IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO 2010HCV 00024

BETWEEN	**ROSEMARIE WRIGHT–PASCOE**	**CLAIMANT**
AND	**ZOE CECILE MCHUGH**	**FIRST DEFENDANT**
AND	**KES DEVELOPMENT COMPANY LIMITED (In Voluntary Liquidation)**	**SECOND DEFENDANT**
AND	**HUGH SCOTT**	**THIRD DEFENDANT**
AND	**ELESA SCOTT**	**FOURTH DEFENDANT**
AND	**JENNIFER MESSADO & COMPANY**	**FIFTH DEFENDANT**

IN CHAMBERS

Nicole Foster-Pusey for the claimant

Gordon Robinson instructed by Patterson Mair Hamilton for the first defendant

Abraham Dabdoub instructed by Dabdoub and Dabdoub for the second defendant

Hugh Scott and Elesa Scott unrepresented (Hugh Scott in person)

Conrad George instructed by Hart Muirhead and Fatta for the fifth defendant

APPLICATION TO EXTEND TIME BY ANCILLARY DEFENDANT TO FILE DEFENCE – APPLICATION TO STRIKE OUT CLAIM AGAINST FIFTH DEFENDANT – STATUTORY TRUST UNDER REAL ESTATE (DEALERS AND DEVELOPERS) ACT – STATUTORY TRUST - WHETHER ATTORNEY AT LAW LIABLE AS ACCESSORY TO BREACH OF TRUST

October 6 and 21, 2011

SYKES J

[1] Dr. Rosemarie Wright-Pascoe is an annoyed and distressed woman. She has paid JMD$7,920,351.30 and USD$17,018.90 to Jennifer Messado and Company, a firm of attorneys, under a prepayment contract for a house which was to be built by KES Development Company ('KES') on land owned initially by Mrs. Zoe McHugh. Eventually, the land was transferred to KES. The house has not been built; the builder of the house is now bankrupt and is in voluntary liquidation; and the firm of attorneys says it does not have the money because it was paid over to Mrs. McHugh and KES. The liquidator's report makes it clear that full recovery from the builder is not going to happen because the claims against the builder are greater than the known assets. Dr. Wright-Pascoe wants to recover her money and she has sued the five defendants.

[2] This unfortunate saga began in June 2005 when Dr. Rosemarie Wright-Pascoe signed two contracts: one with KES for the construction of the house and the other with Mrs. Zoe McHugh for the purchase of the land. The money was not handed directly by her to the other contracting party to any of the contracts. The only person who, without doubt, received the money is the firm of attorneys. The firm says it handed over the money to Mrs. McHugh and KES. Mrs. McHugh and KES say that they did not get the money from the firm. Mr. Hugh Scott and Mrs. Elena Scott were directors of KES at all material times.

[3] Mrs. Zoe McHugh is taking no chances. She does not know whether Dr. Wright-Pascoe will succeed against her. She is seeking contributions from her other co-defendants in the event she is held liable. To this end, she has filed what is known as an ancillary claim. There is a time limit within which the persons sued by Mrs. McHugh need to file a defence. KES has missed this deadline and now wants to get back on the field of play by applying to the court for permission to file a defence out of time. The firm of attorneys despite receiving the moneys, say it is not accountable to Dr. Wright-Pascoe and wants the yoke of the claim to be removed from its neck. It has filed an application to strike out the claim.

[4] Although not pleaded specifically by anyone so far, the submissions proceeded on the assumption that the contracts signed by Dr. Wright-Pascoe fall within the definition of prepayment contract as defined in the Real Estate (Dealers and Developers) Act ('REDDA'). This being so, the court will not have to determine whether these contracts are prepayment contracts as defined by the Act. The consequence of this is that moneys paid by a purchaser to a vendor of land under

a prepayment contract governed by REDDA are tightly regulated. REDDA has set these contracts apart from ordinary conveyancing and construction contracts. The statutory regime has ousted the common law in so far as the statute has laid down the specific manner in which money paid under contracts governed by REDDA is to be treated.

Whether KES should be granted further time to file a defence to the ancillary claim

[5] KES has applied to extend time within which to file a defence to the ancillary claim. Mr. Gordon Robinson submitted that, based on the relevant rules of the Civil Procedure Rules ('CPR'), KES cannot be granted an extension of time within which to file its defence to the ancillary claim because KES has not complied with the rules relating to ancillary defendants. The provisions need to be set out and then examined to see if Mr. Robinson's thesis is sustainable.

