UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

Affidavit of Mark A C Diel

Tab 19

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IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL NO. 15 OF 1992

FOCUS INSURANCE COMPANY LIMITED	Plaintiff
-and-	
MARK GREGORY HARDY	1st Defendant
DAVID ARTHUR THIRKILL	2nd Defendant
DOUGLAS HARVEY **PULLEN**	3rd Defendant
CAREDEED LTD.	4th Defendant
STARBOOK INVESTMENTS LTD.	5th Defendant
VILLAROSA ANSTALT	6th Defendant
MAGNOLIA TRADING SA	7th Defendant
BERMUDA TRUST COMPANY LTD. (as Trustee of Forum Trust)	8th Defendant
JUDY MARY HARDY	9th Defendant

Before: Roberts, P.
da Costa, J.A.
Henry, J.A.

Dates of Hearing: 2nd. 3rd. 4th and 5th November, 1992.
Date of Judgment: 25th November, 1992.

J U D G M E N T

Roberts, P.

History of Proceedings

On 5th July, 1991, a statement of claim was issued by the plaintiff, an insurance company, duly incorporated by registration under the Companies (Incorporation by Registration) Act, 1970. The plaintiff was, at the date of such issue, in liquidation and proceedings were taken on behalf of the liquidator.

At that stage, there were three defendants. who appear above as the first **(D1)**, second (D2) and third (D3) defendants.

A summons was **filed** by D3 on 26th July 1991, seeking the striking out of the plaintiff's writ and statement of claim.

A similar summons was issued on 27th July, 1991 on behalf of D2, seeking the same relief.

Although the summons of D2 was returnable on 31st July 1991, there is nothing in the record which suggests that this was pursued.

On 7th November, 1991. the statement of claim was amended. The original statement of claim had alleged that, by reason of their acts or omissions as directors or officers of the plaintiff,

D1, D2 and D3 were liable for losses caused thereby to the plaintiff. The amended statement of claim on 7th November, 1991 alleged wilful negligence and default by the three defendants.

A summons dated 5th March,' 1992 was issued by D1 seeking the striking out of the amended statement of claim, on the ground that it disclosed "no reasonable cause of action" against D1. The summons was to be heard on 6th April, 1992.

On the same date, 6th April, 1992. the plaintiff sought to amend its statement of claim so as to add the fourth to ninth defendants (D4 to D9) for the first time, as well as to make other amendments.

Hearing Before Chief Justice

It was agreed by all parties that the application to strike out should proceed on the basis of the reamended statement of claim. There were before the Chief Justice applications by D1, D2 and D3 to strike out and by the plaintiff to reamend its statement of claim.

The applications to strike out were brought on the ground that the pleadings, as reamended, disclosed no reasonable cause of action.

In his judgment, delivered on 11th May, the Chief Justice set out what were, in his view, the important parts of the statement of claim, concluding that the material particulars given by the plaintiff were in sufficient conformity with the rules of pleading to enable the defendants to meet the plaintiff's claim and be able to plead to it.

He commented that there was no allegation of fraud or dishonesty, only that the defendants acted with wilful negligence and default arising from their acts and omissions. He found that the facts given in the statement of claim would, if proved, show a wilful disregard of their duties by the directors and would be evidence that they had acted in a negligent manner. He was thus satisfied that the plaintiff had pleaded the material facts on which it relied to show the state of mind of the defendants.

There were submissions to the Chief Justice as to the

effect of bye-law 108 of the plaintiff company which confers protection upon directors of the plaintiff for the neglect or. default of another director. This bye-law should, he said. be considered in conjunction with other bye-laws and sections 97 and 98 of the Companies Act. He also commented that he was only concerned as to whether the plaintiff had properly pleaded its case and found that it had, with the exception of paragraph 8 of the reamended statement of claim. which he struck out.

With regard to the joinder of D4 to D9, the Chief Justice found that 0.15 r.6 gives the necessary authority to join and that the plaintiff had discharged the burden of satisfying him that they were necessary parties to the dispute raised in the action. He therefore ordered that they be joined and allowed service of notice of the writ out of the jurisdiction.

He refused to strike out the writ and reamended statement of claim (save that he struck out paragraph 8) and allowed the plaintiff to reamend its statement of claim in terms of the draft put before him.

Applications for leave

An application for leave to appeal was heard, inter partes, by the Chief Justice on 24th June, 1992. All defendants sought leave to appeal. This was refused by the Chief Justice, on the ground that there was "no arguable point to be reviewed".

The applications were renewed before us, ex parte, on behalf of all the defendants on 20th July, 1992.

After hearing argument that leave should be given, we decided that we should hear the application for leave at the next sitting of the Court. At that sitting, all parties should be ready to argue the merits of the appeal and all documents should be before the Court which would be required as if the hearing were an appeal, and not merely an application for leave.

