JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 66 OF 2001

BEFORE: **THE HON. MR. JUSTICE HARRISON, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (AG.)

BETWEEN	**SPEEDWAYS JAMAICA LIMITED**	**APPELLANT**
AND	**THE SHELL COMPANY (W.I.) LIMITED**	
AND	**GUY MORRIS**	**RESPONDENTS**

Christopher Dunkley and Miss Marina Sakhno instructed by Cowan, Dunkley & Cowan for appellant

André Earle and Miss Anna Gracie instructed by Rattray, Patterson & Rattray for the 1st respondent

Guy Morris, 2nd respondent in person

January 26, 27, 28, February 23, 24, 25, 28, March 1, 2, 3, 2005 & April 7, 2006

HARRISON, P.

This is an appeal from the judgment of Theobalds, J on 23rd March 2001 in favour of the first respondent ("Shell") against the appellant ("Speedways") with costs and in favour of the appellant against the second respondent ("Morris"). Morris, who did not appear at the trial nor contest the suit, was

ordered to pay the appellant the sum of One Hundred and Eighty-eight Thousand, Nine Hundred and Forty-one Dollars and Seventy-six cents ($188,941.76) with costs.

I agree with the reasoning and conclusions of Panton, J.A. in his judgment. These, however, are further comments of mine.

The basis of Speedways' case was that it was brought into contractual relationship with Shell by its negotiations and agreements with Morris who was the agent of Shell. Accordingly, both are liable to Speedways as principal and agent for their breaches and Speedways' consequential losses. No actual agency was claimed to exist nor contended for. Speedways relied on the apparent or ostensible agency that arose, or in the alternative, agency by estoppel.

The essence of the principle of agency is the will and consent of the principal. This conduct brings the relationship of agency into existence. The concept of ostensible authority was defined in the case of ***Armagas Ltd v Mundogas SA (The Ocean Frost)*** [1986] AC 717. Lord Keith at page 777 said:

> "Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question."

Sujanani, the managing director of Speedways had no agreement with Shell, nor could he point to any holding out by Shell that Morris was its agent. It was Morris, who was approached by Sujanani directly, with a written proposal, and who without any prior input or knowledge of Shell suggested that Speedways operate its business at the Shell gas station premises operated by Morris at 138 Old Hope Road, St. Andrew. Consequently, a lease agreement was signed between Speedways and Morris on 20th April 1990. This was not an agency agreement but a contract between two principal contracting parties. Speedways was not in that regard acting on any representation by Shell, by which Shell could be regarded or by which one could assume that Shell was authorizing the said transaction.

In the case of ***Freeman and Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd and another*** [1964] 2 Q.B. 480 the principle of ostensible authority was explained as arising from the conduct of the principal amounting to a holding out of some other person the agent, as competent to act on the principal's behalf.

The facts are that one of the directors of a company, to its knowledge, acted as, and performed the duties of managing director of the company, although he was not appointed as a managing director. He employed the plaintiffs, architects, to obtain planning permission and to do other work in respect of certain property development. The plaintiffs did the work and sued for their fees. The company contended that the liability was not the company's

but that of the said director who employed the plaintiffs. The Court of Appeal held that the director did not have actual authority but had ostensible authority to employ the plaintiffs, as he had acted as managing director to the knowledge of the board of the company. Diplock, L.J. (as he then was) at page 503 said:

> "An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract."

There was no evidence led in the trial below of any representation by Shell to Speedways that Morris had the authority to deal with Speedways as Shell's agent. There was no basis for Sujanani to believe that Shell had given such permission to Morris.

Morris was the lessee of Shell and one of their dealers. At no time did Shell maintain otherwise, and in particular, Shell never represented that Morris was its servant or agent.

Sujanani approached Morris and on 20th April 1991, both entered into a lease agreement, by which Morris himself leased the building in question to Speedways. Sujanani, in examination-in-chief, said:

> "My renovation was by agreement with Morris after he requested architectural plans be submitted, which I did. I understood he wanted Shell's approval. The drawings were done about one week after lease signed on April 20, 1991. I gave Morris the plans and

> after a few days, he got back to me and gave me the green light to start the renovation work as soon as possible. I did so immediately. Containers bought, stored at 129 ½ Old Hope Road, which is opposite. Got Parkinsons Constructions, who start foundations at 138. Also built a room to store material, and work commenced in May 1991." (Emphasis added)

The construction was completed in about November 1991. Up to the time of completion and the opening of the shop by Speedways in December 1991, no representative of Shell had given any approval of the construction to Speedways. Sujanani at page 152 of the record further said:

> "In dealing with Morris, I never got permission from Shell prior to construction ... I was dealing with Shell through Morris ... I never really discovered that Morris was a lessee of Shell ... until now, today ..." (Emphasis added)

and further:

> "I thought Guy Morris was part of Shell and I dealing with Shell through Guy Morris."

Morris led Sujanani to believe so. Sujanani was less than diligent. He had no confirmation from Shell.

The documentary evidence admitted at the trial, clearly reveals Shell's non-involvement in and objection to any construction at the said premises. Shell wrote to Morris a letter dated 21st November, 1991, exhibit 35, signed by Phillip Hibbert, retail marketing manager. It reads:

"RE: CONSTRUCTION ON STATION SITE

You are hereby instructed to cease all construction taking place on the Shell Service Station located at 138 Old Hope Road.

Please also arrange for the immediate removal of the metal posts which have been planted in the Old Hope Road entrance to the station."

Shell, by letter dated 24th December 1991 to Morris (exhibit 36,) referred to its letter, exhibit 35, and complained of:

"... Shell's concerns regarding the illegal construction which you have undertaken at the station without Shell's permission."

and continued:

"Since then you have continued the construction in flagrant disregard of the company's concerns and in direct contravention of the company's instructions as enunciated by myself and your Retail Supervisor, Mrs. Emmanuel. These continued actions on your part have the effect of compelling us to take strong actions to re-establish control over all developments at the station and to ensure that all such developments are consistent and in conformity with Shell's vision/plans for the station."

Phillip Hibbert, in evidence, asserting that no permission was given to Morris to sub-let, with reference to the construction, said:

"During his tenure, construction observed on one corner, a building being erected facing Old Hope Road. We did not give permission. We had several meetings with Guy Morris in which we registered our objections – subsequently confirmed in writing. Guy Morris from time of meetings represented buildings being erected by himself."

On the basis of this evidence Theobalds, J was correct to conclude that there was no agency arising, whether actual or apparent giving rise to any contractual relationship between Shell and Speedways.

The learned trial judge in his reasons, at page 128 of the record, said:

> "... on my findings of fact from Hamilton's evidence there was never any acquiescence in inducement by Shell Company in the acts of the plaintiff. The plaintiff it was who ignored Shell and proceeded with modification and construction of the building."

At page 133 he said:

> "There is not a thread (sic) of evidence of any contractual arrangement between Shell and Speedways."

and further at page 135, said:

> "I find on a balance of probability that the evidence of Mr. Sujanani that Shell held out Morris as their agent is a total fabrication."

However, the learned judge, on page 126 - 127 said:

> The 1st Defendant vacillates in it's acceptance or rejection of the 2nd defendant as it's servant or agent. It is my finding of fact, based on the evidence adduced and documents tendered, that the 2nd Defendant was at all material times in his dealings with the Plaintiff holding himself out to be in control of the premises in issue, jointly with and with the fall (sic) knowledge and control of the 1st Defendant. The 1st Defendant's case that they had no dealings with the Plaintiff can only be upheld to a very limited extent. This is because they did deal with (sic) plaintiff through their agent, the 2nd Defendant."