[6] Rule 18.2:

(1) An ancillary claim is to be treated as if it were a claim for the purposes of these Rules, except as provided by this part.

(2) …

(3) …

(4) The following rules do not apply to ancillary claims-

(a) rules 8.14 and 8.15 (time within which a claim may be served);

[7] Rule 18.8:

(1) A person against whom an ancillary claim is made may file a defence.

(2) The period for filing a defence is the period of 42 days after the service of the ancillary claim.

[8] Rule 18.11:

(1) This rule applies to an ancillary claim other than a counter claim if the ancillary defendant fails to file a defence in respect of the ancillary claim within the permitted time.

(2) The ancillary defendant is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim; and

(3) Subject to paragraph (4), if judgment under Part 12 is given against the ancillary claimant, he or she may apply to enter judgment against the ancillary defendant in respect of the ancillary claim.

(4) The ancillary claimant may not enter judgment under paragraph (3) without the courts permission if the ancillary claimant-

(a) has not satisfied the default judgment under Part 12; or

(b) wishes to obtain judgment for –

> *(i) any remedy other than a contribution or any indemnity; or*
>
> *(ii) a sum exceeding that for which judgment has been entered against the ancillary claimant.*

(5) The court may at any time set aside or vary a judgment entered under paragraph (2) if it satisfied that the ancillary defendant-

> *(a) applied to set aside or vary the judgment as soon as reasonably practicable after finding out that judgment had been entered;*
>
> *(b) gives a good explanation for the failure to file a defence and*
>
> *(c) has a real prospect of successfully defending the ancillary claim.*

[9] Rule 26.1 reads:

(1) The list of powers in this rule is in addition to any powers given to the court by another rule or practice direction or by an enactment.

(2) Except where these Rules provide otherwise, the court may

…

(d) extend or shorten the time for compliance with any rule, practice direction, or order or direction of the court even if the application for an extension is made after the time for compliance has passed.

[10] For Mr. Robinson, rule 18.11 (1) when read with rule 18.8 (2) means that the ancillary defendant, in this case KES, must file a defence within the 42 days after service of the ancillary claim. If this is not done, then the ancillary defendant is shut out and has to await the outcome of the main claim. Mr. Robinson continued by submitting that that makes perfect sense because the ancillary defendant's liability is contingent. His reasoning went like this: an ancillary claim is unique in that it is a contingent claim whose fate is determined by the outcome of the main claim. An ancillary claim is a claim by a defendant against other defendant(s) where the ancillary claimant is seeking a contribution from other persons in the event that he is found liable to the claimant. By filing an ancillary claim the defendant is saying he alone is responsible for the loss suffered by the claimant.

[11] Given the unusual nature of an ancillary claim, the submission continued, the ancillary defendant must follow the rules laid down by the CPR. Under the CPR, the ancillary defendant is given a limited time within which to file his defence and unless he does so time cannot be extended because the rules do not permit time to be extended in such circumstances. Once that door is closed the ancillary

defendant cannot open it and has to await the outcome of the main claim. The reason for this according to Mr. Robinson is the contingent nature of an ancillary claim. Thus there is no need for the ancillary defendant to be let back in before the main claim is determined. If the claimant loses then there is no basis for the ancillary claim. Therefore, this is why under rule 18.11 (5) the court is empowered to set aside or vary the judgment entered against the ancillary defendant. According to Mr. Robinson, the logic here is that if the main claim fails there is nothing for the ancillary defendant to do whereas if the main claim succeeds then the ancillary defendant can set aside or vary in order to set aside the judgment entered against him.

[12] This position is not sustainable because, as Mr. Dabdoub pointed out, rule 18.8 does not in its terms or by necessary implication excludes the operation of rule 26.1 (2) (c). Rule 26.1 (2) (c), Mr. Dabdoub submitted is a rule of general application and this is why the opening words of that rule beings with the words 'except where these rules provide otherwise, the court may' exercise the powers stated in rule 26.1. The rules do not have to provide the exception by specific words. The exception may arise by implication if the internal logic of a particular rule means that rule 26.1 (2) is excluded. The only rule specifically excluded in express words by rule 18.8 is rule 18.2 (4). The internal logic of rules 18.8 and 18.11 does not compel the conclusion that rule 26.1 (2) is excluded from operating. The reason for this is that rule 26 is a strong rule of strong general application because that rule has core of the court's case management powers. The exclusion of any aspect of the court's case management powers from any

rule should not be lightly arrived at. For these reasons the application by KES to extend time within which to file a defence to the ancillary claim is granted.

