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IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL NO. 14 of 1981

B E T W E E N

INTERCONTINENTAL NATURAL RESOURCES LIMITED (In Liquidation) — Appellant

and

SIR BAYARD DILL, Kt., C.B.E., J.P.
SIR JAMES PEARMAN, Kt., C.B.E.
CHARLES T.M. COLLIS
NICHOLAS B. DILL, J.P.
JAMES PEARMAN
RICHARD S.L. PEARMAN
JOHN A. ELLISON
C.F. ALICK COOPER
WALTER MADDOCKS
H. CHESTERFIELD BUTTERFIELD
(Carrying on business as Conyers, Dill & Pearman a firm) — 1st Respondent (1st Defendant)

and

WALTER MADDOCKS (in his personal capacity) — 2nd Respondent (2nd Defendant)

and

JAMES DOUGLAS ROBINSON — 3rd Respondent (3rd Defendant)

and

DOUGLAS JOHN FIELD — 4th Respondent (4th Defendant)

and

WILLIAM MILNER COX — 5th Respondent (5th Defendant)

J U D G M E N T

For reasons which shall be recorded and made available to the parties as soon as possible, we are clearly of the opinion that this appeal should be dismissed with costs here and in the court below, such costs to be taxed if not agreed; and we further order that this is a proper case for three legal representatives for each party.

SIR ALASTAIR BLAIR-KERR, P.

SIR JAMES SMITH, J.A.

HARVEY da COSTA, J.A.

DATED the 15th day of April, 1982.

IN THE COURT OF APPEAL OF BERMUDA

CIVIL APPEAL NO. 14 OF 1981

Intercontinental Natural Resources Limited (In Liquidation)	Appellant (Plaintiff)
and	
(1) Sir Bayard Dill Kt., CBE, J.P. Sir James Pearman Kt. CBE Charles T.M. Collis Nicholas B. Dill J.P. James Pearman John A. Ellison D.F. Alick Cooper Walter Maddocks H. Chesterfield Butterfield (carrying on business as Conyers, Dill and Pearman, a firm)	1st Respondent (1st Defendant)
(2) Walter Maddocks (In his personal capacity)	2nd Respondent (2nd Defendant)
(3) James Douglas Robinson	3rd Respondent (3rd Defendant)
(4) Douglas John Field	4th Defendant
(5) William Milner Cox	5th Respondent (5th Defendant)

R E A S O N S F O R J U D G M E N T

The Plaintiff is a Bermuda exempted company which was incorporated under the provisions of The Companies (Incorporation by Registration) Act 1970 on 6th February 1974. The original name of the company was Paddington Limited. On 11th February 1974, the name was changed to Intercontinental Energy Limited and on 11th March 1974, the name was again changed to Intercontinental Natural

Resources Limited.

On 15th March 1976, a creditor's petition was presented in the Supreme Court of Bermuda for the winding-up of the company on the ground of insolvency; and an order was made for such winding-up on 19th April 1976. The deficiency of assets and shortfall for creditors and members is said to be approximately U.S.$16.8 million.

The First Defendants practise in Bermuda as Barristers and Attorneys under the firm name Conyers Dill and Pearman. The Second Defendant was at all material times a partner in that firm and the Third Defendant was at all material times an employee of the firm.

The Fourth and Fifth Defendants were at all material times an employee and partner respectively of Cox and Wilkinson, another firm of Barristers and Attorneys practising in Bermuda.

The action was instituted by writ dated 19th December 1980, that is to say nearly five years after the making of the winding-up order. The relief sought was:-

"Against the First Defendant:
(1) Damages for breach of contract and negligence whilst acting as Attorney for the Plaintiff

Against the Second, Third, Fourth and Fifth Defendant:
(2) Damages for breach of contract and breach of duty whilst acting as directors of the Plaintiff."

The statement of claim was filed on 20th January 1981; and on 7th September 1981, with the consent of the parties, three summonses came on for hearing before Mr. Justice Melville. The first in time, dated 1st April 1981, was by 4th Defendant for an order under O.12, r.30 of the Rules of the Supreme Court 1952 to set aside an order dated 29th January 1981 giving the Plaintiff leave to

serve the writ and all subsequent proceedings on the 4th Defendant out of the jurisdiction of the Supreme Court. The second summons dated 13th April 1981 was by the 1st, 2nd and 3rd Defendants, for an order that the statement of claim be struck out and the action dismissed as against these Defendants on the grounds that the statement of claim discloses no reasonable cause of action, is embarassing and an abuse of the process of the court (O.19, r.27), O.25, r.4 and the inherent jurisdiction of the court). The Third summons dated 20th April 1981 was by 4th and 5th Defendants and was in terms similar to that of the second summons taken out at the instance of the 1st, 2nd and 3rd defendants and prayed for similar relief.

Mr. L.H. Hoffman Q.C. and Mr. D. Donaldson appeared for 1st, 2nd and 3rd Defendants. Mr. R.R.F. Scott Q.C. and Mr. Michael Jones appeared for 4th and 5th Defendants; and Mr. G.A. Lightman and Mr. A.G. Boyle appeared for the Plaintiff company.

Judgment was delivered on 22nd October 1981. As regards the 4th Defendant's summons, the learned judge ordered that the order of the 29th January 1981 be set aside, and that the service of the writ and all subsequent proceedings be set aside in so far as 4th Defendant is concerned and that the 4th Defendant have his costs of the summons. On the other two summonses to strike out the statement of claim, the learned judge ordered that the statement of claim and the writ be struck out and that the action be dismissed with costs to the defendants.

There is no appeal against the learned judge's order on the 4th Defendant's summons; but the Company has appealed

against the order that the statement of claim be struck out and that the action be dismissed. The appeal was heard on 12th, 13th and 14th April 1982. The parties were represented by the same counsel as in the court below. On 15th April 1982, we gave judgment as follows:-

> "For reasons which shall be recorded and made available to the parties as soon as possible, we are clearly of the opinion that this appeal should be dismissed with costs here and in the court below, such costs to be taxed if not agreed; and we further order that this is a proper case for three legal representatives for each party."

The relevant dates are as follows:-

6/2/74	Incorporation of the Company.
13/2/74	Appointment of the 2nd defendant as director and 3rd defendant as secretary.
14/6/74	Appointment of 3rd defendant as director.
July/74	Company commenced business.
17/4/75	Appointment of 5th defendant as director.
15/3/76	Petition to wind-up.
19/4/76	Winding-up order made.
19/12/80	Date of the Writ in this action.
20/1/81	Date of Statement of Claim.
29/1/81	Chief Justice grants leave to liquidator to proceed with the action.
13/4/81	Summons to strike out by 1st, 2nd, and 3rd defendants.
20/4/81	Summons to strike out by 4th and 5th defendants.
July/81	Date of hearing fixed.
4/11th Sept.81	Hearing of the three summonses before Melville J.
22/10/81	Judgment on the summonses delivered.
3/11/81	Notice of appeal.
20/11/81	Leave to appeal given.
12/14 April 1982	Appeal heard
15/4/82	Judgment delivered (Reasons later).

Bermuda is sometimes referred to abroad as a tax haven, and there are many so-called exempt companies here. They make a substantial contribution to the economy of these Islands. They are all organised on similar lines. Their activities are restricted by law. There is The Exempted Companies Act 1950. Section 6(1)(d) of this

Act provides as follows:-

"6(1).....an exempted company shall not have power.....

