles in the **Hovenden** line of cases, including the irrebutable presumptions(and that includes inferences) that the Court is entitled to make, were cited. It would also appear that there was no distinction made in the case in relation to what a "bribe" is in relation to the civil law, as opposed to the criminal law. I therefore think that the circumstances which existed at the stage of the first application are quite different from those in the instant case.

SECRET BENEFIT

73. Even if the Claimants are not entitled to summary judgment on the more difficult basis that the payments to Mr. Constanzo constitute bribes, it is my view that they are entitled to summary judgment on the, as described at paragraph 31 in the **Ostrich Farm** case, the "pretty obvious case of breach of fiduciary duty". See also per Lord Porter at page 620 H of **Reading v. AG**.

74. It seems to me that the law fully well recognizes the serious nature of fiduciary duties. As Lord Wright stated in **Regal Hastings v. Gulliver** [1942] 1All E.R. 378, at page 392, letters C and D, : "The authorities show how manifold and various are the applications of the rule. It does not depend on fraud or corruption". Further, a fiduciary has a duty to not only ensure that he

does not place himself in a position where his duty and his interest may conflict, but also he must not act for his own benefit without the informed consent of his principal. This principle plainly covers the situation here. I do not see how these Defendants can have any real prospect of maintaining that Mr. Constanzo is not in breach of his fiduciary duties to the Claimants. Under this head, I am of the view that the Claimants are not only entitled to summary judgment in respect of the sum of U.S.$ 2.27 M, but they are also entitled to all monies held in account number 23-6F05-B at TD Waterhouse Inc. in the name of the 1st Defendant as these are monies which were paid to Mr. Constanzo by PCI, from the proceeds of the finder's fee of U.S.$5.55 M paid to Mr. Constanzo without the informed consent of the Claimants, whilst Mr. Constanzo remained the Claimants' fiduciary. Even if Mr. Constanzo could succeed in proving that the Claimants knew that he had many business ventures and a business relationship with Mr. Wong before the Palmyra project, as reasoned in **PMC Holdings**, all the more reason for Mr. Constanzo to make specific disclosure of his particular interests.

75. In my judgment, Section 389 of the Companies Act could not realistically avail Mr. Constanzo. I accept Mrs. Minott-Phillips submission that it would not apply in circumstances and in the context of admitted receipt of monies in secret. There would be no real prospect of Mr. Constanzo validly relying upon that section to claim that his actions were reasonable.

76. As regards the 4th defendant, MML I accept the Claimants' submission that Mr. Constanzo's knowledge is attributable to MML, which beneficially received funds as a result of Mr. Constanzo's breaches of his fiduciary duties to the Claimants and thereby had knowledge of the nature of the funds received being traceable to breach of fiduciary duty, which knowledge makes it unconscionable for it to retain the benefit of the receipt.- Nourse LJ in **Bank of Credit and Commerce International (Overseas) Ltd. v. Akindele** [2001] Ch 437 at 448 . These circumstances combine to constitute MML constructive

trustees in relation to the Claimants' interests and MML has no real prospect of defending this claim.

77. Mr. Manning raised questions in relation to the question of whether Mr. Constanzo has any equity in the land. I think that his arguments are sound, having regard to the fact that there is no pleaded case that any of the money paid to Mr. Constanzo was used to acquire the land in question,(as opposed to the construction of Mango Manor Villa), and also to the fact that the Claimants have indicated that they loaned Mr. Constanzo U.S. $75,000 to complete the construction and that he repaid this sum by way of salary deductions. However, Lord Templeman's dicta at page 4d of **AG for Hong Kong**, is instructive:

In the Courts of New Zealand Mrs. Reid and Mr. Molloy argued that part of the costs of the three New Zealand properties might not be derived from bribes. If so, the courts have ample means of discovering by means of accounts and inquiries the amount (if any) of innocent money invested in the properties and the proportion of the present value attributable to innocent money. It was also argued that Mrs. Reid might have a beneficial interest in the properties. This also could be investigated in due course…(my emphasis).

However, I agree with the Claimants that Mr. Constanzo and MML would have no real prospect of disputing that the repayment of the loan of US$225,000 which Mr. Constanzo used to purchase the land was repaid from monies that Mr. Constanzo received from PCI. Further, that the Claimants would be entitled to trace this sum and any increases in its value into the registered property.

It may well be that some sort of mathematical ratio or formula could be worked out, whereby the proportionate interests of the parties can be arrived at. However, since the case was not argued before me in that way(the claim by the Claimants was for the whole interest, subject to the mortgage), and

there were no valuations discussed before me, it would not be appropriate for me to embark upon that exercise at this stage.