Whether the claim against Jennifer Messado and Company should be struck out

[13] Mr. George has made powerful submissions, relying on a number of cases, to make the point that liability ought not to be extended to the firm of attorneys at law in this particular case because (a) the firm collected the money in its capacity as counsel representing the vendor; (b) the firm was not required under the contract to hold the money as a stake holder; (c) REDDA places no duty on the attorney as such and the statute speaks directly and only to the vendor (there is no mention of the attorney for the vendor); (d) the claimant has a remedy against the vendor; (e) no legal policy requires the extension of liability because there is no remedial gap in law which needs to be filled and (f) the actual pleadings of the claimant do not disclose any wrong doing on the part of the firm.

[14] This is a case of contract, Mr. George submits, and Dr. Wright-Pascoe has her remedy against Mrs. Zoe McHugh and KES who contracted with her. If it is that they have failed to perform she is to seek her remedy against them.

[15] The authorities cited by Mr. George need not be examined in any detail. In ***Gran Gelato Ltd v Richcliff (Group) Ltd and others*** [1992] 1 All ER 865, the claimant brought an action against a firm of solicitors, on various grounds including an allegation that the firm owed the claimant a duty of care. The context was that the firm of solicitors gave incorrect answers to questions raised by the purchaser's lawyers and acting on the incorrect answers, the claimant suffered loss. Vice

Chancellor Nicholls declined the invitation to extend the law on the basis that solicitors acting on behalf of vendors in a conveyancing transaction generally do not owe a duty of care to purchasers. The claim against Jennifer Messado and Company is not grounded in negligence and, in any event, the facts in ***Gelato*** are so far removed from the circumstances before the court that nothing more needs to be said about it.

[16] Mr. George next turned to the decision of Morrison J of this court in the unreported case of ***Audrey Chin v Jennifer Messado and Co and another*** Claim No. 02025 of 2008 (November 18, 2009). In that case, the claimant brought a claim against the firm of attorneys and the Real Estate Board alleging negligence against the firm and breach of statutory duty against the board. Morrison J upheld an application to strike out the case against the firm of attorneys. There is no indication in the pleadings or in the notes of oral judgment provided by Mr. George that the learned judge was asked to consider the position from the stand point of equity as distinct from pure common actions of negligence and breach of statutory duty.

[17] The court does not intend to disrespect the efforts of Mr. George but the court is constrained to decline to accept learned counsel's view of the matter. The court will set out the pleadings, then examine the statute and finally, accessory liability for breach of trust. When this is completed the court will state its position regarding the interaction of the statute and equity.

[18] The case against the firm of attorneys as outlined in the particulars of claim is that (a) all the moneys paid over by Dr. Wright-Pascoe were paid to the firm and (b) the moneys were not used in the manner contemplated by REDDA. Dr. Wright-Pascoe did not particularise in the pleadings what she meant when she alleged that the money was not used in accordance with REDDA. The gap in pleading is filled by Mrs. Zoe McHugh in her ancillary claim against the firm of attorneys. Mrs. McHugh alleges that the moneys paid over by Dr. Wright-Pascoe and other persons were not applied in the manner stated by REDDA but were instead, on the advice of the firm of attorneys, handed over to another company controlled by Mr. and Mrs. Scott. It is also alleged that the firm of attorneys advised Mr. and Mrs. Scott, directors of KES, to engage in the conduct just described. To put it bluntly, Mrs. Zoe McHugh is making the very serious allegation that the firm of attorneys deliberately and with full knowledge of REDDA advised the parties with whom Dr. Wright-Pascoe contracted not to use the money in the manner prescribed by the statute.

[19] The firm of attorneys has filed a defence to Dr. Wright-Pascoe's claim and also a defence to the ancillary claim. In the defence to Dr. Wright-Pascoe's claim, the firm pleads that it received the money and handed it over to Mrs. Zoe McHugh and KES. KES, on the other hand, in its defence, says that it did not receive any moneys from the firm. Mrs. McHugh, in her defence, is saying that she did not receive, from the attorneys, any money paid by the claimant.

[20] Thus far from the pleadings, it is common ground that moneys were paid over by Dr. Wright-Pascoe to the firm. The firm accepts this. Thereafter there is a blackhole.