(d) to carry on business of any kind or type whatsoever in these Islands either alone or in partnership or otherwise except -

(i) carrying on, from a principal place of business in Bermuda, business external to Bermuda;

(ii) doing business in Bermuda with any person, firm or corporation in furtherance only of the business of that company carried on exterior to Bermuda."

And section 8 of the Act provides as follows:-

"8(1) Every exempted company shall at all times maintain an office in these Islands.....

8(4) Every exempted company shall have sufficient directors who are ordinarily resident in these Islands so that directors' meetings may be held in these Islands....."

In other words, to comply with the law, an exempt company must have directors normally resident in Bermuda. Board meetings are held here; but the business of such companies is carried on abroad. They must not compete in these Islands with a local company.

The legal work in connection with the incorporation of the Plaintiff company was done by the 1st Defendant (referred to in the statement of claim as "the firm"). According to section 4 of the statement of claim the 1st Defendant also

(1) obtained permission under the Exchange Control Act for shares in the Company to be held in the beneficial ownership of Pakantial N.V. of the Netherlands Antilles;

(2) obtained recognition of the Company's non-resident status for the purpose of Bermuda exchange control;

(3) arranged for the Company's change of name,

(4) arranged for undertakings under the provisions of the Exempted Undertakings Tax Protection Act;

(5) prepared the Company's Annual Declarations under the Exempted Companies Act 1950;

(6) arranged for meetings of the directors and the shareholders to be held in the offices of the 1st defendants; and

(7) kept the Company's records and registers.

Four Bermudian lawyers (2nd, 3rd, 4th and 5th defendants) were appointed to the Board of the Plaintiff company. They were qualified in every respect to be directors of a company; but it is not suggested that any of them were experts in the oil trade or indeed that they knew anything about the oil trade.

When opening his submissions in the court below, Mr. Hoffman gave the learned judge certain background information which was recorded in the judgment in these words:-

> "In its short trading life of less than 2 years, the Company carried on, outside Bermuda, the business of dealing in oil and oil products. I understand it was a sort of middleman; it bought and sold oil products; it would sometimes buy and sell the product as(it) is or would buy crude oil, refine it and then sell the refined product. It did refining business with a company, Industria Siciliana Asfalti Bitumi (I.S.A.B.). This kind of business, I am told, and it has not been challenged, is a highly skilled one requiring specialist knowledge, and probably never more so than in 1974-75, immediately after the oil crisis, one of the end products no doubt of the Arab-Israeli war."

As the defendants' submission was that the statement of claim should be struck out, it is desirable that this document (so far as relevant to the judge's decision and the grounds of appeal) should be set out verbatim. Paragraphs 4 - 23 read as follows:-

> "4. The Firm incorporated the Company and at all times thereafter was and held itself out to be the legal counsel of the Company and the Company at all times (as the Firm knew or ought to have known) relied on the Firm to act as such counsel and advise and guide the Company and its officers with respect to the law of the Islands of Bermuda and their compliance with the same.....As such counsel and/or by reason of its relationship with the Company the Firm owed to the Company a duty of care and a duty to advise the company and its directors on any matter on which the Firm knew or ought to have

known that the Company or the directors required legal advice.

5. The Company and the Firm agreed that the Firm should provide the Company with various services and in particular the services as directors and secretary respectively of one partner in and one employee of the Firm, who would know and comply with, and be competent to advise the Company and secure compliance by the Company with the laws of the Islands of Bermuda.

6. Pursuant to such agreement, the 2nd Defendant served the Company as a director from the 13th February 1974 until the liquidation of the Company and the 3rd Defendant served the Company as Secretary from the 13th February 1974 until the 14th June 1974 and as secretary and director from 14th June 1974 until the liquidation of the Company.

7. Further or alternatively the 2nd and 3rd Defendants, on acceptance of such offices impliedly warranted to the Company that they knew, or alternatively would learn and know, the laws of the Islands of Bermuda, and in particular the laws relating to the duties of directors and would comply with the same.

8. The 4th Defendant was appointed alternate director on 14th June 1974 and was appointed a director of the Company on the 4th day of March 1975 and the 5th Defendant was appointed a director of the Company on 17th April 1975. On acceptance of such appointments these defendants impliedly gave like warranties to the Company.

9. The Bye-Laws of the Company at all material times (so far as is material) provided as follows:-
   (1) (Bye-Law 9) that the directors should exercise a general supervision over the financial affairs of the Company and should be responsible for the correct keeping of the books and for the safe keeping of all moneys and securities of the Company:
   (2) [Bye-Law 10(1)] that the business of the Company would be managed and conducted by a Board of Directors;
   (3) [Bye-Law 18(a)] that the business of the Company should be managed by the directors;
   (4) (Bye-Law 50) that the Directors should cause true accounts to be kept of all transactions of the Company in such manner as to show the assets and liabilities of the Company for the time being and a complete record of the accounts should at all times be kept at the office of the Company.

10. The 2nd, 3rd, 4th and 5th Defendants as such directors of the Company had fiduciary duties and duties of care to the Company and in particular duties:
   (1) to comply with the Bye-Laws and to take reasonable care to secure and monitor

compliance by the other directors;

(2) (together with the other directors) to manage and conduct the business of the Company and/or supervise and control the same;

(3) to exercise their judgment skill and care and/or reasonable judgment skill and care in respect of the business of the Company and the transactions entered into and carried out by the Company, and the conduct, management and supervision of the same;

(4) to ensure or exercise reasonable care to ensure that the Company kept and maintained proper and up-to-date accounts and books and to examine the same;

(5) to maintain proper control over the financial affairs and management of the Company;

(6) to ensure that their co-directors fulfilled the duties on their part set forth in sub-paragraphs (1) - (5) above or exercise reasonable care to secure the same.

11. The 2nd, 3rd, 4th and 5th Defendants were at all times aware of their duties as aforesaid and in acting as hereinafter pleaded were aware that they were acting in breach of such duties and such breaches were wilful.

12. During the period from its incorporation until its liquidation, the Company carried on (1) a limited business managed in Bermuda and (2) a very substantial business managed outside Bermuda ("the Foreign Business"). In respect of the Foreign Business [by reason of the improvident and/or incompetent management and/or conduct of such business and/or the speculative and/or improvident and/or unwise transactions entered into by the Company, and/or its loss making character,] the Company incurred the substantial losses and liabilities totalling US$16.8 million, by reason whereof the liquidation occurred and the deficiency and shortfall arose. [The best particulars which the Company can presently give are that no or no sufficient consideration was given by those managing and conducting the Foreign Business when deciding whether the Foreign Business should be carried on or continued or as to the transactions to be entered into or the prices to be paid or demanded, to the overall profitability or viability of the Foreign Business and in particular to the direct handling costs, the administrative and finance costs and no or no sufficient provision was made for the claims. There is served herewith the statement as to the Affairs of the Company on the 19th day of April 1976 and the Profit and Loss Account of the Company for the period from the 6th February 1974 to the 19th day of April 1976 from which the foregoing is to be inferred.]

13. During the periods of their respective diredtorships negligently and in breach of their aforesaid duties, the 2nd, 3rd, 4th and 5th Defendants acted

and intended to act as directors in name only of the Company and took no part or interest in the management or conduct of the business of the Company (and in particular the Foreign Business) or the supervision or control of the same. In particular (without prejudice to the generality of the foregoing) the said Defendants caused or permitted persons other than directors of the Company and without reference to or the supervision of, the Directors of the Company:-

(1) To carry on the Foreign Business and enter into all manner of transactions in the course of the same.