Grounds of Appeal

The grounds of appeal put forward on behalf of D1 can be summarized as follows -

(1) The Chief Justice was wrong in finding that, because of the wording of section 97 and 98 of the Companies Act, the defendants could be held liable for mere negligence if they did not "exercise the care, diligence and skill that a reasonably prudent person would exercise in **comparable** circumstances".

(2) The Chief Justice was wrong in law in stating that "at this stage I am concerned only to see whether the plaintiff has properly pleaded their case".

(3) The Chief Justice erred in holding that the plaintiff, except for paragraph (8), had properly pleaded its case.

(4) D4 and D9 were improperly joined as they were made parties only for purposes of discovery.

(5) No cause of action was made out in pleadings against D4 to D9.

(6) Amendments to the statement of claim, so far as D4 to D9 are concerned, were not necessary to determine the real question between existing parties to the action.

(7) Service of the amended statement of claim was in breach of 0.11 R.S.C.

D2 and D3 put forward their grounds of appeal.

Paragraph (1), (2) and (3) raise, in essence, the same issues as D1.

In (4), it is said that the Chief Justice incorrectly failed to distinguish D2 and D3 from D1 and to consider how the pleadings applied to their separate circumstances.

(5) The Chief Justice misapplied the principles of pleading set out in Bermuda Civil Appeal No. 14 of 1981, Intercontinental Natural Resources Ltd. v. Dill and others. (see para. 3(e) of Dl's grounds).

(6) The pleadings are in breach of 0.18 and 12(1)(b) R.S.C. (see para. 3(a) of Dl's grounds).

(7) A proper distinction was not drawn as to distinction between primary and conclusory facts. (see para. 3(g) of Dl's grounds).

(8) The Chief Justice was wrong to conclude that an allegation of the existence of a duty and failure to perform it are sufficient to establish wilful neglect. (see para. 3(c) of Dl's grounds)..

(9) The Chief Justice was wrong to reject the principles of Lipkin Gorman v. Karpnale Ltd. (1987) 1 W.L.R. 1340, to the effect that a plea of "ought to have known" is equivocal and an unacceptable plea.

(10) That the Chief Justice was wrong in law in failing to hold that the reamended statement of claim was an abuse of process.

The defendants contend, for the reasons given above, that the reamended statement of claimshould be struck out against all

the defendants.

Backsround

The plaintiff was originally incorporated in Bermuda by registration on 8th August, 1979, under the name of the Trenwick Insurance Company Ltd. Its principal objects were, among other things, to engage in all types of insurance and reinsurance business.

The plaintiff underwrote insurance of various kinds unitl 1986 when it ceased active underwriting and went into "run-off".

D1 and D3 were directors and officers of the plaintiff at all material times. D2 was such a director and officer from December 1987 to September 1989 and from May 1990 to September 1990.

The plaintiff went into voluntary liquidation on 19th September 1990. Joint provisional liquidators were subsequently appointed by order of the Supreme Court on 8th November, 1990. The plaintiff went into compulsory liquidation by order of that Court on 5th February, 1991.

Forum Reinsurance Co. Ltd. ("Forum Re") was incorporated by registration about 4th July 1985. Its principal objects were to engage in all types of insurance and reinsurance business. D1, D2 and D3 were at all material times directors of Forum Re.

Forum Re was ordered to be wound up by the Supreme Court on 8th March, 1991, by reason of its inability to pay its debts.

By a written agreement on 24th December, 1987 between Forum Re and Trenwick Services Ltd., Forum Re agreed to buy the shares of Trenwick Reinsurance Company Ltd. In accordance with the terms of that agreement, the name of Trenwick Reinsurance Co. was changed to Focus Insurance Co. Ltd. about 25th January 1988.

General liability of a director

A director can only be guilty of negligence if it is proved that he has failed to perform some duty which he is obliged to discharge.

In determining whether a director has been guilty of negligence, "the court will take into account the character of the

business, the number of directors, the provisions of the articles, the normal course of the management and practice of directors, the extent of their knowledge and experience and any special circumstances which apply." See In Re City Equitable Fire Insurance Company Limited (1925) 1 Ch. 407 at p. 426 per Romer J. and Palmer's Company Law, 25th Edition, page 8093.

The same approach applies in considering whether a director was guilty of wilful neglect or default. The difference between ordinary and wilful neglect must be established by the pleadings. Are these sufficient to show that a breach of duty by a director was such as to amount to wilful neglect or default?

It must be recognized that persons are employed as directors for their skills in some particular field, perhaps in finance, marketing, advertising, exporting etc., see Pennington's Modern Company Law. 6th Edition, page 581.

In the case of the plaintiff, D1 was a chartered accountant, D2 a reinsurance specialist and D3 a corporate lawyer. The plaintiff does not, however, purport to plead any matters which D2 and D3 were employed to perform as directors. Each is alleged to have been obliged to carry out the general duties of a director which are set out in paragraph 11.