[21] The firm's defence to the ancillary claim is that it set up a scheme that would enable Mrs. McHugh, the original owner of the land, to be paid the purchase price of the land from the money paid under a number of prepayment contracts (which necessarily includes Dr. Wright-Pascoe). It appears that KES was financing the purchase of the property from Mrs. McHugh from the moneys paid under the prepayment contract. On the face of it this pleading by the firm may amount to a breach of REDDA. Despite the fact that Dr. Wright-Pascoe did not plead specifically what happened to the money, the court cannot ignore the other pleadings in the case which confirm Dr. Wright-Pascoe's assertion that money was paid over to the firm but go further to raise issues of (a) whether the moneys were in fact paid into the requisite trust account; (b) whether the moneys were utilized in accordance with REDDA; (c) whether the firm of attorneys has misapplied the money and (d) whether the firm of attorneys even handed over the money to KES.

[22] A striking out application is part of the case management techniques that the court may use to eliminate hopeless claims. It must not be forgotten that the parties are under an obligation to cooperate with each other and with the court to identify the real issues in dispute between the parties. In this case, there is no dispute that Dr. Wright-Pascoe paid over money under two contracts to the firm of attorneys. There is no dispute that REDDA applies to the transaction. There is no

dispute that the contracts have not been performed. The dispute is between the defendants about the fate of the money paid over by Dr. Wright-Pascoe. The only remaining issue is whether REDDA treats the contracts in such a special way that it can be said that Dr. Wright-Pascoe's pleadings raise the issue of whether there is any equitable principle which can be applied in the statutory context to hold the firm of attorneys liable. It is now time to see what the legislation says about moneys paid under prepayment contracts which fall under REDDA.

[23] Section 29 provides:

> *(1) Subject to such conditions as may be prescribed every person who as a vendor under any prepayment contract relating to any land which is, or is intended to be, the subject of a development scheme, receives any money from any purchaser pursuant to such contract, shall, without delay pay such money into a trust account to be maintained by him with an authorised financial institution and held and applied in accordance with the provisions of this Act.*
>
> *(2) Upon every payment of moneys into a trust account pursuant to subsection (1) the person making such payment shall furnish to the Board a report of such payment specifying the contract to which the moneys comprised in such payment relate, and such other particulars as may be prescribed.*

(3) All moneys deposited in a trust account pursuant to subsection (1) and all interest earned thereon shall, subject to section 31, be held in such account and paid to, or applied for the benefit of, the persons entitled thereto in accordance with the provisions of this Act.

[24] Section 30 states:

It is hereby declared that subject to subsection (3) of section 31, the moneys received by a vendor under a prepayment contract in connection with land in a development scheme and deposited in a trust account pursuant to section 29 shall be held in a trust account, or any other account substituted therefor pursuant to subsection (2) of section 31, until completion or rescission, as the case may be, of the contract under which such moneys were received to be paid to the persons legally entitled thereto pursuant to the terms of the contract upon completion or rescission of the contract.

[25] Section 31 reads:

(1) Subject to subsection (2) and (3) moneys deposited in a trust account pursuant to section 29 and any interest earned thereon shall not be withdrawn from the account until the completions or rescission, as the case may be, of the contract under which the moneys were received by the vendor.

(2) Moneys so deposited in a trust account may be withdrawn and deposited in another trust account with another authorised financial institution subject to such conditions as may be prescribed and the provisions of this Act shall apply to that other account and the moneys held therein as they apply to the original account.

(3) Moneys so deposited in respect of a prepayment contract may be withdrawn from the account prior to the completion or rescission of the contract and applied by the vendor in the payment of stamp duty and transfer tax payable in respect of that contract and in partial reimbursement of the costs of materials supplied and work done in the construction of any building or works which is the subject of the contract, subject to the undermentioned conditions, that is to say –

(a) the moneys withdrawn shall not exceed ninety percent of the amount certified by a qualified quantity surveyor or architect or other person having such qualification as the Board may prescribe for the purposes of this section (not being a person in the employment of, or having an interest in the business of, the vendor or the developer) as being properly due for work already done and materials already supplied in the

construction of the building or works and not previously paid for; and

(b) the owner of the land on which the building or works is being constructed has executed and lodged with the Registrar of Titles a charge upon the land in accordance with subsection (4).

[26] Section 32 provides:

(1) Upon completion of a prepayment contract in accordance with its terms, or upon the vendor lawfully rescinding it by reason of default of the purchaser, the vendor shall be entitled to withdraw from the trust account the moneys deposited therein pursuant to section 29 in respect of that contract and shall be entitled to pay such moneys to the person legally entitled thereto (including himself) under such contract.

(2) Where moneys withdrawn from a trust account in accordance with subsection (1), the authorised financial institution in which such moneys are held shall give written notice of such withdrawal to the Board.