This latter finding, with the exception that, it was Morris who was holding himself out "to be in control of the premises ... with the full knowledge and control..." of Shell, is at variance with his other findings of absence of agency. It is also in conflict with his ultimate decision. This finding being out of harmony with the learned trial judge's findings otherwise, can only be seen as an unfortunate lapse of reasoning. The learned trial judge was of the firm view throughout that no agency was proved. Rule 1.16(4) of the Court of Appeal Rules provides:

> "(4) The court may draw any inference of fact which it considers is justified on the evidence."

On the evidence the clear inference can be drawn that Morris was not the agent of Shell, nor did Shell hold him out to be its agent. Morris, acting on his own and for his benefit, consistently gave Speedways the impression that he had the authority of Shell to transact business on the latter's behalf. This was not so.

Morris, although having filed a defence in the action from 18th June 1995, did not give evidence at the trial nor was he represented.

Furthermore, one cannot say on the evidence that Shell was estopped from denying that Morris was its agent. The learned trial judge correctly found on page 128 of the record, that:

> "... from Hamilton's evidence there was never any acquiescence in inducement by Shell Company in the acts of the plaintiff."

The authors of Chitty on Contracts, 27th edition (1994) at paragraph 31-055, discussing the principle of apparent authority, related it to the principle of estoppel. It reads:

> "Where a person by words or conduct represents to a third party that another has authority to act on his behalf, he may be bound by the acts of that other as if he had in fact authorized them. This doctrine, called the doctrine of apparent or ostensible authority, applies to cases where a person allows another who is not his agent at all to appear as his agent, to cases where a principal allows his agent to appear to have more authority than he actually has, to cases where a principal makes reservation in his agent's authority that limit the authority which such agent would normally have, but fails to inform the third party of this, and to cases where a principal allows it to appear that an agent has authority when such authority has in fact been terminated."

The said authors, relying on the ***Freeman and Lockyer*** case (supra), among others, demonstrated that the evidence must of necessity point to the positive act, conduct or representation of the principal, in order to ground his liability.

There was no evidence before the learned trial judge of any such positive act by Shell to fix liability on Shell. The evidence points the other way. This ground claiming the existence of the relationship of principal and agent is without merit.

For this and other reasons adequately dealt with in the judgment of Panton, J.A., this appeal ought to be dismissed.

PANTON, J.A.

1. In this matter, the appellant is hereafter referred to as "Speedways", the first respondent as "Shell", and the second respondent as "Morris". On March 23, 2001, after a trial that had ended ten months earlier, Theobalds, J. (now retired) entered judgment with costs in favour of Shell against Speedways, on the one hand, and in favour of Speedways against Morris, on the other hand. Morris was ordered to pay to Speedways $188,941.76 together with the costs payable by Speedways to Shell; this, with interest on the total sum at 12% from June 27, 1995, to March 23, 2001.

2. The appeal before us is by Speedways. There are twenty-two grounds listed which challenge the findings of fact by the learned judge as well as his conclusions in law. The question of agency looms large in the challenge. In addition, complaint is made in respect of the quantum of damages and the interest awarded against Morris. It should be added that although Morris filed a defence in the proceedings below, he gave no evidence at the trial, and was unrepresented. He was also unrepresented in the instant proceedings before us.

3. The pleadings, as they should, provide a good picture of the position of the respective parties.

The Claim

Speedways is a company that distributes and sells motor vehicle accessories. Morris was lessee of Shell in respect of premises at 129 1/2 and 138 Old Hope Road, St. Andrew. Speedways and Morris entered into a lease agreement effective from May 1, 1991, for five years with option to renew for five years in respect of part of the said premises. Prior to execution of this latter lease, Speedways and Morris had agreed that Speedways would repair, modify and improve the premises at the sole expense of Speedways. It was contended by Speedways that the repairs, modifications and improvements that it carried out on the premises were done with the knowledge, consent, or acquiescence of not only Morris, but also Shell. Indeed, Speedways alleged that Morris was Shell's agent, and that both Shell and Morris gave ideas as well as instructions on how the work should be done. In that respect, Speedways expended $2,144,000.00.

4. In 1993, Shell carried out extensive re-development of its property. That involved the demolition of the building that Speedways had renovated, and Speedways was required to vacate the premises. During the process of the demolition, Speedways obtained an interim injunction against Shell. According to Speedways, Shell gave it **an oral undertaking** that if it vacated the premises and allowed for the demolition of the building, Shell would provide Speedways with suitable alternative accommodation. In the meantime, Morris undertook in writing to compensate Speedways for the loss sustained consequent on the demolition if Shell failed to provide Speedways with alternative accommodation.

5. The combination of Shell's oral promise and Morris' undertaking caused Speedways to vacate the premises but Shell has not kept its promise. The result has been, Speedways claims, a loss of $2,144,000.00 (the amount spent on the repairs) and $12,567,808.00 (eight years loss of income). The period of eight years is made up of the remaining portion of the current lease and the renewed term of five years.

The Defence

6. Shell contends that the lease agreement between Speedways and Morris was in breach of Morris' agreement with Shell, a breach acknowledged by Morris. Shell denies that Speedways conducted repairs with its knowledge or encouragement. The repairs contravene the lease agreement between Shell and Morris. In the lease agreement between Shell and Morris, the latter undertook that he would not:

> (a) make any alterations in or to the leased premises without the prior written consent of Shell; or
>
> (b) assign or part with the possession of the said premises or any part thereof without having first received the written consent of Shell.

It was a ground for Shell to terminate the lease without notice if Morris attempted to "assign, pledge, mortgage or underlet or part with the possession of the leased premises or any part thereof".

7. Shell denies making any promise whatsoever to Speedways, and asserts that it was not obliged to provide any alternative accommodation for Speedways, and is not responsible for any losses suffered by Speedways. In any event, the oral promise alleged by Speedways is of no legal effect by virtue of the Statute of Frauds. It was not in writing, and there are no acts of part performance.

8. In answer to interrogatories from Shell, Speedways' managing director, Ramesh Sujanani, said that Speedways "personally did not advise the first defendant (Shell) of the ...work of repairing, modifying and improving the premises" (page 61 of the record). However, Mr. Sujanani said that Mr. Howard Hamilton (Shell's managing director) had discussions with him on the work to be done.

The evidence presented on behalf of Speedways

9. Ramesh Sujanani, managing director of Speedways, and Roy Curtis, an accountant, gave evidence on behalf of Speedways. Sujanani described himself as a wholesaler of motor vehicle parts and accessories. He approached Morris who encouraged him to do retailing from the premises at Old Hope Road, where Morris operated the Shell gas station. He presented a written proposal to Morris who told him that he wished to put it to Shell. The next significant step was the signing of a lease agreement between Speedways and Morris.

10. Sujanani, having signed the lease agreement, then formed the opinion that the building earmarked for the retailing business was in no condition for the purpose. He and Morris agreed on renovations to be done, and he had architectural drawings done rather quickly to this effect. Work commenced in short order and was completed in December, 1991, in time for the Christmas holidays. According to Sujanani, Morris was a regular visitor to the site and urged the opening of the business in December as he wanted to use the occasion to promote the sale of Shell gasoline. Morris, on one of his visits, introduced a representative of Shell to Sujanani. At the opening, Morris introduced Howard Hamilton, general manager of Shell, to Sujanani.