There is no allegation that D2 and D3 had any reason not to trust D1, who was their colleague. If such an allegation had been made, it would have been necessary to plead matters which did, or ought, to have given rise to such mistrust.

Before the Chief Justice, counsel for the plaintiff argued that there was dishonesty by D1. This submission was presumably based on paragraph 12 of the reamended statement of claim. Before us, however, counsel submitted that he was making no allegation of dishonesty in the pleadings but was relying on section 97(4) of the Act, which states that in certain circumstances a director is "deemed not to be acting honestly and in good faith".

If counsel is correct and there was no suggestion of dishonesty on the part of D1, there would have been no reason why D2 and D3 should have supervised what D1 did or omitted to do. As

Lord Halsbury commented in Dovev v. Carey (1901) AC 477 at p. 486 -

> "The business of life would not go on if people could not trust those who are in a position of trust for the express purpose of attending to details of management."

He later pointed out that there is no such duty of detecting fraud. The same should apply to dishonesty.

A director is not the watchdog of another director. A duty of care could only arise if one director had reason to suspect that his fellow director was acting dishonestly.

If there is an allegation of dishonesty on the part of **D1,** the breaches of duty of D2 and D3, of a nature which would make them liable, would have to be set out in detail in the pleadings.

Nor is it pleaded, as it should have been, that if D2 and D3 had discharged properly the duties which lay upon them, the alleged losses would not have occurred.

In paragraph 11 there is set **out a** series of duties which a director must perform. Counsel for the plaintiff submitted that this is sufficient in a case of **wilful** default, relying on the dissenting judgment of Griffiths C.J. in Gould v. Mount Oxide Mines Ltd. (in liquidation) and others (1916) 22 D.L.R. 490. at p. 502 -

> "After alleging the proceedings for winding up the plaintiff Company, the statement of claim in **para.** 62 charged that the appellants were guilty of breaches of duty as directors of the company and grossly negligent in relation to the Company's affairs 'in the following amongst other respects'. It then enumerated 25 separate instances of acts of omission on the part of the **appellants.** One of them was that they consented to the insertion in the agreement of the 23rd December of the provision for payment of the **£20,000** to the.Herman Company and neglected to see to its application. Another, with which I deal separately, was that they improperly issued certification for shares."

These illustration make it clear that, although Griffiths C.J. described them as acts of omission, they were not properly so called. Both the giving **of consent** and the issue of shares were positive acts by the directors. These were specifically pleaded. The plaintiff did not rely upon a general allegation of breaches of duty.

In a later passage, on the same page, Griffiths C.J. comments -

> "It wound up by an allegation that the appellants were puppets of Herman and Herman Company, and acted under their direction, without exercising any independent judgment or discretion, and delegated to them the exercise of their powers and duties as directors."

This is, in essence, the plaintiff's case against D2 and D3, who are, in effect, said to have abrogated their duties, and left it to their fellow director D1 to run the company as he wished.

But it is not sufficient for a plaintiff to allege that the defendant acted negligently and caused him damage. He must set out the particular breach of duty - see West Rand Central Gold Mining Company v. R. (1905) 2 K.B. 391 at p. 400.

The Companies Act, 1981 ("the Act")

In his judgment of 11th May. 1992, the Chief Justice considered the effect of sections 97 and 98 of the Act and of bye-laws 108 and 109 of the plaintiff.

This is of importance, since a decision as to the validity of these bye-laws would mean that the directors of a company, if they are valid, could be held liable only for "wilful negligence, wilful default, fraud and dishonesty". If the bye-laws are not valid, the directors could be held liable for negligence or default.

The Chief Justice, however, made no finding as to whether or not the relevant bye-laws of the plaintiff were valid, though he expressed the opinion that the defendants "could be held liable for mere negligence in performing their duties if they did not exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

The relevant sections of the Act are as follows -

> "97. (1) Every officer of a company in exercising his powers and discharging his duties shall -
>
> (a) act honestly and in good faith with a view to the best interests of the company; and
>
> (b) exercise the care, diligence and skill that

a reasonably prudent person would exercise in comparable circumstances.

(2) Every officer of a company shall comply with this Act, the regulations, and the bye-laws of the company.

(3) Subject to section 98, no provision in a contract, the bye-laws or a resolution relieves an officer from the duty to act in accordance with this Act or the regulations or relieves him from liability for a breach thereof.