[27] Section 33 states:

Where a vendor defaults in completing any prepayment contract for the sale of land in a development scheme in accordance with the

terms and conditions of such contract and the Board is satisfied that such default (together with any default by the vendor in the completion of other prepayment contracts for the sale of land in that scheme are of such a substantial nature as to amount to a failure of the scheme, the Board shall -

(a) require the financial institution with which the trust account is maintained pursuant to section 29 to pay over to the Board all moneys (including interest) standing at credit of the trust account; and

(b) enforce any charge in favour of the Board pursuant to section 31 either by sale of the land subject to the charge or by such other action, consequent on the charge, as the Board thinks fit; and

(c) if it sells the land –

(i) apply the proceeds of such sale (after deducting the expenses thereof) in satisfaction rateably of the amount due to the Board under such charge and of the amount under any mortgage or charge ranking pari passu with the charge in favour of the Board; and

(ii) thereafter apply the balance of such proceeds of sale together with the moneys received by the Board out of the trust account pursuant to a requirement made

under paragraph (a) rateably to the person legally entitled thereto pursuant to the prepayment contracts under which moneys were received by the vendor and deposited in the trust account.

[28] Section 34 states:

(1) It shall be the duty of an authorised financial institution with which the trust account is maintained pursuant to section 29 to take reasonable measures to ensure that withdrawals are not made from such trust account save in compliance with paragraphs (a) and (b) of subsection (3) of section 31 and to comply with any requirement of the Board made upon it under paragraph (a) of section 33.

(2) All moneys payable to the Board by an authorized financial institution pursuant to a requirement made by the Board under paragraph (a) of section 33 shall be recoverable as a debt due to the Board.

[29] There is no doubt that REDDA has established a statutory trust. All the provisions cited above make extensive provisions for the keeping and application of moneys paid under the provisions of the legislation. The statute even imposes a duty on the financial institution to take steps to ensure that moneys paid out from trust accounts are so paid in accordance with specific provision of the legislation. What has happened here is that the legislation has imposed requirements in respect of development schemes falling under REDDA.

[30] Section 29 (1) demands that any vendor who receives money ‘shall without delay’ pay the money into a trust account. This provision has ring-fenced prepayment moneys and as such it cannot be used for the normal business expenses of vendor such as paying staff, paying utility bills, purchasing stationery and repairing his place of business. Section 29 (2) requires that the vendor accounts to the Board for the moneys received by telling the board, in a report, the specific contracts to which the moneys received relate. This is a fundamental provision because it enables the Board to know how much was paid by each purchaser, in the event of a failure of the scheme, so that when the moneys are being dealt with under section 33 (c), the persons can be allocated, if possible, the amounts actually paid by them. No person should receive more than he or she actually paid him. Section 29 (3) removes any doubt; all moneys paid into the trust account and all interest earned shall be held for and applied for the benefit of the persons entitled to the benefit. This could not possibly mean the vendor of the land.

[31] Section 31 is an interesting provision. Section 31 (3) (a) says that moneys ‘deposited’ may be withdrawn before completion or rescission of the contract and ‘applied by the vendor in the payment of stamp duty and transfer tax payable in respect of that contract and in partial reimbursement of the costs of materials supplied and work done and materials supplied in the construction of the building or works and not previously paid for.’ This would suggest that the moneys paid under a prepayment contract are not be used as working capital for the development of the scheme.

[32] Section 32 imposes even further restrictions. While section 31 says that moneys can only be withdrawn to pay for the things specified there, section 32 is supplementing section 31 by dealing with withdrawals of moneys in two situations. First, where the contract is completed according to its terms or where the contract is rescinded by the vendor 'by reason of the default of the purchaser.' If the rescission is not because of the purchaser's fault then the vendor cannot withdraw money under section 31 to pay other persons including himself.

[33] Section 33 provides for the vendor defaulting in completing the prepayment contract according to the terms of the agreement. If that default amounts to a failure of the scheme then the Board intervenes and deals with the moneys in accordance with the provisions of REDDA.

[34] In effect, at all material times REDDA requires that the moneys paid under a prepayment contract in respect of a development scheme be accounted for in the following manner: (a) any moneys paid by purchasers or intended purchasers in respect of development schemes governed by the Act must, without delay, be paid into a trust account; (b) it must be known at which financial institution the moneys are; (c) the specific amounts paid in by the person under the prepayment contract as well as the contract to which the payment is connected must be reported to the Real Estate Board; (d) any movement of funds from one financial institution to another must be reported to the Real Estate Board; (e) moneys cannot be withdrawn by the vendor except in accordance with the provisions of the Act; (f) the financial institutions are under a duty to put in place measures to ensure that moneys are not withdrawn from the trust account except in

accordance with the provisions of the Act; (g) moneys paid under the Act cannot be used by the vendor to run his or her business except in the manner specifically stated by the Act. The Act even goes as far as providing for distribution of the money in the event that the development scheme fails.