(2) To operate accounts in the name of the Company with the following banks, namely:

(a)U.V.Slavenburg's Bank Rotterdam ("Slavenburgs")

(b)First National City Bank (Channel Islands) Ltd.

(c)United Overseas Bank, Geneva

(d)Bank de Paris et des Pays-Bas (Suisse) S.A. Geneva

(e)Trade Development Bank, Geneva

The Company will refer to the Minutes of the Meetings of the Directors held or purported to be held on the 12th day of July 1974, 5th day of August 1974, 15th day of November 1974, 9th day of December 1974, 11th day of April 1975; 17th day of April 1975, 18th day of June 1975, 28th day of July 1975, 29th day of October 1975 and 9th day of December 1975.

14. Further, negligently and in breach of their aforesaid duties, the directors of the Company (and in particular the 2nd, 3rd 4th and 5th Defendants) during the said periods in respect of the conduct and management of the Foreign Business and the transactions therein entered into and carried out by the Company, collectively and/or individually failed:-

(1) to manage or conduct or supervise or control the same adequately or at all;

(2) to exercise reasonable or any judgment, skill or care;

(3) to cause true or full or proper or any accounts of the transactions of the Company in such manner as to show the assets and/or liabilities of the Company for the time being or at all or to keep a complete record of the accounts at the offices of the Company in Bermuda;

(4) to maintain proper or any control over the financial affairs or management of the Company or the transactions entered into by the Company;

(5) to ensure or exercise reasonable or any care to ensure that their co-directors fulfilled their duties to the Company or remedied or required remedy of their defaults as hereinbefore pleaded.

15. By reason of the foregoing, the said directors (and in particular the 2nd, 3rd, 4th and 5th Defendants) caused or permitted the Company to carry on the Foreign Business in the manner hereinbefore pleaded and thereby to incur the losses pleaded in paragraph 12 hereof.

16. In the circumstances, the 2nd, 3rd, 4th and 5th Defendants have occasioned by reason of their wilful negligence, breach of trust and default the aforesaid damage and loss to the Plaintiff.

17. At a meeting of the directors of the Company held or purported to be held on the 26th day of August 1975, attended only by the 2nd and 3rd Defendants, the 2nd and 3rd Defendants passed resolutions to the following effect:
    (1) That a Letter of Guarantee be given to Slavenburgs to guarantee Messrs. ISAB Industria Siciliana Asfalti Bitumi Spa up to an amount of US$1 million and that the secretary of the Company be authorised on behalf of the Company to execute documents required by Slavenburgs to effect the said Guarantee;
    (2) That the action of the officers of the Company in executing a Deed of Suretyship to Slavenburgs on behalf of InconEnergy S.A. be ratified.

18. In pursuance or purported pursuance of the said resolutions on or purportedly on the 26th day of August 1975 the 3rd Defendant executed the said Letter of Guarantee to Slavenburgs and on the 3rd day of October 1975 the 3rd Defendant executed such Deed of Suretyship to Slavenburgs.

19. Pursuant to the said Deed of Suretyship the Company incurred a liability to Slavenburgs which amounted to US$1,961,490.74 and in respect of the said liability Slavenburgs is a creditor of the Company on the liquidation in the said sum together with interest.

20. In passing such resolutions and authorising the action and acting as hereinbefore pleaded, the 2nd and 3rd Defendants failed to exercise reasonable or any judgment skill or care or to consider properly or at all whether it was in the interests of the Company to incur such liabilities.

21. It was not in the interest of the Company to incur such liabilities or either of them, and by reason of the wilful negligence and breach of duty of the 2nd and 3rd defendants in incurring the same the Company suffered damage and loss, namely the liability to Slavenburgs hereinbefore pleaded.

22. The 1st defendants at all times knew or ought to have known the facts and matters pleaded in paragraphs 13-14 and 17-20 hereof but wrongfully and in breach of their duties to the Company failed to require or advise the 2nd and 3rd defendants to act otherwise or to advise the Company or the directors of the duties of the

Directors to the Company or of the non-fulfilment of the same. By reason of such default, the said directors continued to act as hereinbefore pleaded and the losses were occasioned to the Company.

23. If (which is denied) the 2nd, 3rd, 4th and/or 5th Defendants were not aware of their duties to the Company as hereinbefore pleaded and/or their neglect and/or defaults were not wilful, in respect of the 2nd and 3rd Defendants, the 1st Defendants were in breach of contract and the 2nd and 3rd Defendants were in breach of warranty, and in respect of the 4th and 5th defendants, these Defendants were in breach of warranty as hereinbefore pleaded, and by reason of such breach of contract and/or warranty the Company has suffered the aforesaid damage."

So, to summarise, according to paragraph 4, the whole firm of Conyers Dill & Pearman held themselves out as counsel to give unsolicited advice at all times and on all matters affecting the well-being of the Company, and they all owed the Company a "duty to advise" the Company and its directors on all such matters and "a duty of care" as regards such advice.

According to paragraph 5, there was some sort of an agreement whereby Messrs. Conyers would "furnish the Company with various services", in particular the services, as directors and a secretary, of a partner and an employee of the firm, persons who would know the laws of Bermuda and be able to advise the Company regarding those laws and be competent to "secure compliance by the Company" with those laws.

The duties of directors, as contained in certain Bye-Laws of the Company and the general law, are set out in paragraphs 9 and 10; and paragraph 11 avers that the 2nd, 3rd and 5th defendants were aware of their duties, were aware that they were acting in breach of such duties, and that such breaches were wilful, all "as hereinafter pleaded".

Paragraph 12 of the Statement of Claims avers that

the Company incurred substantial losses by reason of

(a) improvident and/or incompetent management

(b) speculative, improvident and/or unwise transactions entered into by the Company.

The paragraph goes on to aver that "no sufficient consideration" was given to various matters by those managing the Foreign Business and that this could be inferred from the appendices to the Statement of Claim.

As stated by the learned judge, the appendices indicate a loss of about US$1 million on sales, approximately US$6.3 million on direct handling costs and some US$6 million on administrative and other expenses. These total approximately US$11.5 million. Sales totalled about US$500 million which was about 4% of the Company's turnover; and, from these figures, the Plaintiff says that the alleged shortcomings of the directors, can be "inferred."

In paragraph 13 it is averred that the directors acted and intended to act as directors "in name only" and took "no part or interest in the management or conduct of the business of the Company or the supervision or control of the same". In particular they "caused or permitted persons other than directors to "enter into all manner of transactions" and to open various bank accounts.

Paragraph 14 alleges, (again in the most general terms) that the directors failed:

(1) to manage or supervise
(2) to exercise reasonable judgment, skill or care
(3) to cause proper accounts to be kept
(4) to maintain control over the financial affairs of the Company;

and paragraphs 15 and 16 allege that this resulted in

"the losses pleaded in paragraph 12 hereof" and that such losses were occasioned "by reason of their wilful negligence, breach of trust and default."

Paragraphs 17 - 21 stand on their own, the allegation being that in passing the Board resolutions regarding the Letter of Guarantee and Deed of Suretyship and causing the necessary documents to be executed, the 2nd and 3rd defendants failed to exercise reasonable judgment, skill or care or to consider whether it was in the interests of the Company to incur such liabilities; that it was not in the interest of the Company to incur such liabilities and that "by reasons of the wilful negligence and breach of duty" of these two defendants, the Company suffered loss namely a liability to Slavenburgs.