(4) Without in any way limiting the generality of sub-section (1) an officer of a company shall be deemed not to be acting honestly and in good faith if -

(a) he fails on request to make known to the auditors of the company full details of -

(i) any emolument, pension or other benefit that he has received or it is agreed that he should receive from the company or any of the company's subsidiaries; or

(ii) any loan he has received or is to receive from the company or any its subsidiaries;

(b) he fails to disclose at the first opportunity at a meeting of directors or by writing to the directors -

(i) his interest in any material contract or proposed material contract with the company or any of its subsidiaries;

(ii) his material interest in any person that is a party to a material contract or proposed material contract with the company or any of its subsidiaries.

(5) For the purposes of this section -

(a) a general notice to the directors of a company by an officer of the company declaring that he is an officer of or has a material interest in a person and is to be regarded as interested in any contract with that person is a sufficient declaration of interest in relation to any such contract;

(b) the word material in relation to a contract or proposed contract shall be construed as relating to the materiality of that contract or proposed contract in relation to the business of the company to which disclosure must be made;

(c) an interest occurring by reason of the ownership or direct or indirect control of not more than ten per centum of the capital of a person shall not be deemed material.

(5A) An officer is not liable under subsection (1) if he relies in good faith upon -

(a) financial statements of the company repre-

sented to him by another officer of the company; or

(b) a report of an attorney, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by him.

(6) Any officer of a company who fails to make known a matter he is required to make known under subsection (4) shall be liable to a fine of one thousand dollars.

(7) Nothing in this section shall be taken to prejudice any rule of law or any bye-law restricting officers of a company from having any interest in contracts with the company.

98. Subject to the provisions of this section and section 98A, any provision, whether contained in the bye-laws of a company or in any contract or arrangement between the company and any officer, or any person employed by the company as auditor, exempting such officer or person from, or indemnifying him against any liability which by virtue of any rule of law would otherwise attach to him in respect of any wilful negligence, wilful default, fraud or dishonesty of which he may be guilty in relation to the company shall be void:

Provided that -

(a) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or ommitted to be done by him while any such provision was in force; and

(b) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid indemnify any such officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal in which judgment is given in his favour or in which he is acquitted or when relief is granted to him by the Court under section 281.

The bye-laws of Trenwick Reinsurance Company Limited, which was the former name of the plaintiff, contain the following' -

"108. Subject to the provisions of Bye-Law 109, no Director, Secretary or other officer of the Company shall be liable for the acts, receipts, neglects, or defaults of any other Director or officer or any person involved in the formation of the Company, or for any loss or expense incurred by the Company through the insufficiency or deficiency of title to any property acquired by order of the Directors for or on behalf of the Company, or for the insufficiency or deficiency of any security in or upon which any of the monies of the Company shall be invested, or for any loss or damage arising from the bankruptcy, insolvency, or tortious act of any person with whom any monies. securities, or effects shall be deposited. or for any loss occasioned by any error of judgment, omission. default, or oversight on his part, or for any other loss. damage or misfortune

> whatever which shall happan in relation to the execution of the duties of his office or in relation thereto, unless the same happens through his own dishonesty.
>
> 109. Neither the indemnities contained in Bye-Laws 102 and 103, nor the right to make advances contained in Bye-Law 106, nor the relief from liability contained in Bye-Law 108 shall extend to any matter which would render the same void pursuant to the Companies Acts.

As will be seen, section 98 of the Act does not adopt the U.K. wording, which makes illegal any provision intended to relieve directors of liability for any negligence, default, breach of duty or breach of trust (see Section 310 of the U.K. Companies Act, 1989).

Section 98 of the Act retains the previous common law concept that releasing provisions are to be ineffective only in respect of "wilful negligence, wilful default, fraud or dishonesty."

We note in passing that "wilful negligence" and "wilful default" must indicate conduct which is not, and so falls short of, fraud or dishonesty. If it were not so, the references to fraud and dishonesty would be redundant.

"Wilful negligence" and wilful default imply conduct which is more serious in nature than mere negligence and mere default.

The defendants' argument was that an act or omission can be said to be "wilful" only if there is a conscious recognition by the wrongdoer that he was acting in breach of his duties or that he does not care whether he is so acting.

It is not in dispute that a bye-law which seeks to exempt directors from liability for wilful negligence, wilful default, fraud or dishonesty can be of no effect.

Bye-law 108 provides that a director shall not be liable for the acts, neglects or defaults of any other director and for various other acts, other than his own dishonesty. This bye-law is expressly made subject to bye-law 109, which itself, in terms specifies that bye-law 108 shall not extend to any matter which would "be void under the Companies Acts".

Thus bye-law 108 does not extend to wilful negligence,

wilful default, fraud or dishonesty. This, the defendants argue, is the purpose of bye-law 109.

When these two bye-laws are read together, it is apparent that bye-law 109 limits the application of bye-law 108 to conduct for the consequences of which the Act provides that a director may be relieved by the bye-laws.

If there were any conflict between the bye-laws and the Act, the latter would prevail, as must be the case whenever a statute conflicts with subordinate legislation.