11. Between 1991 and 1993, business was good, according to Sujanani. Sales kept rising, he said. Then, Shell commenced preparations for the demolition of the structures on the site. Morris told Sujanani that Speedways would be relocated until the works at Old Hope Road were completed, and stated that Hamilton had approved the relocation of Speedways' business to premises at Constant Spring Road. In September, 1993, Speedways obtained an injunction against Shell in respect of the demolition. Morris and Sujanani went to Shell's head office at Rockfort. Sujanani said that this visit had been arranged as Morris had told him that Hamilton had wished to see him. At this meeting, according to Sujanani, Hamilton told him that he should indicate how many shops he needed at Constant Spring Road in exchange for the Old Hope Road location. Hamilton, when asked by Sujanani as to the time for relocation, said that he should leave it

to him but he should vacate the premises as early as possible so as to facilitate the construction process. According to Sujanani, he, later that day, heard his attorney-at-law, Mr. Hugh Levy, requesting Hamilton on the telephone to put the promise in writing before any action by Speedways. There is a letter (**Exhibit 6**) from Mr. Levy (who did not give evidence) to Hamilton (who gave evidence). It reads in part:

> "I understand from our conversation of the 28th instant that in consideration of my client vacating the premises he now occupies you are prepared to offer him accommodation in the new complex to be erected at 138 Old Hope Road and also to grant him a lease of a shop or shops to be erected on premises at Constant Spring Road in the vicinity of Dunrobin Avenue.
>
> If you would be good enough to let us have that commitment in writing as you have promised an application can be made to the Court to release the injunction prior to the expiration of 14 days, and the necessity of a further application for an extension obviated".

12. There was no response as requested in exhibit 6. Instead, there was a letter of undertaking from Morris. Speedways undertook to vacate the premises because Sujanani said he was assured that Morris' undertaking was coming from Shell. Thereafter, Speedways moved across the road to 129 Old Hope Road to which Morris had moved.

13. Eventually, Speedways had to cease operations due to a decrease in business. Speedways' stock was sold below its true value - $5 million worth of

merchandise disposed of for $2 million - and there was a loss of reputation and goodwill. So far as proof of its loss was concerned, the evidence presented was to the effect that there was a fire that destroyed receipts indicating purchases. No steps were taken to secure copies of receipts from suppliers or contractors. Some materials were imported from the United States of America by Speedway Auto Supplies Ltd. in Miami. Sujanani is President and one hundred percent shareholder in that company. The remaining imported stock was paid for out of Sujanani's personal resources. On demolition of the building, people were allowed to take what they wished including a big central air conditioning unit which was located on the roof.

The evidence presented on behalf of Shell

14. The viva voce evidence presented on the part of Shell came from two witnesses, Phillip Hibbert, Shell's retail manager, and Howard Hamilton, who was Shell's General Manager during the relevant period, but had retired by the time of the trial of the case. The contents of exhibit 44 formed a major plank of the defence put forward by Shell. Exhibit 44 is the "dealer lease" between Shell and Morris. It gave Shell the right to terminate the lease without notice if Morris underlet or part with the possession of the leased premises or any part thereof [see clause 2 (v)]. Morris also undertook "not to make any alterations in or to the leased premises without the prior written consent" of Shell.

15. Shell's representatives noticed construction work taking place at a corner of the premises. Being aware that no permission had been sought or obtained, Shell objected. Several meetings were held with Morris who represented that the works were being done by him. Eventually, Shell's objection was put in writing, and on November 21, 1991, Morris was instructed in a letter signed by Hibbert to cease construction.

16. Shell only became aware of the existence of Speedways in 1993. Sujanani and Morris attended a meeting with Shell's general manager, Howard Hamilton. According to the latter, the meeting was called to discuss and resolve a problem that had arisen on Shell's property, and had been brought to his attention by Morris. Hamilton advised Morris and Sujanani of the plans that Shell had to remodel the gas station. Shell, he said, was contemplating a number of shops and Sujanani could apply for one of those shops when the time came for their construction. In November, 1993, there were no shops in existence or available to Shell for a relocation offer to be made to Speedways. The latter gave up possession of the premises voluntarily, and there was no promise made by Shell to Speedways. Morris gave Shell a commitment in the form of an indemnity.

The judge's findings and reasons

17. The major findings may be grouped as follows:

Morris

The learned judge found that Morris acted contrary to the terms of his lease agreement with Shell by entering into a sub-lease with Speedways. He collected rent, authorized the modification of the premises and gave a letter of undertaking to compensate Speedways for the loss sustained due to the demolition of the structure. He also found that Morris formed a plan to extend the facilities, overhaul the appearance of the building, and allow Speedways to use a portion of the premises as a motor vehicle accessories outlet. This was done without Shell's approval, according to the judge. Morris' interest was in the improvement of the station at no expense to himself. In his dealings with Speedways, he at all times held himself out as being in control of the premises jointly with Shell. At the same time, Morris was representing to Shell that the construction and remodeling were being done by him.

Speedways

Theobalds, J. said he had difficulty in understanding why Speedways had not sought legal advice in relation to the repairs and construction activities that it had undertaken. He found that Sujanani, Speedways' managing director, was guilty of ineptitude in not informing himself of the conditions of the lease between Shell and Morris. Speedways should have checked Morris' statements

before embarking on the construction work that it did. In embarking on the project without the necessary approvals from the relevant authorities, Speedways had contravened the law and should not be allowed to benefit from its illegal activity. The learned judge was unimpressed by Sujanani and found that his evidence, that Shell held out Morris as its agent, was "a total fabrication ... nothing but a misguided attempt to have the by no means limited financial resources of a multinational corporation available in the event that substantial damages are awarded to the plaintiff company".

Shell

The learned trial judge found that there was no contract between Shell and Speedways. However, he said that Shell's case that it had no dealings with Speedways can only be upheld to a very limited extent. This is because they did deal with Speedways through their agent Morris. This statement is at page 127 of the record. However, later, at page 134, he held that Shell could not be liable to Speedways as it was clear that the Shell lease to Morris contained express covenants against parting with possession, and made any grant of an underlease a ground for termination of the lease between Shell and Morris. He also found, from the evidence of Hamilton, that there was never any acquiescence or inducement by Shell in the acts of Speedways. It was Speedways that ignored Shell and proceeded with the modification and construction of the building.

The grounds of appeal

18. As indicated earlier, twenty-two grounds of appeal were filed. I hope that I am doing no injustice to the efforts of the framers of these grounds if I were to say that I sensed an air of over-kill in the filing of so many grounds, given the narrow issues involved in the case. In the arguments before us, Mr. Dunkley, with much ebullience, gave an overview of the evidence along with his understanding of the reasoning of the learned judge, whereas Mrs. Sakhno-Gill classified the issues and did her own grouping of the grounds of appeal. Her classification of the issues was along the following lines: **agency, the lease, illegality, the promise and the undertaking,** and **damages.**

19. **The first of the twenty-two grounds of appeal** seems to have been based on a misunderstanding of a finding of the learned trial judge. It reads:

> "The Hon. Mr. Justice Theobalds erred in law and in fact having held that the **plaintiff** was at all material times dealing with the defendants by virtue of the second defendant being an agent of the first defendant in giving judgment to the first defendant against the plaintiff".

