

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PASHA S. ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendant.

Master File No. 09-cv-118 (VM)

This Document Relates To: All Actions

Affidavit of Mark A C Diel

Tab 10

have been by reason of a defalcation by a partner or employee of Patrick Partners. Secondly, the money must have been received by the firm in the course of or in connexion with the firm's business of dealing in securities. Thirdly, the money must have been entrusted to or received by the firm for or on behalf of the appellant or by reason that the firm was trustee of the money. It is in relation to the second condition that s.58 differs from s.97; the former section requires only that the money shall have been entrusted or received "in the course of or in connection with the business of that firm".

4. In the present case the second of these conditions was satisfied. The money was received in connexion with the firm's business of dealing in securities. The connexion lay in the fact that Dr **Daly** went to the firm for the purpose of investing in securities and was instead persuaded to advance the money to the firm. However, if the transaction was what it purported to be - one of loan - the first and third conditions were not satisfied. A borrower does not commit a defalcation either by receiving the money lent to him or by failing to repay his debt. Nor, in the absence of special stipulation, does a borrower receive the money that is lent to him for or on behalf of the lender or as a trustee.

5. The argument for the appellant was that Patrick Partners owed a fiduciary duty to Dr Daly and were in breach of that duty in borrowing money from him without disclosing the firm's unsatisfactory financial situation. The failure to account for money received in a fiduciary capacity was, so it was submitted, a defalcation. Further, it was said, a constructive trust arose immediately the money was received, so that the money was received for or on behalf of Dr Daly, or as trustee, within the meaning of the sections.

6. It was right to say that Patrick Partners owed a fiduciary duty to Dr Daly and acted in breach of that duty. The firm, which held itself out as an adviser on matters of investment, undertook to advise Dr Daly, and Dr Daly relied on the advice which the firm gave him. In those circumstances the firm had a duty to disclose to Dr Daly the information in its possession which would have revealed that the transaction was likely to be a most disadvantageous one from his point of view. Normally, the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make to the client a full and accurate disclosure of the broker's own interest in the transaction: *In re Franklyn*; *Franklyn v. Franklyn* (1913) 30 TLR 187; *Armstrong v. Jackson* (1917) 2 KB 822; *Thornley v. Tilley* [1925] HCA 13; (1925) 36 CLR 1, at p 12; *Glennie v. McDougall & Cowans Holdings Ltd.* (1935) 2 DLR 561; *Burke v. Cory* (1959) 19 DLR (2d) 252; *Culling v. Sansai Securities Ltd.* (1974) 45 DLR (3d) 456. The duty arises when, and because, a relationship of confidence exists between the parties: see *Tate v. Williamson* (1866) LR 2 ChApp 55, at pp 61, 66 and see also *McKenzie v. McDonald* (1927) VLR 134, at pp 144-145; *Hospital Products Ltd. v. U.S. Surgical Corporation* [1984] HCA 64; (1984) 58 ALJR 587, at pp 596-598, 628; [1984] HCA 64; 55 ALR 417, at pp 431-436, 488-489.

7. It is however not enough for the appellant to establish that the relationship between Dr **Daly** and the firm of stockbrokers to which the money was paid was a fiduciary one. To bring the case within either s.97 or s.58 it is necessary to show that the moneys were received by the firm for or on behalf of Dr **Daly**, or as trustee. The appellant seeks to do that by establishing that the moneys when received by the firm were the subject of a constructive trust in