The plaintiff has argued that the defendants may not rely on bye-law 108 because of section **97(2)** of the Act. This does not seem to us to be correct.

Sections **97(1)** and **97(2)** impose duties on directors. Section **97(3)** provides that subject to section 98, by-laws cannot relieve directors of their duty to conduct themselves in accordance with the Act.

Section 98 of the Act permits a company to exempt a director from liability from a breach of sections 97(1)(b) or section **97(2)** provided that the conduct falls short of wilful negligence, wilful default, fraud or dishonesty.

The position in Bermuda is not complicated. Sections **97(1)** and (2) impose duties on directors. By section **97(3)**, they cannot be relieved of liability, subject to section 98. This permits a director to be relieved, so long as his breach of duty does not amount to the **conduct** described in section 98.

Bye-laws 108 and 109 seem to us to be valid and effective so as to relieve the directors of Focus from liability for acts or omissions which fall short of the prohibition contained in section 98 of the Act.

It must follow from this that the plaintiff can only succeed against the second (D2) and third (D3) defendants if he pleads and proves a cause of action based on wilful negligence or wilful default, as no fraud or dishonesty is alleged against them.

The Intercontinental Case

During the hearing of the application for leave to appeal,

a large number of cases were cited to us. Many of these. since they depended upon the facts before the Court, were of little assistance. However, frequent reference was made to a Bermuda appeal. This considered the principles of pleading which apply. We should follow it, unless satisfied that the Court was in error. This was Intercontinental Natural Resources Limited v. Sir Bayard Dill and others (Bermuda Civil Appeal No. 14 of 1981), in which the authorities applicable were examined in detail.

The relief sought against D2, D3. D4 and D5 in that action was for damages for breach of contract and breach of duty whilst they were acting as directors of the plaintiff company. D1 and D5 sought to have the action dismissed as disclosing no reasonable cause of action and as embarrassing and an abuse of the process of the Court.

The duties of directors were set out in paragraphs 9 and 10 of the Statement of Claim. Paragraph 11 averred that D2 and D5 were aware of their duties, were aware that they were acting in breach of them and that such breaches were wilful "as hereinafter pleaded".

Paragraph 12 stated that the company sustained substantial losses by reason of improvident management and unwise transactions entered into by the company.

Paragraph 13 alleged that the directors took no part in the management or conduct of business of the company. Paragraph 14 alleged various failures by the directors, which were said to have caused the losses pleaded in paragraph 12.

The President of the Court of Appeal for Bermuda reviewed the various authorities cited to him. His conclusions can be summarized as follows -

> (a) Directors are not obliged personally to take every decision but must entrust some tasks to others. See Romer J. in In re City Equitable Fire Ins. Co. Ltd. (1925) 1 Ch. D. 407 at p. 426.
>
> (b) The acts which cause loss had to be identified. so that the Court could decide if the directors were at fault in leaving the managers to perform those acts in order to make out any cause of action against the directors.

(c) The general and unparticularized allegations in the Statement of Claim were not material facts within the meaning of 0.19 r.4. "Breach of contract", "breach of duty", "wilful default" are conclusions which may or may not be drawn from material facts.

(d) The onus lies on the plaintiff to prove wilful default.

(e) By 0.18 r.12(1)(a) particulars of a claim of wilful default must be given in the pleadings. In the case of an allegation of any condition of mind other than knowledge, particulars must be given in the pleadings or if they are not, the court may order them to be given.

(f) Paragraphs 11 and 16 failed. not because of any lack of particularity as to wilfullness, but because there was no particularity as to the alleged default.

(g) There must be particulars of default from which the defendants can know that a transaction was contrary to their duty to authorize.

(h) The liquidator could not succeed because it could not be inferred, from the statement of claim, that the directors were guilty of any default, let alone wilful default.

(i) The power to strike out should only be used if there is no reasonable cause of action (other phrases are also quoted from the White Book at paragraph 18/19/3).

(j) The Statement of Claim was devoid of the necessary material particulars to the extent that it was an embarrassing pleading.

(k) it is not sufficient merely to allege that "the directors abdicated responsibility to others".

da Costa J.A., agreeing with the conclusion of the President, first sets out what he describes as the gravamen of the charge against the directors as -

(a) The directors had duties to manage the business of the company and a duty to monitor or supervise others.

(b) The directors abdicated responsibility for the management and conduct of the business.

(c) They gave a free hand to run the business to others whom they did not monitor.

(d) The company's loss was caused by the negligence and breach of duty of the directors as aforesaid.

He came to the'conclusion that the case depended upon a narrow point of pleading and made the following findings -

(a) By 0.19 r.4, a pleading must contain a statement of the material facts on which a party relies. As to the meaning of material, he quotes Scott L.J. in Bruce v. Odhams Price (1936) 1 K.B. 697

at p. 712.