[35] While, the usual terminology of settlor, objects and beneficiaries of the trust is not found in the statute, it is clear that the legislature intended that pre-paid contracts that fall within the provisions of REDDA are to be treated in a special and unique way. It is a statutory trust. This court has no reservation in treating the moneys under a prepayment contract governed by REDDA as trust property which can only dealt with in the terms of the Act. Lord Langdale's three certainties are present (***Knight v Knight*** 3 Beav. 148). There is certainty of intention as gleaned from the statute; there is certainty of property (the trust account) and there is certainty of objects (the beneficiaries). What makes this trust different is that it is not established by private law, that is to say, a private person asking an attorney at law to draft a trust instrument which usually contains all the relevant information regarding the trust. Parliament has provided the instrument in the form of legislation. Parliament has also provided the terms of the trust, in the detailed legislative provisions governing the money paid under a prepayment contract.

[36] On reading the entire Act, this court sees no reason in law, logic or principle why equitable principles cannot apply. The fact that statute establishes the trust is not a reason for excluding equity.

[37] The court raised with Mr. George the applicability of what can now be called the ***Barnes v Addy*** principle, that is, the liability of someone who assists a trustee in breach of trust, to the allegations against the firm or attorneys. Mr. George roundly rejected the applicability of these principles. This rejection by Mr. George has led this court to examine whether ***Barnes v Addy*** (1874) LR 9 Ch App 244 as updated by ***Royal Brunei Airlines v Tan*** [1995] 2 AC 378 is applicable in this context. In ***Barnes v Addy***, the facts were these. Mr. Duffield, a solicitor, prepared an instrument appointing a Mr. Barnes to be trustee of a trust fund in place of Mr. Addy. Mr. Preston, another solicitor, who was the solicitor of Mr. Barnes scrutinised and approved the instrument appointing Mr. Barnes as trustee in place of Mr. Addy. Mr. Duffield also prepared a deed of indemnity to be executed by Mr. Barnes to Mr. Addy. Mr. Duffield had grave reservations about the appointment of Mr. Barnes because he felt that it was not wise to have a single trustee, in this case Mr. Barnes, over the whole of the trust fund. In fact, Mr. Duffield advised against it from the outset but there was no evidence that he knew of or had any reason to suspect that either Mr. Barnes or Mr. Addy would engage in any act of dishonesty in relation to the trust fund. It turned out that Mr. Barnes misapplied that part of the fund that was transferred to him in his capacity as a trustee and subsequently became bankrupt. The children of Mr. Barnes sought make Mr. Addy and the two solicitors liable for the lost fund. It was common ground that neither of the solicitors knew or had any reason to suspect that any dishonesty was involved in the transaction making Mr. Barnes the sole trustee. It was also common ground that the appointment was within the terms of the

instrument establishing the trust fund. There was no evidence that any of the solicitors received any of the trust property. The Vice Chancellor dismissed the bill and the suitors appealed. It is in this context that the famous words of Lord Chancellor Selbourne are to be understood. His Lordship said at page 251-252:

> *It is equally important to maintain the doctrine of trusts which is established in this Court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them.*
>
> *Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist*

with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case. If those principles were disregarded, I know not how anyone could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees. But, on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees, and are not to have the character of trustees constructively imposed upon them, then the transactions of mankind can safely be carried through; and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees.

[38] These passages have been the basis of the accepted shorthand in this area of law, namely, knowing receipt and knowing assistance (also called accessory liability). The first expression, knowing receipt, refers to persons who actually receive trust property or traceable proceeds. The second expression, knowing assistance, covers liability in circumstances where the person found liable has not received the property. This shorthand for both heads of liability has had unfortunate consequences. Subsequent generations of lawyers and judges have been unable to separate the woods from the trees and have become lost in

terminological issues which only served to encrust this area of law with unnecessary and needless complexity. As shall be seen below, it was not until the illuminating advice of Lord Nicholls in ***Royal Brunei Airlines*** that order returned to what was hitherto an uncomplicated area of law.