Paragraph 22 purports to set out a cause of action against the 1st defendants, the allegation being that they ought to have known that the 2nd and 3rd defendants "intended to act in name only" and to take no part in the management, and that they ought to have known that the two directors improperly executed the Letter of Guarantee and Deed of Suretyship, and that "in breach of their duties to the Company" (presumably the duties flowing from what is alleged in paragraph 4) the 1st defendants failed to advise the 2nd and 3rd defendants not to act "in name only" and not to execute the Letter of Guarantee and Deed of Suretyship and failed to advise the 2nd and 3rd defendants of the duties of directors.

In paragraph 23, it is averred that if the directors were ignorant of their duties (so that their alleged neglects and defaults were not wilful) the 1st defendants

were nevertheless in breach of contract (having regard to paragraph 5 of the Statement of Claim) and the 2nd, 3rd and 5th defendants were "in breach of warranty as hereinbefore pleaded".

In his closing address, Mr. Lightman's main submission regarding his claim against the directors may be summarised as follows:-

> I accept full responsibility for any errors in pleading; but a litigant should not suffer because of a pleader's errors. He is entitled to have his case heard on its merits. The plaintiff's case is this: Under the Bye-laws and the general law, the directors were under a duty to personally manage and conduct the Company's business. In so far as they were empowered to delegate matters to others, they had a duty to monitor and supervise those others. In breach of those duties, the directors abdicated all responsibility for the management and conduct of the Company's business. They gave a free hand to others. The loss was caused by the directors' negligence and breach of duty in failing themselves to manage and conduct the business, in wrongfully committing the conduct of the business to others and in wrongfully failing to supervise and monitor the activities of those others. For the purpose of this claim it is unnecessary to establish whether the conduct of those others was negligent or not. The directors were in breach of their duty in committing the conduct and management of the business to them. If one pleads acts, then particulars may be given, but if one pleads omissions - in this case the directors doing nothing - there are no particulars which they could give. I have pleaded the facts. If they ask for particulars, they will be supplied. We can give particulars of all transactions referred to in paragraphs 12, 13(1) and 14 of the statement of claim; but the substance of our case is that the directors took no action at all.

Turning to the judgment, the learned judge analysed the statement of claim paragraph by paragraph. At page 11 he accurately set out the substance of Mr. Lightman's closing address. As regards the duties of directors, it is clear from page 13 of his judgment that he had in mind the observations of Romer J. in In re City Equitable Fire Insurance Co. Ltd. [1925] 1 Ch. 407 at page 427]; and having set out the provisions of O.19 r.r. 4 and 6,

the learned judge said:

> "It is not in dispute here that for the Plaintiff to succeed in this action it would have to be pleaded and proved, among other things, that the directors were in 'wilful default' in the performance of their duties. I have been taken through the various paragraphs of their statement of claim with great thoroughness. In the end, as it appears to me, it is a question of degree. What may be sufficient in one set of circumstances may not be enough, given another set of circumstances".

And, having cited relevant passages from the judgments of Cotton and Brett LJJ. in Phillips v Phillips [(1878) 4 QBD at pages 133, 134 and 139], the learned judge said:

> "Applying those principles to the matter before me, it is patently clear that this statement of claim is grossly lacking in those material particulars which would alert the defendants to the case they would have to meet.....when (the statement of claim) is analysed it is really telling the defendants nothing.....it covers everything and yet discloses nothing.....what are the primary facts on which the Plaintiff relies? Despite the very forceful submissions of Mr. Lightman I am afraid the answer still eludes me. Part of his submissions was, that by the articles of the Company these defendants, directors were to personally manage the affairs of the Company, and having improperly delegated that function, they are liable for any resulting loss to the Company and that is what was pleaded. To which Mr. Hoffman's retort was, presumably the Board should have been in continuous session sending the telexes and licking the stamps as well. The short answer to this would seem to be in Article 18(c) which states:
>
> > 'The directors may appoint, suspend and remove the managers, secretary, clerks, agents and servants of the Company, and may fix their remuneration, and determine their duties.....'
>
> Another limb of Mr. Lightman's submissions was that even if - which was not conceded - the statement of claim did not disclose the causes of actions alleged, it was no more than a matter for further and better particulars, which would have been willingly supplied on request. I am unable to agree. This is not a case in which material facts have been stated so that further and better particulars could fill out the case being put forward. It is just completely devoid of the necessary material particulars, to the extent that it becomes a wholly embarrassing pleading.
> .....
> Turning to the claim against the directors,

based on their breaches of implied warranty, it seems that the same inherent vice that affects the claims against the directors for breaches of duty apply with equal force to these claims; a lack of any material particulars. Further, I confess I have some difficulty in following what the Plaintiff is here alleging. Speaking generally, when a person becomes a director of a company he owes certain duties to the Company. These are partly statutory, partly under the articles, and partly dependant on the laws of agency and trusteeship, but mainly fiduciary as I understand it; so when an implied breach of contract is alleged one would normally expect that a special contractual relationship exists. One would expect such a contract to be pleaded. But to say that by merely becoming a director, such an implication, as stated in paragraphs 7 and 8 of the statement of claim, arises seems to me to be rather far fetched. Reliance was placed on In re John Fulton & Co. Ltd. (1932) N.I.L.R. 35, but I am unable to extract any such propositions from that case. It seems to me, as Mr. Scott submitted, that this part of the claim is misconceived.

As to the claims against the first defendants, again the necessary material facts have not been pleaded. In addition, here, it was argued, the breaches arise from the general retainer between solicitor and client. In Saffron Walden Second Benefit Building Society v Rayner [(1880) 14 Ch. D. 406, 415] Bramwell L.J. said:-

> 'As Lord Justice James has said, there is no such thing as a standing relation of a solicitor to a man. A solicitor does not stand in a permanent relation to his client as a chaplain does to a nobleman or body having a chaplain. A man is a solicitor for another only when the other has occasion to employ him as such. That employment may be either to conduct a suit or to advise him about some matter in which legal advice is required; but there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes.'

This authority has stood for exactly a century and does not seem to have been doubted in any way. (See Cordery's Law relating to Solicitors, 7th Edition, Chapter 4, page 85). That, I think, disposes of the claim based on contract against the first defendants.

In the way the matter has been pleaded, the allegation in tort against the first defendants would also fail as there is no such thing as 'the office of solicitor'; so that there would be no duty of care on the part of the first defendants vis-a-vis the Plaintiffs. But Mr. Lightman puts this claim forward as an alternative to the claim against the directors for breach of duty. If, says he, at the trial it is established that the directors were not 'wilful', in that they did not

know their duties, then he would have a claim against the first defendants for breach of contract in failing to provide directors who were aware of their legal duties. With respect, this seems to be an argument of 'heads I win; tails you lose', or the case of the 'dog catching its tail'.

For the reasons I have endeavoured to state, I am clearly of the view that this statement of claim, as it stands is an embarrassement, and discloses no reasonable cause of action and on that ground should be struck out and I so order."