A proper interpretation of the actual words used by the learned judge, in making his finding, gives a different picture. These words are at page 126 of the record, and are as follows:

> "It is my finding of fact, based on the evidence adduced and documents tendered, that the **second defendant** was at all material times in his dealings with the plaintiff holding himself out to be in control

> of the premises in issue, jointly with and with the full knowledge and control of the first defendant"

The ground as formulated suggests that the finding was that **Speedways** was at all times dealing with Shell and Morris by virtue of Morris being an agent of Shell. That, however, with respect, is not the finding made by the judge. The finding was in fact that **Morris**, in dealing with Speedways, held himself out as being in control of the premises and that he was dealing with Speedways with the full knowledge and control of Shell. In other words, the learned judge found that Morris was a pretender.

Ground 1, being a misquotation of the judge's finding, is therefore unworthy of any further discussion or comment.

20. **Ground 3** falls in the same failing category as Ground 1. It reads:

> "That having found that the second defendant was the agent of the first defendant and having found for the plaintiff against the second defendant, the learned judge erred in granting judgment in favour of the first defendant against the plaintiff".

It has to be emphasized that the learned judge did not find that Morris was the agent of Shell. His finding was that Morris pretended that he was Shell's agent. Pretence and reality are usually poles apart.

21. **Ground 2** is rather lengthy but has to be quoted in full. It reads:

> "That the learned judge erred in that his finding at page 3 that : "The first defendant vacillates in its acceptance or rejection of the second defendant as its servant or agent. It is my finding of fact, based

> on the evidence adduced and documents tendered, that the second defendant was at all material times in his dealings with the plaintiff holding himself out to be in control of the premises in issue, jointly with and with the full knowledge and control of the first defendant. The first defendant's case that they had no dealings with the plaintiff can only be upheld to a very limited extent. This is because **they did deal with the plaintiff through their agent, the second defendant**" is wholly inconsistent with his finding at page 12: "I find on the balance of probability that the evidence of Mr. Sujanani that Shell held out Morris as **their agent** is a total fabrication. It is nothing more than a misguided attempt to have the by no means limited financial resources of a multinational corporation available in the event that substantial damages are awarded to the plaintiff company".

The emphasis on some of the words in the passage just quoted is not mine; it is that of the framers of the grounds of appeal. The complaint here is that the judge found that Morris was the agent of Shell, yet he branded as false Sujanani's evidence that Shell held out Morris as its agent. This was described by Mrs. Sakhno-Gill as a non-sequitur. In his overview, Mr. Dunkley had, on the same point, submitted that the judge's conclusion that Sujanani's evidence was not worthy of belief was unreasonable. Mr. Dunkley was also unhappy that "the Judge upheld Shell's defence in its entirety, notwithstanding his statement that Shell's case that they had no dealings with Speedways can only be upheld to a very limited extent".

22. **Ground 2**, like **Grounds 1 and 3**, shows a misunderstanding, on the part of the appellant, of the judge's reasons for judgment. This

misunderstanding, it is fair to say, may have been contributed to by an inexact use of the word 'agent' by the learned judge in some respects. The reasons for judgment have to be viewed in their entirety, not in segments. When that is done, it will be seen that perhaps the single most important finding by the judge was in relation to the credibility of Sujanani. That finding destroys the entire foundation of Speedways' claim. The judge did not believe Sujanani's evidence that Shell held out Morris as its agent. This means that he rejected Sujanani's evidence that Howard Hamilton, the general manager of Shell, had congratulated him "for the opening and on the merchandise" , and encouraged and advised him (Sujanani) on "best aluminum quality that he had experience in". It means also that the judge rejected the evidence that suggested that representatives of Shell were introduced to Sujanani and they inspected the site knowing that Speedways was independent of Morris and giving the impression that Morris had Shell's authority to deal with Speedways on Shell's behalf. Also rejected was Sujanani's evidence that he was dealing with Shell through Morris (page 132) and that he undertook to vacate the premises as he was assured that Shell was giving him an undertaking. From that angle, it will be readily appreciated that the judge's use of the word 'agent' was inexact when he said that Shell's case could only be upheld to a very limited extent as Shell had dealt with Speedways through their agent Morris. The lease agreement and general business arrangements between Shell and Morris may well have been that which led to

the inexactitude, considering that under the lease, Morris was obliged to sell only Shell's gasoline, oils, greases, and kerosene.

23. **Ground 4** states:

> "That notwithstanding his finding of agency the learned judge erred in that he failed to consider that the first defendant held the second defendant out to be their agent by way of displaying the first defendant's trade name, mark and design on the second defendant's property and stationery".

This ground also fails by virtue of the fact that there was no finding of agency as stated. Ground 4, like grounds 1, 2 and 3, revolves around the issue of agency. So, before closing this issue, it is necessary to refer to the submissions that were made thereon. Both parties relied on the cases **Watteau v Fenwick** (1893) 1 Q.B. 346, **Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd** (1964) 2 Q.B. 480, and **Armagas Ltd.** v **Mundogas** (1986) 2 All ER 385. In addition, Mr. Andre Earle for Shell relied on **British Bank of the Middle East v Sun Life Assurance Co. of Canada (U.K.) Ltd** (1983) 2 Lloyd's Law Reports 9.

24. Speedways, through its managing director Sujanani, did not think of Morris as an employee of Shell (see page 151 of the record). There being no evidence from Shell, or otherwise, to indicate that Morris had actual or implied authority to act on its behalf, for Speedways to succeed, it had to show that there was agency by estoppel. Indeed, in the written submissions advanced by

the appellant, it is stated that "the appellant/claimant in its claim against Shell is relying on the principle of agency by estoppel and the doctrine of ostensible authority". It seems to me that in any discussion on agency, an appropriate commencement point is the not unfamiliar quotation from Lord Cranworth in the case **Pole v Leask** (1863) 33 LJ Ch 155 at 161-2:

> "No one can become the agent of another person except by the will of that person. His will may be manifested in writing, or orally or simply by placing another in a situation in which according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him ... This proposition, however, is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that belief, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed...Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with anyone as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it".

25. In looking at the cases on which the parties have relied, there is not much more that they add to the quotation above, in so far as relevance to the circumstances of this case is concerned. In **Watteau v. Fenwick** (1893) 1 Q.B. 346, the plaintiff supplied cigars on credit to the Victoria Hotel which was owned

by the defendants. The plaintiff did not know of the existence of the defendants who had engaged the services of Humble to manage the business. The defendants had forbidden Humble to credit cigars. On becoming aware of the true owner, the plaintiff sued them for the cigars. It was held that the defendants, as the real principals, were liable for all acts of their agent which were within the authority usually conferred upon an agent of that kind, notwithstanding he had never been held out by the defendants as their agent and the actual authority had been exceeded.