[39] The point made from this passage is this: the fact that the action of the solicitors enabled the breach of trust did not, without more, operate to make them liable. The evidence was that they had no reason to know or suspect that the trustee was about to or may have acted in the way that he did. Indeed, Mr. Duffield specifically warned against appointing a sole trustee but he was instructed otherwise. Mr. Duffield acted properly and on instruction and fundamentally, nothing that he did gave the trustee more power than a properly appointed trustee would have. The fact that he prepared a deed of indemnity could not be used against him because that without more cannot mean that he suspected that a breach was going to occur; it was simply an appropriate precaution to take. As the Lord Chancellor observed, in respect of Mr. Duffield, at page 254:

> *All these circumstances, and his own honest advice to his client, pointing out the risk and the dangers, and recommending that the transaction should not proceed, prove that he thought that was all which he, as solicitor, was bound to do. He did not think he incurred responsibility by settling the form of the deed, which, after all, did not increase the power of Mr. Addy, who was then sole trustee, to commit a breach of trust. We cannot consistently with the evidence, or with justice, or reason, disbelieve Mr. Duffield, when he says he*

never knew nor suspected any dishonest purpose, or believed that any actual fraud would result from what was done; and if that be a true interpretation of the facts, I certainly, for one, am unable to hold him responsible.

[40] On the face of it the case of ***Barnes v Addy*** is consistent with Mr. George's position that a firm of attorneys ought not to be visited with liability on the basis of assisting in the disposition of trust property where that firm of attorneys has no knowledge of proposed dishonest conduct on the part of the trustee or on the basis that the attorney himself was dishonest.

[41] The ***Royal Brunei*** case will now be examined. In that case, the claimant arranged with the defendant company for the defendant company to hold moneys received from certain sales until the money was accounted for to the claimant. Mr. Tan, the defendant, was the managing director and principal shareholder of the company. The defendant company with the defendant's knowledge and assistance paid the money into the company's current account instead of a separate account. The defendant used the money for its own purposes and subsequently became insolvent. The claimant brought a suit against Mr. Tan to recover the money. At first instance, the trial judge held him liable as a constructive trustee. The Court of Appeal reversed the judge on the basis that the defendant could not be held liable because it was not shown that the company was guilty of fraud or dishonesty in relation to the money held on trust for the claimant. The Judicial Committee of the Privy Council reversed the Court of Appeal.

[42] The advice of Lord Nicholls is very important and deserves careful study and analysis. His Lordship indicated that the critical issue on which the Court of Appeal decided the case was that it was not proved that the defendant company was itself dishonest and therefore Mr. Tan could not be held liable under the second limb of Lord Selbourne's dictum. It is this holding by the Court of Appeal that Lord Nicholls subjects to close analysis. His Lordship said at page 385:

> *But his [the trustee's] state of mind is essentially irrelevant to the question whether the third party should be made liable to the beneficiaries for the breach of trust. If the liability of the third party is fault-based, what matters is the nature of his fault, not that of the trustee. In this regard dishonesty on the part of the third party would seem to be a sufficient basis for his liability, irrespective of the state of mind of the trustee who is in breach of trust. It is difficult to see why, if the third party dishonestly assisted in a breach, there should be a further prerequisite to his liability, namely that the trustee also must have been acting dishonestly. The alternative view would mean that a dishonest third party is liable if the trustee is dishonest, but if the trustee did not act dishonestly that of itself would excuse a dishonest third party from liability. That would make no sense.*

[43] Lord Nicholls' examination exposes the frailty of the Court of Appeal's reasoning. His words are so clear that it need not elaboration from the court. His Lordship goes on to state the basis of liability of the non-recipient of trust property. At page 387 Lord Nicholls observed:

But accessory liability is concerned with the liability of a person who has not received any property. His liability is not property-based. His only sin is that he interfered with the due performance by the trustee of the fiduciary obligations undertaken by the trustee. These are personal obligations. They are, in this respect, analogous to the personal obligations undertaken by the parties to a contract. But ordinary, everyday business would become impossible if third parties were to be held liable for unknowingly interfering in the due performance of such personal obligations. Beneficiaries could not reasonably expect that third parties should deal with trustees at their peril, to the extent that they should become liable to the beneficiaries even when they received no trust property and even when they were unaware and had no reason to suppose that they were dealing with trustees.

[44] Lord Nicholls made the point that the touchstone of liability for the non-recipient or the accessory should be dishonesty. However, it is important to note that the standard of dishonesty here is not the dishonesty contemplated by the criminal law where the prosecution would need to prove that the defendant himself was subjectively dishonest. Lord Nicholls said that the standard of dishonesty here is objective. This is vital. The accessory cannot escape liability on the basis that he or she was not actually dishonest, that is that he or she did not consciously act dishonestly. His Lordship stated at page 389:

At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.