The learned judge then considered the question whether the writ should be struck out. He said:-

"The defendants refer to the facts that (a) this action is brought almost at the end of the limitation period and then in a most defective way so that any indulgence to file a fresh statement of claim would be unfair to the defendants as they would thereby lose their right to rely on any Statute of Limitation. (b) The crux of the Plaintiff's case is contained in paragraph 12 of the statement of claim, which, after more than five years of investigation by a very qualified liquidator, can go no higher than to say 'these are the best particulars that can presently be given'. (c) these defendants, with one exception, based as they are in Bermuda, must perforce spend considerable time and money investigating the foreign business of this company to properly prepare their case, when so far no more than a mere 'spes' is alleged against them. (d) These allegations are almost tantamount to dishonesty, made against professional persons. (e) Some eight months have elapsed since the Plaintiffs were made aware of the allegations being made by the defendants, yet nothing has been done to put their house in order.

On the other hand I was reminded that an action ought not to be struck out for mere lack of particulars; nor should I be unmindful of the words of Fletcher Moulton, L.J. in Dyson v Attorney General [1911] 1 K.B. 410 at 419: 'To my mind it is evident that no Judicial system would ever permit a Plaintiff to be DRIVEN FROM THE JUDGMENT SEAT in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad'. In the circumstances that exist here, it is contended, if the writ is struck out the Plaintiffs would be denied the right to bring a further action as they may well be met by a limitation plea. In effect, it is said, any shortcomings of counsel ought not to be visited on the Plaintiffs.

What then is the justice of this case as between the parties? It has taken some 5 years of investigation to produce a statement of claim, devoid in my view of any material facts. Mr. Lightman takes the blame, if any, for these deficiencies. But then another eight months have gone by when it is known, or ought to be known that the statement of claim was being attacked on this ground, true it is, among other grounds. One would have thought that within that time frame, some attempt would have been made to put an amended statement of claim on file. Then

during the course of the arguments, it became abundantly clear that this was the main attack being made on this statement of claim. In that situation, I would have thought that at least some broad outline of what the Plaintiff was alleging would be forthcoming in the course of the submissions. I am in no doubt as to the sincerity of Mr. Lightman when he averred that particulars can be supplied. My difficulty is what kind of particulars will these be? Giving the matter the best consideration, I can, and balancing the conflicting views I agree with Mr. Hoffman when he said 'the fault is not with the man making the bricks but with the one supplying the straw'. Accordingly I am of the view that the writ should be struck out also and I so order."

Mr. Lightman's main submission to this court was to much the same effect as his submission in the court below, namely that under the Bye-Laws of the Company the directors were under a duty personally to manage the business of the Company; that they had no power to delegate; that unauthorised persons managed the Company's activities abroad; and that the directors did not monitor the activities of those persons with the result that the Company suffered loss.

Mr. Lightman submitted that:

(1) The statement of claim is not lacking in particularity; but
(2) if it was so lacking in particularity, such defects were curable by service on the Defendants of further and better particulars of the nature of the claim (O.19.r.7); and
(3) even if the statement of claim was so lacking in particularity that there were grounds for striking it out, the Plaintiff company should have been given the opportunity of filing a fresh statement of claim; and the writ should not have been struck out.

In the court below, according to the learned judge's note, at the end of his closing address in regard to the two summonses to strike out the statement of claim, Mr. Lightman did submit that the Plaintiff should be given four weeks to prepare and file a fresh statement of claim. Mr. Lightman did not have a draft

of such a document during the hearing and the judge was left in ignorance as to what any fresh pleading might contain and there was no application for an adjournment. We were informed that counsel for the defence were served with a copy of a suggested new statement of claim two months before the hearing of the appeal. Mr. Hoffman said (and this was not questioned by Mr. Lightman) that the additions were "mostly padding and partly recounting matters of history which counsel for the Plaintiff did not include in the first statement of claim because they rightly took the view that it was irrelevant". Both Mr. Hoffman and Mr. Scott objected to our looking at the document mainly on the ground that it was irrelevant to anything we had to decide on this appeal.

That discussion took place on the 12th April. On the resumed hearing Mr. Lightman addressed the court thus:-

> "In the light of my friends' objection, I am not pressing the court to look at the new statement of claim at this stage. I have said what the Plaintiff's case is. It is quite irrelevant whether any particular transactions were improvident or negligent. Our case is: The directors wrongly put the Company at risk by wrongfully abdicating responsibility to others. They have to pick up the tabs. I accept that some confusion may be caused by the way paragraph 12 of the statement of claim is phrased. I ask that portions of it be deleted. My case is simply this: if there was a wrongful delegation and the Company made a loss, the directors are liable. It is irrelevant and superfluous to examine the nature or character of any of the transactions. I am not concerned with the question of whether those who managed the Company were negligent or not. The sole questions are: whether the delegation was improper and whether legal liability results. The critical pleading for my claim against the directors is set out in paragraphs 13 and 14 (1). That is a pleading of material facts constituting a cause of action".

Overnight, Mr. Lightman's approach to the question of pleading had changed considerably. Up till then, section 12 appeared to be the crux of the Plaintiff's case. According

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to this paragraph, the Company's loss was allegedly caused "by reason of the improvident and/or incompetent management and.....speculation and/or improvident and/or unwise transactions"; and in his closing address in the court below Mr. Lightman offered to give the Plaintiff "particulars of all transactions referred to in paragraphs 12, 13(1) and 14". Even at the commencement of his submissions on this appeal, as I understood him, Mr. Lightman's view was that any defects in his pleading were curable by his giving particulars. Now, we were told that, in his submission, it was "irrelevant and superfluous to examine the nature or character of any of the transactions". From then on, Mr. Lightman's submissions was that, irrespective of any negligence on the part of those who managed the affairs of the Company abroad, the mere fact that the directors put the Company at risk by allegedly "abdicating responsibility to others" constituted a good cause of action; and that the critical pleading for the Plaintiff's claim against the directors is as set out in paragraphs 13 and 14(1).

I have markedby square brackets the portions of paragraph 12 to be deleted at Mr. Lightman's request. All that remains of that paragraph now is an allegation that the Company carried on a limited business in Bermuda and a substantial business managed outside Bermuda and that in respect of the foreign business the Company incurred losses totalling $16.8 million.

Mr. Lightman also addressed us as follows:-

> "I now do not intend to support the allegation of implied warranty by the directors".

When considering the adequacy of a statement of claim one looks first of all to O.19 r.4 which reads:

"r.4 Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved; ....."

In Bruce v Odhams Press Ltd. [(1936) 1 K.B. 697], Scott L.J. said (p.712):-

"The word 'material' means necessary for the purpose of formulating a complete cause of action; and if any one 'material' fact is omitted, the statement of claim is bad; it is 'demurrable' in the old phraseology, and in the new is liable to be struck out under O.25 r.4 : see Philipps v Philipps (4QBD 127); or 'a further and better statement of claim' may be ordered under O.19 r.7".

Commenting on the present English O.18 r.7(1) [the equivalent of our O.18 r.4] , the learned editors of The Supreme Court Practice 1973 say (18/7/5) :-

"Each party must plead all the material facts on which he means to rely at the trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success".

In Bruce v Odhams (supra), Scott L.J., referring to the function of particulars, said (p.712):-

"They are not to be used in order to fill material gaps in a demurrable statement of claim - gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. Consequently, in strictness particulars cannot cure a bad statement of claim".

As the material allegations in paragraph 12 have now been abandoned, it is not clear whether the appendices still form part of the statement of claim. But, assuming they do, no court could reasonably infer from the figures in those appendices that the loss sustained by the Company was other than an ordinary trading loss. There is nothing

from which breach of contract, negligence, or breach of duty against any person could possibly be inferred.