26. **Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd** was concerned with the authority of an agent to create contractual rights and liabilities between his principal and a third party. There, a property developer and another individual formed the defendant company to purchase and resell a large estate. These two individuals and a nominee were appointed directors of the company. The articles of association provided for the appointment of a managing director but none was appointed. The property developer engaged the plaintiffs to seek planning permission to develop the estate. The plaintiffs did that which was required of them by the developer. On the question of whether the property developer had the authority to bind the defendant company by his actions, it was found by the Court of Appeal of England (in upholding the judgment of the county court judge) that the property developer had no actual authority to employ the plaintiffs, but he had ostensible authority as he had acted throughout as managing director to the knowledge of the board. The

property developer's act of engaging the plaintiffs' services was within the ordinary ambit of a managing director, and the plaintiffs did not have to inquire whether he had been properly appointed; it was sufficient that under the articles of association there was in fact power to appoint him as such.

27. In **Armagas Ltd. v. Mundogas SA** (1986) 2 All ER 385, at 389j to 390a, the House of Lords stated the following in respect of ostensible authority:

> "Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it. Ostensible general authority can, however, never arise where the contractor knows that the agent's authority is limited so as to exclude entering into transactions of the type in question, and so cannot have relied on any contrary representation by the principal: see **Russo-Chinese Bank v Li Yau Sam (1910) AC 74".**

28. Speedways, in submitting that Shell ought to be estopped from denying that Morris was its agent, relies primarily on things allegedly said and done by Morris. For example, it is said that Morris displayed all Shell logos and

trademarks, and that the correspondence from Morris to Speedways was at times delivered in envelopes with the Shell logo. It was also submitted that Shell made no objections to the construction and modifications done by Speedways, hence Shell is now estopped. Added to this, the submission goes, Shell's representatives visited the site during the period of construction, so there could be no claim of ignorance of the activities. Mr. Earle's response to these submissions was simply that the use of the Shell name and logo is insufficient to give rise to apparent authority. Further, he said, Morris, as an independent trader, displayed his name on all letterheads and billboards to display his separate legal status.

29. It seems to me that given the legal relationship between Shell and Morris, it was reasonable to expect Shell's representatives to visit the premises from time to time; and, for Morris to also display Shell's trademarks. After all, Morris was bound to sell Shell's products. Speedways is being nothing short of clever, it seems, to be relying on Shell's logo and trademarks as supportive of its case, considering that it entered into an agreement with Morris without there being any indication whatsoever of Morris acting for anyone other than himself. The agreement (Exhibit 48) which was signed by Sujanani for Speedways clearly shows Morris as signing for himself alone, and shows that the tenancy was granted by Morris. The fact that there may have been advertisements of Speedways' activities on the premises would not be an indication that Morris was an agent for Shell. There is nothing in exhibits 50 and 51 (two advertisements)

that shows that Morris was an agent of anyone. In all the circumstances, there is no evidence which satisfies the principles relative to estoppel.

30. **Grounds 5 and 6** complained that the judge erred in failing to consider the substantial financial benefits that flowed from Speedways' business to Shell's and Morris' businesses. I have been unable to find in the record any evidence as to these alleged benefits.

31. **Ground 7** charged that the learned trial judge erred by misapplying the law to the facts of the case before him in making the following finding:

> "no stranger can conceivably enter upon the land of another without that other's consent and proceed to modify and reconstruct any building thereon. It matters not whether that stranger is a sub lessee of Morris (the original lessee) or not" .

There was misapplication, according to this ground, as there was evidence that Shell had notice of Speedways' construction and business. The evidence relied on for this ground was particularized thus:

> (a) the construction commenced in April, 1991, but it was only when completion was near in November, 1991, that Shell wrote to Morris in respect of the building;
>
> (b) there was no communication from Shell to Speedways of any objection, although Speedways trade mark and design were conspicuously displayed on the premises; and

(c) there was evidence that several servants of Shell visited the premises and demanded modifications.

This ground is for the most part a repetition of ground 4, set in a different style. There is no need for any further comment except to say that Speedways relies on **Exhibit 39** in this regard, but that exhibit is a letter addressed by Shell to Morris, and does not in any way support Speedways in its cause. The letter, dated July 21, 1992, written by Shell's marketing manager, reads:

> "We refer to our letters to you dated November 21, 1991, December 24, 1991, January 2, 1992, and the visit of myself and Mr. Phillip Hibbert on June 1, 1992, and wish to restate the following points:
>
> 1. the structure was erected without permission from Shell Company (W.I.) Limited and is in gross violation of the agreement which you have with us.
>
> 2. further, the structure is in total violation of Shell's VM standards with respect to the application of competing signs and colours.
>
> 3. several requests have been made to you for the situation (to) be corrected, the last such request being made on June 1, 1992, by the undersigned.
>
> 4. an undertaking was given by you to me that corrections would be made. These to date have not been effected. We are seriously concerned with failure to make any progress in this matter.
>
> We request again that you comply with our many requests by Friday, August 14, 1992 failing which we will be forced to take further action".

It is clear from this exhibit that Shell had been duped by Morris. This situation does not confer a benefit on Speedways.

32. **Grounds 8 and 9** read as follows:

Ground 8 –

> "...the learned judge erred in law and in fact in that he failed to consider that there is no requirement in law that "consent" must be prior and that "consent" can be after the fact either by words or actions (or inactions where action is reasonably warranted) or can be inferred from same".

Ground 9 –

> "...the learned judge erred in that he failed to consider (the) legal effect of the massive advertising campaign undertaken by the plaintiff to promote its business together with that of the defendants and engaging for this campaign the services of the advertising agent used by the first defendant".

Both grounds raise matters that have already been dealt with in the earlier stages of this judgment in respect of estoppel and do not require any further discussion.

33. **Grounds 10, 11, 12 and 13** are in relation to the lease agreements and the finding that Speedways' construction of the building was illegal. They read:

Ground 10 -

> "...the learned judge erred in that he failed to find that the pre-existing structure was in breach of the lease agreement and that the first defendant by allowing same to remain undisturbed was waving the relevant provision of the lease".

Ground 11 –

> "...the learned judge erred in that he failed to find that the lease agreement between the first and second defendants was not the entire agreement between them and moreover was irregular on its face".

Ground 12 –

> "...in respect of his findings on the plaintiff's building itself the learned judge erred in that:
>
> (a) contrary to his finding of illegality, there was neither any allegations in the pleadings as to the 'illegality' of the building nor was there any evidence presented, such as a notice of non-compliance or any other communication from the KSAC with respect to the 'illegal' construction of the building;
>
> (b) the plaintiff's construction of the building without the building permit was in reasonable reliance on the advice of professionals and the second defendant, who was in occupation of the said property for several years, and that no evidence was brought that such permit was required as the construction was a modification of an existing structure".

Ground 13 –

> "...the learned judge erred in that he failed to find that it was only after the first defendant's corporate plans for the gas station changed that the first defendant expressed their interest in demolishing the building and further failed to find that the building was not inconsistent with any plan at the time of its erection".

34. It is undisputed that Speedways did not seek the approval of the building authority, Kingston and Saint Andrew Corporation, to execute the project that it undertook on Shell's premises. Mrs. Sakhno-Gill submitted that no notice of

compliance was issued by the authority, nor was there any prosecution, so the question of illegality is irrelevant. Shell, she said, should not be relying on the fact that there may have been a breach of the building regulations by Speedways. This breach, according to the written submissions filed on behalf of Speedways, ought to be viewed in the context of there having been an earlier building that was erected in breach of the lease agreement between Shell and Morris. The existence of this earlier building, it was submitted, meant that Shell had acquiesced in Speedways' construction activities.