(b) It is not the function of particulars to fill in gaps or make good an inherently bad pleading.

(c) Every material fact necessary to constitute a complete cause of action must be pleaded. Phillips v. Phillips (1878) 4 Q.B.D. 127 at p. 133.

(d) In the case of wilful default 0.19 r.4 requires "particulars to be stated in the pleadings". This means that full particulars of the facts constituting wilful default must be given, though it is sufficient to plead a mental element as a fact without setting out the circumstances from which it is to be inferred.

(e) The company would succeed only if it could show that the directors had acted in breach of their duties by a wrongful delegation and that the breach occasioned loss. This must be pleaded by the company.

(f) Because the directors did carry out some of the company's business, it was necessary to indicate which matters were entrusted to others which the board of directors should have undertaken and the facts which show that they knew it was a breach of duty should also be pleaded.

(g) There is a distinction between primary and conclusory facts. A statement of claim based largely on a series of conclusory facts does not inform the defendant of the case he has to meet and offends 0. 19 r.4. If it fails to do so, the pleading is vexatious.

In their two extensive judgments in the Intercontinental appeal, the President and da Costa J.A. considered both the facts before them and the various principles of pleading which applied. We do not consider it necessary to examine these again. We have set out above what seem to us to be the relevant findings of the Court. We shall apply these, where appropriate, to this appeal.

Summary of Statement of Claim

The original statement of claim was dated 5th July, 1991. It was amended on 7th November, 1991 and reamended. with leave of the Chief Justice, on 7th April, 1992. It will be convenient to deal with the reamended statement of claim of 7th April, 1992, in determining whether leave to appeal should be given and whether that pleading should be struck out, as the defendants ask.

Paragraphs 1 and 2(a), 2(b) and 2(k) recite the history of the plaintiff. Paragraphs 2(c), 2(d), 2(e), 2(f) and 2(g) relate to D7, D8, D6, D5 and D4 respectively. It is said that each of

them was used as a device by D1 to protect his assets from the claims of creditors.

Paragraph 2 is narrative only. It sets out various businesses which are said to be owned or controlled by D1 and used by him to conceal his assets. They do not, of themselves, make allegations of misconduct (to use a neutral term) against any of the defendants.

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Paragraph 3 describes only the change of name of the plaintiff, from "Trenwick Reinsurance Company Ltd.", to Focus Insurance Company Ltd. (the plaintiff) on 29th January, 1988.

Paragraph 4 is an untidy paragraph in that it alleges that as a result of the wilful negligence and default arising from the acts and omissions of each of the defendants as directors or officers of the plaintiff, the latter suffered loss and damage, as particularized in paragraph 11.

D4 to D9 never were directors of the plaintiff. In relation to them, therefore, this paragraph cannot be said to apply. No doubt its untidy nature can be ascribed to the manner in which the statement of claim was prepared. In the first version, there was no allegation of "wilful" conduct by the defendants nor any reference to paragraph 11. Both these allegations appeared for the first time in the second version of the pleading. No doubt when the third version, which introduced D4 to D9 for the first time, was prepared, the need to amend paragraph 4 to accord with the status of the newly joined defendants was overlooked.

Taken by itself, this paragraph contains no facts upon which a claim for loss by the plaintiff can be based. It asserts merely that the acts or omissions resulting in the wilful negligence is to be found in paragraph 11.

It does not matter if, taken by, itself, the paragraph does

not contain any matter to which the defendants can properly plead. Nor does it matter that this paragraph itself offends the rules against pleading, provided that any such deficiences are made up by paragraph 11, to which paragraph 4 specifically refers.

Paragraph 5 is directed at a sales agreement, whereby Forum Re was to pay US$4.8 million to Trenwick Services Ltd., as consideration for the transfer of the shares, payment to be deferred till 1997. The payment was secured by a promissory note executed by Forum Re in favour of Trenwick Services. There was a release agreement whereby money standing to the credit of the plaintiff was to be paid to Trenwick Services Ltd. in satisfaction of Forum Re's obligations under the promissory note.

It is said that the use of the plaintiff's funds for this purpose was contrary to section 39 of the Act, as D1, D2 and D3 knew or ought to have known.

The plaintiff is said to have suffered loss and damage as a result of the wrongful use of US$3.7 million of the plaintiff's assets.

D1 was alleged to be in breach of his duties as a director in procuring the signing of the note and the payment by the plaintiff.

Paragraph 5(e) does not plead actual knowledge by D2 and D3. It says that it is to be inferred, from the fact that the transactions were substantial. that D2 and D3 knew that the plaintiff had signed the promissory note and was going to apply the plaintiff's funds,. in the discharge of Forum Re's obligations under the release agreement.

It is important to note, however, that there is no mention of the plaintiff in paragraph 5(a) as a signatory of the promissory note.