I agree with Mr. Hoffman's submission that the statement of claim should be viewed on a 3-tier basis. Firstly, it is said that there were managers abroad who conducted the foreign business of the Company, and it is alleged that these managers did certain things which caused the loss. For all we know, such acts may have been done in the normal course of trading without negligence. But, assuming the managers were negligent, secondly, it is said that the directors were negligent and in breach of duty because they wrongly allowed the managers to do those loss-causing acts. Alternatively, that they did not supervise the managers properly and that if they had done so, they would have prevented the managers doing these acts. Moreover, it is said that the directors knew that it was a breach of their duty to allow the managers to do those acts which caused the loss and did not prevent the managers doing those acts. Therefore, it is said, the directors were guilty of wilful default.

The third "tier" is the firm - or rather the alleged liability of the firm for breach of duty and breach of contract, the contract being of a continuous and indefinite nature which obliged the firm (that is to say every member of it) to volunteer to the Company any legal advice which the Company might need from time to time. And so, it is said, the firm should have advised the directors not to allow the managers to do those loss-making acts and should have advised them to monitor and supervise the activities of the managers.

It is simply not true to say (as is averred in para-

graph 13) that the directors acted "in name only" and "took no part or interest in the management or conduct of the business". It is clear from the statement of claim and the affidavits that Board meetings were held, and decisions were made regarding the opening of bank accounts and the granting of the guarantee and the deed of suretyship. As Mr. Scott said, it is patent nonsense to suggest that because the Bye-Laws say that the business of a Company shall be managed by the directors that this obliges the directors personally to take every single decision. It is implicit in the process of management of a business that some tasks must be entrusted to others.

Obviously there are certain matters that should be dealt with by the Board of Directors. The question whether the letter of guarantee should have been given to Messrs. Slavenburg was a matter which properly came before the Board. The annual accounts of a company must be considered by the Board of Directors, and so on. But directors are not expected to approve votes of petty cash for the purchase of stationery, stamps, and other minor office equipment. In between those two extremes, it is impossible to draw a hard and fast line as to what a Board of Directors should retain in its hands and what should be left to the management. As Romer J. said in In re City Equitable Fire Insurance Co. Ltd. [(1925) 1 Ch. 407 at p.426]:-

> "It is indeed impossible to describe the duty of directors in general terms, whether by way of analogy or otherwise. The position of a director of a company carrying on a small retail business is very different from that of a director of a railway company. The duties of a bank director may differ widely from those of an insurance director .....The larger the business carried on by the company the more numerous, and the more important, the matters that must of necessity be left to the managers, the accountants and the rest

of the staff. The manner in which the work of the company is to be distributed between the board of directors and the staff is in truth a business matter to be decided on business lines. To use the words of Lord Macnaughton in Dovey v Cory [(1901) A.C. 477 at 488] :

> 'I do not think it desirable for any tribunal to do that which Parliament has abstained from doing - that is to formulate precise rules for the guidance or embarassment of businessmen in the conduct of business affairs. .....'

In order, therefore, to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the articles of association".

And at pages 428/429, Romer J. is recorded as saying:-

> "A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director of a life assurance company, for instance, does not guarantee that he has the skill of an actuary or of a physician..... (1).....directors are not liable for mere errors of judgment. (2) a Director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings.....He is not bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so. (3) In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform his duties honestly .....Business cannot be carried on upon principles of distrust, men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them".

As previously stated, the business of the Plaintiff Company was carried on abroad. It is not alleged that the directors were, or that they ever held themselves out to be, skilled in the oil trade. Provided the managers and others abroad were carefully chosen for their jobs, those

men had to be trusted. Be that as it may, from the structure of the statement of claim, if the allegation is that the directors allowed managers to do the acts which caused loss, in order to make out any cause of action against those directors, it is absolutely essential that the acts which caused the loss are identified so that the court may say whether the directors erred in allowing the managers to perform those acts. One cannot come to grips with any of the issues raised unless one knows the acts complained of.

Buying and selling oil calls for judgment. There is bound to be a speculative element in such activity. If, for example, it were said that some manager bought a large quantity of oil and it is alleged that anyone ought to have known that it was the wrong time to buy, the directors might plead in different ways. They might say it was not the contract which caused the loss; or, if it did, it was proper to have allowed the manager to enter into such a contract; or the directors might plead that, with hindsight, they agree that the managers should not have been allowed to enter into such a contract, but that as lawyer/directors it was not obvious to them that it was such a risky purchase and that they relied on others who knew far more about the oil trade than they did.

I agree entirely with Mr. Hoffman's and Mr. Scott's criticisms of this statement of claim. As Mr. Scott said, the word "facts" may have a number of meanings. It may connote primary facts. These are the "material" facts envisaged by O.19 r.4. The general and unparticularised allegations in paragraphs 11, 13, 14 and elsewhere in the statement of claim are "facts" in a sense, but are not "material facts" within the meaning of r.4. "Breach of

contract", "breach of duty", "wilful default" etc. are no more than conclusions which may or may not be drawn from material facts if such were alleged. As Mr. Hoffman said, how far would a plaintiff in a running-down action get if he pleaded that the defendant was negligent because he drove negligently? How far would he get if, upon being asked to particularise his allegations, he said "You drove negligently in everything you did. I don't have to give you further particulars"!

It was not in dispute in the court below that for the Plaintiff to succeed against the directors, it has to be proved, among other things that the directors were in 'wilful default'; but on this appeal the question of onus of proof and whether it was necessary for the Plaintiff to give particulars of the bald allegation of wilful default was questioned by Mr. Lightman. Firstly, he submitted that Bye-Law 62 of the Company's Bye-Laws does not operate till pleaded and invoked by a defendant director and that the onus is on the defendant directors who invoke the bye-law to prove that they acted honestly and that any breach of duty was not wilful. Secondly, Mr. Lightman submitted that even if the onus is on the Plaintiff to prove wilful default, having regard to the provisions of O.19 r.22 it is not necessary for the Plaintiff to give particulars.

Bye-Law 62 reads as follows:-

> "62. The Directors, Auditors, Secretary and other Officers for the time being of the Company..... shall be indemnified and secured harmless out of the assets and profits of the Company from and against all actions, costs, charges, losses, damages and expenses which they or any of them .....shall or may incur or sustain by or by reason of any act, concurred in or omitted in or about the execution of their duty, or supposed duty, in their respective offices.....except

> such (if any) as they shall incur or sustain by or through their wilful neglect or default ..... and none of them shall be answerable for the acts, receipts, neglects or defaults of the other or others of them or for joining in any receipts for the sake of conformity, or for any bankers or other persons with whom any moneys or effects belonging to the Company shall or may be lodged or deposited for safe custody or for insufficiency or deficiency of any security upon which any moneys of or belonging to the Company shall be placed out of or invested, or for any other loss, misfortune or damage which may happen in the execution of their respective offices .....or in relation thereto, unless the same shall happen by or through their own wilful neglect or default respectively".

O.19 r.6(1), so far as relevant, reads:-

> "6(1) In all cases in which a party pleading relies on .....wilful default.....particulars (with dates and items if necessary) shall be stated in the pleadings".

As regards onus of proof, Mr. Lightman cited a passage from the judgment of Sargant L.J. in the City Equitable case. It reads (pp. 528/9):-

> "What is the meaning of the exception 'wilful neglect or default' in that article? Romer J. has analysed with great care the cases on the subject, and in my opinion he has, as a result of that analysis, come to a correct conclusion. I think the word 'wilful' in this phrase is of importance, and means that the officer in question is consciously acting or failing to act, in a reprehensible manner. It may be for him to show that this is not so". (emphasis mine).