35. Mr. Earle submitted that there was illegality patent on the face of the record, and that Speedways cannot seek the aid of the Court where it has breached a statute, in this case the Kingston and Saint Andrew Building Act. Further, he said, Speedways should not receive a benefit for having committed the breach, and there is no privity of contract between a landlord (Shell) and an under-tenant (Speedways).

36. Section 10(1) of the Kingston and St. Andrew Building Act requires anyone who proposes to erect or extend any building or any part thereof to give notice thereof to the Building Authority. It is an offence under section 10(2) to erect or extend a building without the written approval of the Building Authority, and in such a situation, the Court may fine the offender as well as order the taking down of the building or part thereof. It is not an unusual situation for persons to breach the law in this respect: see the relatively recent decision in the case

Auburn Court Ltd. v. The Kingston and St. Andrew Corporation and another (Privy Council Appeal No.76 of 2002).

37. It is difficult to understand why complaint has been made about the judge's finding that the construction activity was illegal. The stark fact is that Speedways disregarded section 10 (supra), and the inaction of the Building Authority should not be interpreted as official condonation or sanction of the breach. The learned judge was clearly entitled to make his observation, notwithstanding the lack of formal pleading on the point. In any event, the unauthorized construction activity is far removed from the central issue in the case, that is, a determination as to whether Morris was the agent of Shell or not.

38. So far as the lease agreement between Shell and Morris is concerned, it is also difficult to see how Speedways could expect to benefit, as of right, from the terms of that agreement, even if one were to assume that it contains terms that were potentially beneficial to Speedways. The contractual arrangements between Shell and Morris are for the benefit of the immediate parties, not for a third party. The lease between them forbade the granting of a lease by Morris to anyone. It follows therefore that the lease between Morris and Speedways infringed the rights of Shell. It was quite reckless indeed and out of step with good business practice for Speedways to have failed, not only to get sight of the documentary authority of Morris to the control of the premises, but also to have

ignored the building law. In the circumstances, it is rather ambitious of Speedways to be seeking compensation from Shell.

Shell's alleged promise and Morris' undertaking

39. **Grounds 14 to 19** deal with Speedways' complaint that Shell made a promise that it did not keep. The following is a summary of these grounds:

14 – the judge did not consider properly the evidence of the witnesses as to the purpose of the meeting of September 28, 1993, that is, to have the injunction discharged;

15 – the judge erred in not finding that Speedways' abandonment of its right to an injunction was due to a promise from Hamilton on behalf of Shell;

16 – the judge erred in not considering properly Speedways' attorney-at-law's letter confirming Shell's promise;

17 – the judge erred in failing to find that at least after the meeting on September 28, 1993, Shell had full knowledge of Speedways and its claim;

18 – the judge erred in failing to consider properly or at all that Shell, knowing of Morris' undertaking to Speedways, sought and received an indemnity from Morris, then demolished the building without notifying Speedways that it was Shell's position that the representations pertaining to Shell in the said undertaking were false;

19 – the judge erred in failing to consider properly or at all Shell's denial of making a promise to Speedways and the evidence that Shell wrote only to Morris although Shell was aware that Speedways was relying on the promise.

40. The evidence presented in the case has already been summarized in paragraphs 9 to 16 above, and the findings of the learned judge set out in paragraph 17. The issue in these grounds of appeal turns on the outcome of the meeting on September 28, 1993. Speedways wishes this Court to find that the discontinuation of the injunction that had been obtained by Speedways was due to the promise made by Shell, through Hamilton, to provide alternative accommodation for Speedways. This, Speedways claims, is the only rational explanation for its actions in abandoning the injunctive relief as well as for vacating the premises. On the other hand, it has been submitted on behalf of Shell that Speedways could not have acted on the basis of the promise alleged as Shell's attorneys-at-law had indicated in writing that there had been no commitment to provide alternative accommodation.

41. In considering the question of whether Shell, through Hamilton, had made the promise of which Sujanani testified and on which Speedways has based its claim, it has to be borne in mind that Speedways had the benefit of legal advice at this critical stage. Whereas Speedways may not have sought legal advice in the early stage of its relationship with Morris, that was certainly not the position by the time Sujanani and Morris met with Hamilton in the latter's office. The sequence of events is important. It shows that on September 27, 1993, Speedways obtained an ex parte injunction to restrain Shell from demolishing the building. The next day Sujanani, Hamilton and Morris met. Then, on September

30, attorney-at-law Hugh Levy Jnr. wrote exhibit 6 to Hamilton. That letter has already been quoted at paragraph 11 above. Shell's attorneys-at-law replied on October 8. This was followed on October 19 by a letter from Hugh Levy Jnr. to Hamilton. A letter dated October 27 from Morris gave Speedways an undertaking. There is also a document headed "Letter of Undertaking" and dated November 5, 1993. It was followed by a letter, similarly dated, to Morris from Sujanani agreeing to vacate the premises. By letter dated January 11, 1994, Speedways made formal application to Shell "for concession of the retail shops available at Shell Gas Station on Constant Spring Road".

42. Exhibit 6 bears repetition. It is signed by Hugh Levy Jnr., addressed to The General Manager The Shell Company (W.I.) Limited, and reads:

> "I hand you herewith attested copy order on application for interim injunction issued by the Supreme Court on the 27th instant which speaks for itself.
>
> I understand from our conversation of the 28th instant that in consideration of my client vacating the premises he now occupies you are prepared to offer him accommodation in the new complex to be erected at 138 Old Hope Road and also to grant him a lease of a shop or shops to be erected on premises at Constant Spring Road in the vicinity of Dunrobin Avenue.
>
> If you would be good enough to let us have that commitment in writing as you have promised an application can be made to the Court to release the injunction prior to the expiration of 14 days, and the necessity of a further application for an extension obviated.

I await your response."

The evidence given by Sujanani indicates that after leaving Hamilton's office, he and Morris had stopped at Hugh Levy Jnr's office to discuss the meeting with Hamilton. Levy thereupon had a telephone conversation with Hamilton. Exhibit 6 above is, apparently, a follow-up to the conversation. There followed Shell's response dated October 8, 1993, to Hugh Levy. That letter states:

> "We have entered an appearance herein on behalf of the first defendant who has passed to us your letter of the 30th ultimo for response.
>
> Our instructions are that no promise or offer was given to your client along the lines contained in your said letter as such, our client is not in a position to give you the written commitment requested.
>
> Please be guided accordingly".

43. Shell's letter was responded to on October 19, by Hugh Levy Jnr. who scolded Hamilton thus:

> "I refuse to accept that the Howard Hamilton known to me could be guilty of such duplicity and can only conclude that that information must have been transmitted to the lawyers by some unauthorized minion and who had no knowledge of the exchanges between Mr. Hamilton and me or Mr. Sujanani and Mr. Hamilton.
>
> I confidently expect that Mr. Hamilton will do what he knows to be honourable and provide the promised letter with dispatch thereby obviating the necessity for further extension of the injunction".

44. No letter was forthcoming from Hamilton or Shell. Instead, in relatively short order, Morris penned a letter to Sujanani in these terms:

> "Dear Rick,
>
> As we discussed last evening, I am now assured that necessary arrangements have been put in place to assure you of the space at the Shell Service Station on Constant Spring Road. The letter has been prepared by Shell's lawyers and is to be signed by Mr. Howard Hamilton who is currently off the island.
>
> Please take this letter as my undertaking that should Shell not fulfil their promise to give you access to premises at Constant Spring Road I will personally compensate you for the building you now occupy. This project means everything to my business for the future, hence my personal commitment to you".