The final sentence of paragraph 5 contains a plea of wilful negligence or default. D2 and D3 are said to have been in breach of their duties as directors in permitting the note to be signed.

There are, however, no facts pleaded in support of this.

D2 and D3 are not alleged to have signed the note or to have known that somebody else was to sign it.

0.19 **r.12(1)** (see the 'President's view at (e) of the Intercontinental case above) requires that particulars of a claim of wilful default must be given. The same applies to an allergation of wilful negligence.

Paragraph 6

It must first be noted that there is no suggestion in the pleadings that D2 and D3 was employed to take any part in the financial management of the company, save of course, in so far as such activity was a necessary part of the duties of a director.

It is asserted that D2 and D3 authorized **D1** to exercise sole signing rights over various bank accounts of the plaintiff. But no reason is pleaded as to why they should not have done so and it is not suggested that they should&have harboured any suspicion as to the honesty of **D1.**

No facts are alleged as to how such a duty arose, since there is, in the absence of them, nothing which obliges a director to supervise, monitor and control the activities of a fellow director. (See above)

The allegations contained in this paragraph are that **D1,** D2 and D3, as the plaintiff's board, were guilty of wilful neglect and default by failing to supervise properly, by not delegating authority to a management committee or other person. D2 and D3 were present at Board Meetings at which resolutions were passed authorizing **D1** to **sign** various bank accounts, but it cannot be said that. by itself, this amounted to wilful neglect or default.

Paragraph 7

This paragraph sets out 24 payments which are alleged to have been made improperly from the plaintiff's bank account, without the Board of Directors being informed of this.

The loss suffered by the plaintiff is said to be **US$13,274,542,** incurred as a result of the wilful default and negligence of **D1,** D2 and D3. It is said that **D1,** D2 and D3 "knew or ought to have known" of these payments. In each case. the

transaction can be identified from the particulars given and sufficient facts are pleaded to enable the defendants to know what is alleged against them.

As in paragraph 6, however, there can be liability of D2 and D3 only if their conduct amounts to wilful negligence or default. It is again not alleged that D2 and D3 had any reason to doubt the honesty of D1, such as might have put them on notice and obliged them to supervise and control what he did. In the absence of any such warning, no such duty lies on a director - see Dovey v. Carey (1901) A.C. 477.

In view of the opinion which we have expresed as to the bye-laws of the Company, the plaintiff could only succeed if it could show that there was wilful negligence and default by D2 and D3, so far as the case against them is concerned.

Before this can be established there must be pleaded primary facts from which it can be said that D2 and D3 were guilty of misconduct which amounted to wilful negligence or default.

It is not sufficient, in our view, merely to assert that D2 and D3 were guilty of wilful negligence or default because they knew or ought to have known that these payments listed in paragraph 7 had been made by D1, when he had been authorized by a meeting of the Board, as specified in paragraph 6, to sign cheques on behalf of the company without reference to them.

We do not consider that it is possible per se for a director to be held guilty of wilful neglect or default by reason of any failure to supervise the acts of a fellow director, especially when he has been authorized so to act by the Board.

He can only be found to be so liable if he knew of the improper conduct of D1 or was reckless as to whether or not he had behaved improperly. We are satisfied that in this case facts have not been pleaded from which such a finding is possible as against D2 and D3.

Paragraph 9. Liquidator's Fees

This is an allegation that D1 committed the plaintiff to pay £250,000 to a voluntary liquidator, with the knowledge of D2

and D3, and that the sum was excessive and not in the plaintiff's interest. This payment is said to have been made as a result of breaches of duty of D1, D2 and D3 and of their wilful neglect and default.

It is a matter of opinion as to whether or not the fee charged was excessive. It is said that the payment of it was due to the wilful neglect or default of the defendants, though paragraph 9 does not specify the breach of duty or wilful neglect and default concerned. Nor is there any allegation of what a proper fee may be.

Paragraph 10. Novation

D1 is said to have signed a contract of novation on 19th September, 1990, on behalf of the plaintiff, transferring various reinsurance agreements from Forum Re to Channel. D2 is said to have signed the contract on behalf of, From Re, but not on behalf of the plaintiff. There is no suggestion that. at the time of the signature, D2 and D3 had any reason to suspect that Channel would not meet its obligations.

It is said that this has caused loss to the plaintiff, as the result of the wilful neglect and default of D1, D2 and D3, though no facts are pleaded to show that any loss caused thereby was due to the wilful neglect or default of D2 or D3.

Paragraph 11. Director's duties

Paragraph 11(1) sets out the manner in which D1, D2 and D3 were in breach of their statutory or common law duties as directors. By its reference to the wilful negligence and default mentioned in paragraphs 4 to 10, it is presumed that the acts of wilful negligence or default mentioned in those paragraphs were constituted by the failure of directors to observe the duties of directors set out in this sub-paragraph.