Mr. Lightman cottoned on to the last sentence of the above passage in support of his argument that the onus is on the defendant directors to prove that any default was not wilful.

I entirely disagree. In the City Equitable case the question of onus of proof was not an issue; and judgments have to be read in their context. Of course, if a liquidator gives prima facie evidence of wilful default, it is open to the director "to show that this is not so". But that one sentence from the judgment of Sargant L.J., taken out of context, gives no support whatsoever to Mr. Lightman's submission that the onus is on the defendants and that it is

not for the Plaintiff to prove wilful default on the part of the directors. I might add that there is a passage at p.538 which form part of the report in Leeds City Brewery Ltd. v Platts (a note of which is attached to the report in the City Equitable case, which makes it clear that the onus of proving wilful default lies on the person alleging it and who would fail if this was not established by proof of the necessary material facts.

As regards the second part of Mr. Lightman's submission on this appeal, O.19 r.22 reads:-

> "22. Where it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the condition of mind is to be inferred".

Mr. Lightman compared r.22 with r.6(1). My note of his submission reads:-

> "How can these two rules be reconciled? Either r.22 has no application when r.6 applies, or r.22 modifies r.6 so that as regards wilful default it is sufficient to plead the mental element (wilful) without particulars but giving particulars of the breach of duty (the default). I say the latter construction is preferable. Rule 22 does not contain any words of limitation such as 'subject to r.6'; and if the construction is that r.22 does not operate in any case where r.6 applies, to a great extent it would have no sensible application at all".

In his closing address in the court below, Mr. Lightman appears to have mentioned r.22 on two occasions. The first note made by the judge reads:-

> "O.19 r.22. 1949 Annual Practice at p.386. Note of knowledge".

The second note reads:-

> "O.19 r.22 where it is necessary to allege 'knowledge' sufficient to state it as a fact. On the claim here of wilful breach the plea of wilfulness is sufficiently pleaded".

Whatever Mr. Lightman's submission was in the court below it was not sufficient to cause either Mr. Hoffman or Mr. Scott to deal with it in their Replies; and it is not surprising that the judge did not mention r.22 in his judgment.

Our rules 6(1) and 22 are copies of the former O.19 rr. 6 and 22 in force in England prior to 1962. The meaning of the latter rule came up for consideration in Burgess v Beethoven Electric Equipment Ltd. [(1943) 1 KB 96 C.A.] There the plaintiff claimed commission under an agreement by which he was to use his best endeavours to obtain government contracts for the defendants. The defendants pleaded that the agreement was "intended" by the plaintiff to be carried out by him by bribing government officials to induce favour to be shown to the defendants and that such an agreement was void. The plaintiff asked for particulars of any fact, document or act of the plaintiff on which the defendants intended to rely. It was held that the plaintiff was not entitled to particulars of the defendant's allegation. Giving the judgment of the court, Lord Greene M.R. said (p.98):-

> "I should have thought that (the rule) meant what it said, namely, that a pleading which merely makes an allegation of a condition of the mind is sufficient ..... r.22 appears clearly and without qualification to provide that a pleader who alleges the particular condition of the mind in question has pleaded sufficiently".

The present English rule is O.18 r.12 which is based on the former O.19 rr.6,7,7B and 22. Under r.12(1)(a), particulars of a claim of wilful default must be given in the pleading. Rule 12(1)(b) provides that in the case of an allegation of any condition of the mind other than knowledge, particulars must be given in the pleading. In the case of

an allegation of knowledge, particulars need not be given in the first instance but the Court may order that particulars be given [12(1)(4)]. Paragraph (4) of r.12(1) was intended to reversethe effect of the decision in Burgess (supra) and restore the practice prevailing before that case was decided, a practice which was summarised by the editors of the Yearly Practice 1940 p.333.

In the City Equitable case, Lord Romer said (p.434):-

> ".....the difficulty is not so much in ascertaining the meaning of the adjective 'wilful' as in ascertaining precisely what is the noun to which the adjective is to be applied. An act or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty".

Mr. Lightman cited In re John Fulton & Co. Ltd. (1932) NILR 35 in support of his argument. With respect, that decision is of no assistance to him. The default in the Fulton case was identified. In the instant case, none of the alleged defaults are identified.

The other case cited by Mr. Lightman was In re Newcastle-upon-Tyne Marine Insurance Co. ex parte Brown [(1854) 9 Bear.97]. This case involved a question whether a director who had transferrred shares may nevertheless be a contributory. The judge said he was presumed to know the law; and one of Mr. Lightman's arguments was that directors are deemed to know the law and to have knowledge of their duties and therefore that any breach must be deemed to be wilful.

The decision in In re Brown, decided 75 years before

the City Equitable case, is no authority on the question of wilful default. As Mr. Scott said the question of "assumed knowledge" does not arise in this case.

In my view O.19 r.22 has no bearing on any question before us in this appeal. Order 19 r.6 states clearly that in all cases in which a party pleading relies on wilful default, particulars shall be stated in the pleading. There are no particulars in paragraphs 11 and 16. These paragraphs fail not because of any lack of particularity as to wilfulness. Wilfulness would be a matter of inference from all the circumstances. It is the alleged default or defaults on which there is no particularity. That is why the paragraphs are utterly defective.

Mr. Lightman endeavoured to support his submission that it was irrelevant whether any particular transactions were improvident or negligent, by comparing the position of a company director with that of a trustee. He gave the analogy of a trustee, whose duty it is to invest trust funds in accordance with the law, allowing someone else, say a stockbroker, a free hand. If the investments depreciate, it doesn't help the trustee to say that the stockbroker was using reasonable skill.

As Mr. Hoffman said, that would be a good analogy if some particular act on the part of the managers were pleaded and it was held that the power to do this act should not have been delegated to the managers; but not otherwise.

As regards paragraphs 17 - 21 of the statement of claim, that portion of the pleading does state material facts within the meaning of rule 4. The Board are said to have resolved to give Slavenburgs a Letter of Guarantee

and to have ratified the action of an officer of the Company in executing a Deed of Suretyship in favour of Slavenburgs. The 3rd Defendant is said to have executed the Letter of Guarantee and the Deed of Suretyship; and naturally it is said that the Company thereby incurred a liability to Slavenburgs. But how far does this take the Plaintiffs in their attempt to frame a cause of action?

In my view it falls far short of stating a cause of action. The Company was trading at the time. Apart from stating that the Company incurred a liability to Slavenburgs, there is nothing on the face of the pleading to suggest that there was anything unusual or wrong about the transactions. Giving guarantees and executing deeds of suretyship are matters of everyday commercial experience. The pleading does not even say that these transactions contributed to the loss sustained by the Company. But assuming that the transactions did contribute to the loss, how can it possibly be argued that it is sufficient to aver that in passing the resolutions and authorising the execution of the two documents, the 2nd and 3rd Defendants "failed to exercise reasonable or any judgment skill or care" etc. and that it was "not in the interest of the Company to incur such liabilities". In what way, was it not in the interests of the Company? Where are the particulars of default from which it will appear why the defendants are being told that there was a transaction they knew it was contrary to their duty to authorise? The answer is obvious; and on the face of it, it was an ordinary commercial transaction; yet, Mr. Lightman has said that he does not have to give such particulars.