This letter was followed by a document headed "letter of undertaking" dated 5th November, 1993. In it, Morris stated:

> "...in consideration of your agreement to vacate premises which you now occupy at 138 Old Hope Road, Kingston 6, within seven (7) days of the date hereof I hereby undertake to compensate you for the loss sustained by reason of the demolition of your building by Shell Company (West Indies) Limited to an amount to be agreed upon between us, failing this by an arbitrator appointed pursuant to the provisions of the Arbitration Act in the event that Shell Company (West Indies) Limited fails to honour its promise to you to provide you with accommodation in shops to be erected by them at Constant Spring Road or otherwise provide you with an irrevocable commitment so to do within sixty (60) days of the date hereof".

On the same date as the "letter of undertaking", Sujanani wrote to Morris thus:

> "In reliance upon the undertaking today given by you in the letter of undertaking of even date I hereby agree to vacate the above premises in order to facilitate demolition thereof".

45. The correspondence and the "letter of undertaking" quoted above indicate the following:

- Speedways sought written confirmation of a promise allegedly made by Hamilton on behalf of Shell to Speedways through Sujanani;
- Speedways wished this written confirmation as a prelude to its making an application to have the injunction it had obtained discharged;
- Shell denied the making of any promise or offer, and refused to give the written commitment;
- Morris gave a personal undertaking to compensate Speedways;
- Speedways, on the basis of the undertaking and without having received any written confirmation from Shell, agreed with Morris to vacate the premises.

46. In my view, the learned trial judge must have inferred that Speedways, having asked for a written commitment from Shell and not received it, must have realized it did not have a leg to stand on and so it abandoned the idea of pursuing injunctive relief, closed its business and vacated the premises. At this stage, one is reminded, Speedways had the benefit of legal advice. Morris, in giving the undertaking, has to be seen as accepting responsibility for leading the

hapless Speedways (through an unwise Sujanani) into its predicament. Morris' letter dated October 27, 1993, which advised Speedways that a letter had been prepared by Shell's lawyers and was awaiting the signature of Hamilton who was off the island, must have been seen by the learned trial judge as nothing more than a ploy aimed at giving the impression that he was *au fait* with the inner workings of Shell and its lawyers.

47. In closing discussion on this aspect of the case, it needs to be pointed out that if there had been any doubt as to whether Shell had made a promise to Speedways, such doubt would have been dispelled by a letter dated January 11, 1994 (exhibit 15). In it, Speedways applies to Shell "for concession of the retail shops available at Shell Gas Station on Constant Spring Road". Significantly, there is absolutely no mention of any previous conversation or promise.

Interrogatories

48. **Ground 20** complains that the learned judge erred in law and in fact in that he failed to consider Morris' defence and his answers to the interrogatories which corroborated Speedways' case "almost in its entirety and were unchallenged at the trial".

The submissions on behalf of Speedways in respect of this ground were virtually non-existent. However, Mr. Earle for Shell took no chances with that fact, and stoutly contended that the answers to the interrogatories were to be disregarded as they were not put into evidence by Speedways at the trial. In the

written submissions, Mr. Earle and Ms Gracie said that "it is only when a party to the action puts in the answers to the interrogatories that they become a part of the evidence in the case which the Court must consider as a whole". They further submitted that in the instant matter the answers were made part of the Judge's bundle, having been inserted therein by Speedways without Shell's agreement, and "they were not put into evidence by either party to the action and hence would not form a part of the evidence to be considered by the Court".

49. The submissions on behalf of Shell on the question of the answers to the interrogatories are, in my view, very sound. The fact that a party has provided answers to questions posed by another party cannot make such answers automatically part of the evidence that the learned judge has to consider. Were it otherwise, a party could find himself in a situation where he has received disagreeable answers to his question and has no discretion as to whether he should use them or not. So, he would be stuck with even perjured answers. In my view, from the point of view of common sense, this could not be so. It would be most intolerable. In any event, it seems to me that the case law supports Shell's position.

50. In **Leeke v. Portsmouth Corporation** (1912) 106 L.T. 627, an action was brought for the recovery of possession of two strips of land forming part of one continuous strip lying on one side of a road and alleged to be waste within the plaintiffs' manor. The plaintiffs intimated that at the trial they intended to

show acts of ownership by them over parts of the strip contiguous to and at greater distance from the parts of the strip in dispute in the action. They proposed to interrogate the defendants as to facts concerning the defendants' acquisition of other parts of the strip not in dispute lying between inclosures of the defendants and the road. Eve, J.(as he then was) dealt with the matter thus at page 629:

> "The question is whether I ought to allow them so to do, seeing that the discovery sought is directed to the dealings by the college with pieces of the strip distinct from those in dispute in the action, but alleged by the plaintiffs to be of an exactly similar character and to form part, with the pieces in dispute, of one tenant. Two objections are taken on behalf of the college...I do not think that there is any substance in either objection. The plaintiffs cannot prove all their case at once – they can only establish it by successive steps, and by this discovery they seek to obtain from the defendants information which will go to prove one of such steps. The fact that **any admissions made by the defendants in their answers will only be admissible when the plaintiffs have established that they are the owners of the manor**, and that the whole strip lies within the manor and is of one continuous character, cannot properly deprive the plaintiffs of their right to the discovery if it is necessary for the proof of any part of their case" (emphasis added).

Implicit in the emphasized words quoted above is the understanding that the answers given by the defendants will still have to pass the test of admissibility. Surely, it cannot be that an answer that would have been inadmissible by the ordinary rules of evidence, if given orally, will become automatically admissible, however outrageously offensive to the rules of evidence, merely because it has

been given on affidavit in response to interrogatories. It follows therefore that the party who has received the answers must still seek to have them admitted formally in evidence by the judge before they can be regarded as evidence in the case. This preserves the right of a party to use such evidence as it desires in proof of the case being advanced.

51. I should have thought that the matter was beyond doubt given the authoritative statements in Volume 13 of the 4th edition of Halsbury's Laws of England. Paragraph 108 thereof, which is headed "Using answer at the trial", reads thus:

> "At the trial of a cause, matter or issue, a party may use in evidence any one or more of the answers or any part of any answer of the opposite party without putting in the others or the whole, subject to the power of the court to direct the others or the whole to be put in whenever it is of the opinion that they are so connected with those originally put in that the latter should not be used without them".

The authorities which form the basis for this statement are **1 RSC Order 26, r.7** and **Lyell v. Kennedy (No.3)** (1884) 27 Ch.D 1 at 15 per Cotton, LJ.

The paragraph continues:

> "If answers are so put in by a party, he is not debarred from calling other evidence which may contradict them. A party putting in the answers makes them part of his own case, but this does not preclude him from calling other evidence to contradict the answers, since they only form part of

> the total evidence which the court must consider as a whole" :
> **Endeavour Wines Ltd. v. Martin and Martin**
> (1948) 92 Sol. Jo. 574.