This is however, a general allegation and it cannot be said that, in relation to the various matters specified in those paragraphs, the duties of the directors are the same. If the plaintiff is correct, D2 and D3 have been guilty of conduct for which they must answer. But if they are liable, the breaches

concerned must differ in relation to each act or omission pleaded. There has not been any setting out of the different breaches involved in each act of misconduct.

In paragraph 11(1) are set out 15 duties which should have been performed by D2 and D3. If it is accepted that the matters set out in this sub-paragraph form part of the duties of a director, it is not sufficient merely to list them, in order to render D2 and D3 liable for loss incurred by the plaintiff.

We accept that, in some respects, it is unavoidable that a pleader should be forced to aver a negative, if his complaint is that a director failed to take the steps which he is obliged to take by law. This sub-paragraph, however, does no more than specify a list of duties, without any indication of which of them was breached in any individual case, in which improper payment on the part of D1 is alleged.

Nothing is said, in the pleading, as to the origin of the various duties, other than a general reference to statute and common law.

Paragraphs 11(3) and (4) contain allegations that D2 and D3 failed to bring an infomred and independent mind to bear on the plaintiff's transactions. It is said that this amounts to wilful default and neglect but this allegation is not supported by any pleaded primary facts.

Paragraphs 12 to 15 deal only with the acts of D1. In each of them, sufficient facts are pleaded to enable D1 to know what the case against him is.

Liability of D4 to D9

The reamended statement of claim asserts that -

(a) Magnolia Trading SA (D7) owned 7% of the issued share capital of Forum Re and sold it to Magnolia Trading Ltd. D1 was said to be the only shareholder of Magnolia Trading SA.

(b) D1 controlled and directed the business of D7, which was used as a device by D1 for preserving his assets.

(c) Magnolia Trading was owned by The Forum Trust, formed by D1 in 1988, of which Bermuda Trust Co. Ltd. (D8) was sole trustee and in which D1 was the Protector.

(d) Villarosa Establishment (D6) was a private company incorporated in Liechtenstein. It was owned by the Forum Trust.

(e) Starbrook Investments Ltd. (D5) is a private company incorporated in England on 16th February, 1990. It is owned by Villarosa (D6) and controlled by **D1.**

(f) Caredeed Ltd. (D4) is a private company limited by guarantees of D5 and **D9** incorporated in England on 21st October, 1991.

(g) D9, the wife of **D1,** holds various assets on behalf of **D1.**

In paragraphs 16 and 17. combined with paragraph 18(v) and (vi) are set out assertions that D4 to **D9** are, in effect, vehicles controlled by **D1,** which he used for the dispersal of assets which he had obtained improperly from the plaintiff.

What is sought against D4 to **D9** is no more than a declaration that the assets held by them are in reality those of **D1.**

Two or more persons may be joined in one action as defendants with the leave of the court, provided that the right to relief arises from the same transactions and there is a common question of law or fact under 0.15 r.4 and **r.6(2).**

Persons who have an interest in the subject matter of the claim, as D4 to **D9** are alleged to have, may be made defendants, though it is not proper to join a person who has no'connection with the alleged wrongdoing merely for the purpose of securing discovery.

It is pleaded here that each of the defendants is the recipient of Dl's assets and that anything found due from him to the plaintiff which has come into the hands of D4 and **D9** should be made available, if the appropriate declaration is made, for the payment of sums found due to the plaintiff.

The defendants D4 to D8, added by the plaintiff in its third statement of claim, are companies controlled by **D1.** We see no objection to joining these companies as parties, since it is open to the Court to enquire as to the control of a company and to ascertain to what extent it was controlled by **D1;** this is called "lifting the corporate veil". It is also alleged that **D9** holds a

a title to a property in the U.K., though she is alleged to be a person of no independent means.

We agree with the reasoning and conclusions of the Chief Justice with respect to the joinder of D4 to **D9.**

Conclusion

It follows from the above comments that -

(a) As regards **D1,** we consider that the pleadings, though in some respects open to criticism, are sufficient to show what is alleged against him.

(b) As regards D2 and **D3,** we do not find that the plaintiff. on whom must be the burden of showing that a case has been made out, has pleaded facts of such a nature as to call upon them to answer the allegations.

(c) That the joinder of D4 to **D9** should be maintained.

We therefore strike out the action against D2 and D3 and dismiss the appeal by **D1** and D4 to **D9.**

It follows that we have given leave to appeal to all defendants and having heard the merits, have ordered as above.

Denys Roberts

SIR **DENYS** ROBERTS, **P.**

Julian Hall — for **D1** and D4 to **D9**
Coles Diel — for D2
Richard Aitkens Q.C. — for D3
John Cooper — for D3
Saul Froomkin Q.C. — for the Company