78. Therefore, this means that I am of the view that the Claimants are entitled to the relief claimed in paragraphs 1 a. and c., 3 and 4 of the Notice of Application for Summary Judgment. In relation to paragraph 1a, the Claimants are entitled to the relief there sought in respect of the sum of U.S.$2.27 M in respect of bribes, debt, and in relation to money had and received by Mr. Constanzo, or alternatively for breach of fiduciary duty. I am not sure why, in relation to this aspect of the claim, the Claimants have not claimed the whole sum of US$ 3,547,853 which they say consists of bribes or secret benefits. The amount being claimed in respect of the T.D.Waterhouse account in Canada does not account for the full difference.

79. The order sought at paragraph 2 is for the Court's order to authorize T.D.Waterhouse Inc. in Canada to take certain steps. That entity is located in Canada, and is not a party to these proceedings, and thus I am of the view that the order sought goes beyond my jurisdiction. Save for that, it would seem to be a reasonable order. I am in my judgment limited to making the order at paragraph 1c; that the Claimants are by equitable tracing established and declared to be beneficially entitled to the sums in that account.

80. In relation to 1b, which concerns the property registered at Volume 1392 Folio 140, I will declare that this property, in so far as it represents bribes/or undisclosed payments to Mr. Constanzo as fiduciary, is, to that extent held in trust by MML the 4th Defendant for the Claimants, subject to the mortgage. It seems to me that the question of Mr. Constanzo's own beneficial interest, if any in the property, will have to be determined, valuations obtained, and the Claimants' declared interest in the land, enforced after the taking of accounts and inquiries.

81. The other issues such as conspiracy, rescission of contract, deceit, remain

capable of being dealt with at trial. Although there are still aspects of the claim outstanding, I am of the view that granting this application does serve useful and fair purposes. The issues and claims are more than theoretically severable; they are also practically capable of being treated separately. This is mainly because of the way in which the civil law treats breach of fiduciary duty and bribery.

82. I therefore make the following orders:

1. Summary judgment is granted in favour of the Claimants as against the 1st and 4th Defendants on the Claimants' claim :
    i. By way of debt, or of money had and received, or breach of fiduciary duty, in the sum of US $ 2,270,000 received by the 1st Defendant (whilst a fiduciary of the Claimants) being an undisclosed loan from the 2nd Defendant extended via the 5th Defendant;
    ii. It is hereby declared that the property registered at Volume 1392 Folio 140 of the Register Book of Titles registered in the name of the 4th Defendant at the instance of the 1st, in so far as it was acquired and/or improved and represents bribes or secret payments accepted by Mr. Constanzo as fiduciary, that is, to the extent of value up to at least U.S. $2.495 M(U.S.$2.27 M plus U.S.$225,000), and any accretions attributable thereto, is held proportionately in trust by MML, the 4th Defendant, for the Claimants, subject to the interest of the registered mortgagee, National Commercial Bank Jamaica Limited under mortgage #1555389. Accounts and Inquiries are to be taken to determine the interest, if any that Mr. Constanzo may have in the property, and as to what portion, if any, of the cost of acquiring the land, effecting improvements, or constructing Mango Manor Villa, is

attributable to money which did not come from bribes or secret payments.

iii. It is expressly declared that there shall be no double recovery in relation to orders i. and ii . (**AG for Hong Kong v. Reid)**.

iv. All monies held in account number 23-6F05-B at TD Waterhouse, Inc. in the name of the 1st Defendant have been established by equitable tracing to be the property of the Claimants and it is hereby declared that the Claimants are beneficially entitled and are the owners of all sums in that account.

v. Subject to such order of the Ontario Superior Court of Justice (Commercial List), in Court File No. 09-8337-00CL, and the Claimants providing the written consent referred to in paragraph 13 of the Court Order of the Honourable Mr. Justice Pitt, made on August 26, 2009 in those proceedings, the 1st Defendant is hereby ordered to transfer forthwith to an account in Jamaica to be specified by the Claimant's Attorneys-at-law, all monies held in account number 23-6F05-B at T.D. Waterhouse Inc, in the name of the 1st Defendant.

2. Costs of this application to the Claimants for more than one attorney-at-Law to be paid by the 1st and 4th Defendants to be taxed if not agreed.

3. Special Costs Certificate granted.

4. Permission to Appeal, if required, is granted.

5. Stay of Execution granted in respect of orders 1(i) and 1(v) until the 4th of February, 2011.

6. Accounts and Inquiries fixed for hearing on the 18th day

of March, 2011 for 1 day before Mangatal, J.

83. Rule 15.6 (3) of the CPR requires that in these circumstances, where the summary judgment application does not bring the proceedings to an end, the hearing should be treated as a case management conference. I will now discuss that with the parties.