If the action were allowed to go to trial on the

statement of claim as it stands, the liquidator would prove that the 2nd 3rd and 5th Defendants were directors for various periods of the Company's life; that Board meetings were held; that the Company was carrying on a foreign business and that such business was carried on by managers on a day-to-day basis; that the Board authorised the giving of a guarantee and executing a deed of suretyship; and that, during the period of its working life, the Company made a loss.

Would the liquidator be entitled to succeed on those facts? The answer is obvious. It could not possibly be inferred from what the liquidator may prove, on the statement of claim as it stands, that the directors were guilty of any default, much less wilful default.

The third "tier", that is to say the case against the 1st Defendants, depends on the success of the Plaintiff's claim against the 2nd, 3rd and 5th Defendants (the "second tier", to adopt the language of Mr. Hoffman) because if the 2nd and 3rd Defendants are not guilty of wilful default, it matters not how they were appointed and what the relationship was between the firm and the Plaintiff company.

As regards the allegation of a general retainer, the learned judge cited a passage from the judgment of Bramwell L.J. in Saffron Walden Second Benefit Building Society v Rayner [(1880) 14Ch.D. 406 at 415] the concluding words of which read:

> "....there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes".

In Midland Bank v Hett, Stubbs and Kemp [(1979) 1Ch.384], Oliver J. said:-

"Mr. Harman sought to rely upon the fact that Mr. Stubbs was Geoffrey's solicitor under some sort of general retainer imposing a duty to consider all aspects of his interest generally whenever he was consulted, but that cannot be. There is no such thing as a general retainer in that sense. The expression 'my solicitor' is as meaningless as the expression 'my tailor' or 'my bookmaker' in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do".

It is conceivable, of course, that a whole firm of Barristers and Attorneys could contract with some particular client to give advice on a general basis for an indefinite period; and there were vague suggestions by Mr. Lightman both here and in the court below that there was some such extraordinary contract. But it would be unusual, to say the least of it, if there ever was such an arrangement between the firm and the Company. As Mr. Hoffman said, can one imagine Conyers Dill and Pearman writing to Mr. Maddocks (one of their partners) saying: "The law relating to limited liability companies is so-and-so; be sure you follow it"! And if there ever was such a contract, the defendants are entitled to full particulars as to how it came into being.

However, in my view there never was such a contract written or oral. In the court below in his closing address Mr. Lightman's submission may be summarised thus:-

The position in Bermuda is that law firms provide services to exempt companies. Such companies are their creation and remain in their care. There was a very special relationship between the 1st Defendants and the Plaintiff company in that the 1st Defendants created the Company and procured directors and secretarial services. Ordinarily a person acts as solicitor to another in regard to a particular matter. But the concept of a solicitor or counsel generally originated in the United States and can be recognized today by the

law of Bermuda. I submit such a relationship existed by implication. I have no authority for this. I make this submission on general principles.

Before this court, Mr. Lightman's submission may be summarised thus:-

> In the very special situation in Bermuda the standing relationship of solicitor and client can and does exist between an exempt company and the person concerned with its formation. The common law can expand and recognize new situations and we will say that the practical reality is that all parties proceeded on the basis of this standing relationship. That is what is pleaded in paragraph 4.

If such an extraordinary state of affairs as is envisaged by these remarks exists in Bermuda, one would have expected that it would have been spelt out in some detail in the pleading, not from the Bar after the adequacy of the pleading has been challenged.

The principles which should guide a judge when dealing with an application to strike out a pleading and to dismiss an action are well-known. Over the years, those principles have been expressed in different ways by different judges. The learned editors of The White Book give a summary under paragraph 18/19/3 and subsequent paragraphs. It has been said in numerous cases that the power to strike out should only be exercised "in plain and obvious cases", when the claim is "obviously unsustainable", "when the action cannot succeed" or "is in some way an abuse of the process or the case unarguable", where there is "no reasonable cause of action", when the pleading is "not only demurrable but something worse than demurrable i.e. such that no legitimate amendment can save it from being demurrable". The courts will not permit a plaintiff to be driven from the judgment seat "except when the cause of action is obviously bad and almost incontestably bad".

In my view, the learned judge did not err in law; and

in this appeal we are reviewing the exercise of a judicial discretion. In Evans v Bartlam [(1937) A.C. 473,] Lord Wright said:

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong".

In G.L. Baker Ltd. v Medway Building and Supplies Ltd. [(1958) 1 W.L.R. 1216], on an appeal from a refusal of leave to amend a defence, Jenkins L.J. said (p.1231):-

> "I should next make some reference to the principle to be followed in granting or refusing leave to amend, and I start by saying that there is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the judge with which the court should not in ordinary circumstances interfere unless satisfied that the judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties".

In Ward v James [(1966) 1QB 273], Lord Denning said (p.293):-

> "The court can and will interfere, if it is satisfied that the judge was wrong. Thus it will interfere if it can be seen that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him.....Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him....."

In re C.(Infants) [(1971) Ch. 748], Davies L.J. said (pp. 754/5):-

> "In my considered opinion the law now is that if an appellate court is satisfied that the decision of the court below is wrong, it is its duty to say so and to act accordingly".

In Beck v Value Capital Ltd. (no.2) [(1976) 1W.L.R. 572] Buckley L.J., having cited this passage from the judgment of Davies L.J. in In re C. (Infants) said (pp.573,574):-

> "Counsel are sometimes inclined, it seems to me, to treat this as meaning that, where a discretionary jurisdiction is involved, an appellate court is

> entitled to substitute its own exercise of the discretion for that of the judge of first instance, unfettered by any regard for the view he took, and that if, so exercising its discretion, the appellate court arrives at a conclusion differing in some respects from the conclusion of the trial judge, the appellate court is entitled to treat the trial judge as having been wrong to that extent and to vary his order accordingly. In my opinion, this is an erroneous view and one which is likely to encourage unmeritorious appeals.....Where a trial judge is not shown to have erred in principle his exercise of a discretionary power should not be interfered with unless the appellate court is of opinion that his conclusion is one that involves or, to use the language of Lord Wright, the appellate court is clearly satisfied that the judge of first instance was wrong".

In Birkett v James [(1978) A.C. 297], Lord Diplock said (p.317):-

> "Where leave is granted, an appellate court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases.....where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account".

Mr. Lightman's approach in the court below was: I can cure all the defects in my statement of claim by submitting further and better particulars. The learned judge said:

> "This is not a case in which material facts have been stated so that further and better particulars could fill out the case being put forward. It is just completely devoid of the necessary material particulars to the extent that it becomes a wholly embarrassing pleading".

I agree. Not only is it an embarrassing pleading. As it stands, I do not see how the plaintiff could possibly succeed if the case went to trial.

Speaking for myself, the correctness of the learned judge's decision was demonstrated clearly during the hearing of the appeal when Mr. Lightman informed us that

it was quite irrelevant whether the overseas managers were negligent as regards any transaction, and that he was entitled to go to trial upon a bald allegation that the directors "abdicated responsibility to others" and "thereby put the company at risk".

Not only does Mr. Lightman's statement demonstrate the correctness of the learned judge's decision to strike out the statement of claim. The judge was also amply justified in striking out the writ. Whatever a new statement of claim might contain, it is clear that it would not contain averments of material facts necessary to support wilful fault on the part of the directors.

In my view, this court had no alternative but to dismiss the appeal.

Dated 5th July 1982

Sir Alastair Blair-Kerr P.