52. Morris did not see it fit to contest the allegations of Speedways beyond the filing of a defence. Apart from this, his participation in the proceedings has been limited to the supplying of answers to interrogatories addressed to him by Speedways. Whatever may be the effect of the answers given so far as they affect the position of Morris vis-à-vis Speedways, it does not seem to require the citation of any precedent for it to be said that the answers cannot adversely affect Shell. This has to be the position given the fact that Shell never had the opportunity to cross-examine Morris on any of the answers.

Damages

53. **Ground 21** claims that the learned judge erred in law and in fact in refusing to grant Speedways' entire claim against Morris having regard to the judge's failure :

> (a) "to consider properly or at all evidence of a chartered accountant, whose credentials and credibility were unchallenged, with respect to the losses sustained by the plaintiff" (Speedways):
>
> (b) "to consider that financial projections and evidence of director's loans is not 'simply throwing figures at the court' and is in fact the best available evidence of the plaintiff's losses"; and

(c) "to consider properly or at all the physical evidence of the plaintiff's building and the oral evidence with respect thereto which even on a quantum meruit would lead to a reasonable conclusion that the building was worth the amount claimed by the plaintiff being $2,144,000.00".

54. The claim before the learned judge was for the sum of $2,144,000.00 as regards the expenditure on the premises and for $12,567,808.00 for loss of income for eight years. He found that proof had been adduced in respect of only $188,941.76. He also found that the evidence of loss of income was unreliable. In arriving at his conclusion, the learned judge had before him the evidence of Mr. Sujanani and Mr. Roy Curtis, an accountant who said that he did the accounts for Speedways for the period April 30, 1992, to November 30, 1993. He also did forecasts for the period 1994/1995 to 2001/2002.

55. The submissions on behalf of Speedways as well as Shell on the question of the damages relate to the quality of the evidence, or the lack of it. Whereas Mr. Dunkley and Mrs. Sakhno-Gill contend that the evidence was reliable and sufficient, Mr. Earle points to the opposite. On the basis of the view that I take of the case, this ground is of importance only so far as the liability of Morris is concerned. The learned judge reasoned that figures were merely thrown at the Court by Speedways, and that there was no proper proof of the damages claimed. There is a solid base for the view taken by the judge in that Sujanani's evidence indicated that there was hardly any distinction between his personal

funds and those of Speedways in respect of the purchase of goods. Receipts were apparently hard to come by for production in Court to substantiate the claims of purchases and other expenditure. There was also a situation in which strangers were allowed to take whatever they wished of the presumed assets of Speedways during the process of demolition.

56. Given the state of the evidence, I cannot agree that the judge erred in any respect in not awarding that which was claimed. In **Bonham-Carter v Hyde Park Hotel** (1948) 64 TLR 177, Lord Goddard, CJ, reminded plaintiffs seeking damages that the burden of proof is on them. It is insufficient for them to merely say to the Court what they have lost. This reminder was ignored by Speedways. There is also the fact that Speedways was reckless in entering into such a serious arrangement with Morris without checking on the lease that Morris had with Shell. Had Speedways taken this basic precaution, as has earlier been noted, it would have spared itself the predicament that befell it. Furthermore, having seen that which was impending, that is, the demolition of the building and the reconfiguring of the premises, prudence ought to have dictated that a speedy exit to another location was the proper choice that was open to Speedways.

Interest

57. The final complaint of Speedways is that the learned judge erred in refusing to award interest at the rate of 25% per annum. Instead, as already

noted, a rate of 12% was awarded. It was submitted on behalf of Speedways that the case **British Caribbean Insurance Company Ltd. v. Delbert Perrier** (SCCA 114/94 –delivered on May 20, 1996) was "authority to calculate interest at 25% per annum". On the other hand, the position of Shell is that where there is no agreement for interest that is higher than the rate provided for by section 51 of the Judicature (Supreme Court) Act, that is, 12%, the Court will not permit a plaintiff to recover more than that rate.

Alternatively, it was submitted that a claimant "may make use of the discretionary rate of interest awarded by the Court pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act".

58. There seems to be a misunderstanding on the part of the attorneys-at-law for Speedways as to what was decided in the **British Caribbean Insurance Company** case. Carey, J.A., in dealing with the award of interest, referred to the Privy Council decision of **Motor and General Insurance Co. Ltd. v. Gobin** (unreported) , delivered on December 3, 1986, and thereafter ventured "the rate which a judge should award in what may be described as commercial cases". He continued :

> "It seems clear to me that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award".

He then summarized the position thus:

> " (i) awards should include an order for the defendant to pay interest.
>
> (ii) the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and
>
> (iii) the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed.

Nowhere in the reasoning of Carey, J.A. or of Patterson, J.A. is there anything to support the contention that the award of interest in the instant case should be 25%. The award of 25% in the **British Caribbean Insurance Co**. case was based entirely on the evidence presented before the judge at first instance, Langrin, J (as he then was). The list of exhibits supplied with the record in the instant case does not show the tendering of any documentary evidence as to interest. Further, the submissions made in the Court below did not throw any light on the matter. It was merely asserted that 25 % interest was payable by virtue of the **British Caribbean Insurance Co**. case (see page 102 of the record). In my view, the challenge to the award fails as the learned judge was empowered to make an award as he saw fit on the evidence presented.

The respondent's notice

59. Shell filed a notice contending that the judgment of Theobalds, J. may be affirmed on nine grounds other than those relied on by him. The fifth and sixth of those grounds were not pursued. The first ground suggested that the judge

ought to have had regard to the issue of whether or not Shell could have been liable to Speedways in trespass given that the latter had voluntarily vacated the premises. The point to be made in this regard is that the matter of trespass was not an issue in the case.

The second ground said that the judge should have had regard to the effect of the Shell lease on the Speedway lease, in that the latter was bound to observe the covenants in the Shell lease. The learned judge did have regard to the effect of the head lease on the under-lease, but not in the manner suggested. (In this judgment, the question of the lease and sub-lease is dealt with in paragraphs 33 to 38).

The third ground said that the judge ought to have had regard to the option to renew clause in the Speedways lease as it affects Speedways' claim for loss of future income for eight years. In view of the conclusion arrived at by the Court below, that the evidence of loss of income was unreliable, and this Court being unable to disagree with that conclusion, the outcome of the case would not have been affected by the option to renew clause.

The fourth ground states that the learned judge "ought to have had regard to the issue of estoppel . . . in that . . . the plaintiff/appellant must have made a mistake as to its legal rights and consequently expended money on the fact of this mistaken belief." This ground has been dealt with in paragraphs 19 to 32 herein during consideration of the Speedways' grounds one to nine.

The seventh ground put forward by Shell in support of the judgment states that the learned judge ought to have had regard to the issue of agency. This was also dealt with in paragraphs 21 to 29.

Shell's eighth ground states that the judge "ought to have had regard to the issue of whether the plaintiff/appellant could successfully claim in respect of the illegal building which had been constructed...". This was dealt with in considering Speedways' grounds ten to thirteen in paragraphs 33 to 38.

Finally, ground 9 of the respondent's notice, referring to rental, needs no mention as it was not an issue in the case.

Conclusion

60. In view of the opinion expressed in the foregoing, I conclude that the appeal is without merit and ought to be dismissed with costs being awarded to Shell.

McCALLA, J.A. (Ag.)

I agree with the reasoning and conclusion of my learned brothers Harrison, P., and Panton, J.A. and have nothing further to add.

HARRISON, P.

ORDER

Appeal dismissed. Costs awarded to Shell to be agreed or taxed.