In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the

beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.

[45] The standard is how an honest person would act in the particular circumstances. An honest person does not assist in the misapplication of trust funds if he knows that the funds are being applied in breach of the trust. An honest person does not deliberately ignore use of trust funds which he or she has good reason to believe is in breach of trust. Lord Nicholls addresses the question of risk since it may be argued that all investments are risky and to that extent losses may be incurred. His Lordship held at page 389 – 390:

All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so if the transaction serves another purpose in which that person has an interest of his own.

This type of risk is to be sharply distinguished from the case where a trustee, with or without the benefit of advice, is aware that a particular investment or application of trust property is outside his powers, but nevertheless he decides to proceed in the belief or hope that this will be beneficial to the beneficiaries or, at least, not prejudicial to them. He takes a risk that a clearly unauthorised

transaction will not cause loss. A risk of this nature is for the account of those who take it. If the risk materialises and causes loss, those who knowingly took the risk will be accountable accordingly. This is the type of risk being addressed by Peter Gibson J. in the Baden case [1993] 1 W.L.R. 509, 574, when he accepted that fraud includes taking "a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take."

This situation, in turn, is to be distinguished from the case where there is genuine doubt about whether a transaction is authorised or not. This may be because the trust instrument is worded obscurely, or because there are competing claims, as in Carl Zeiss Stiftung v. Herbert Smith & Co. (No. 2) [1969] 2 Ch. 276, or for other reasons. The difficulty here is that frequently the situation is neither clearly white nor clearly black. The dividing edge between what is within the trustee's powers and what is not is often not clear-cut. Instead there is a gradually darkening spectrum which can be described with labels such as clearly authorised, probably authorised, possibly authorised, wholly unclear, probably unauthorised and, finally, clearly unauthorised.

The difficulty here is that the differences are of degree rather than of kind. So far as the trustee himself is concerned the legal analysis is straightforward. Honesty or lack of honesty is not the test for his liability. He is obliged to comply with the terms of the trust. His

liability is strict. If he departs from the trust terms he is liable unless excused by a provision in the trust instrument or relieved by the court. The analysis of the position of the accessory, such as the solicitor who carries through the transaction for him, does not lead to such a simple, clear-cut answer in every case. He is required to act honestly; but what is required of an honest person in these circumstances? An honest person knows there is doubt. What does honesty require him to do?

[46] At pages 390- 391 Lord Nicholls makes this telling observation:

Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little

difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did.

[47] Where there is evidence that a particular kind of transaction was prohibited and the trustee with knowledge of this did the act in question which resulted in loss to the beneficiaries, then undoubtedly he will be held accountable. The trustee will be held accountable even if he did not know that his act was in breach of trust because knowledge is not a necessary foundation for the trustee's liability. In the case of the accessory, if he or she knew that the act in question was prohibited and assisted the trustee in breaching the trust, can there be any good reason why he or she should not be held accountable? Where this occurs, it cannot be called the mere incompetence or bad judgment. It is a deliberate breach of the trust. By parity of reasoning where a statute creates a statutory trust and the trustee deliberately removes property from the trust in clear breach of the statute there is no good reason why the trustee, by whatever statutory name he or she is called, should not be held liable, by equity, for breach of trust. Similarly, an accessory, who knows or strongly suspects that the trustee is acting in breach of trust but refrains from enquiring because he or she does not wish to know the answer

should not escape liability on the basis that he or she was not actually dishonest in the sense of embarking upon a scheme to defraud either the trustee or the beneficiary. The reason for this position is as the passage from Lord Nicholls explains: these transactions would be unauthorized to the certain actual knowledge in the case of the trustee, and in the case of the accessory, he or she would be taking an unauthorized decision that prejudices the rights of the beneficiaries and this was known to the accessory. An honest person does not do these things. It is one thing to have a genuine doubt over whether a particular transaction is authorised or within the terms of the trust, but it is quite another to engage in a transaction which the person knows or strongly suspects that he or she has no lawful basis to take. These are the principles to be drawn and applied from ***Royal Brunei***. But these are not the only principles.

[48] Lord Nicholls also dealt with the objective standard of honesty. In determining whether the objective standard of dishonesty is met the court has to take into account all the circumstances known to the third party at the time the alleged assistance in breach of trust was given. Importantly, the court must have regard to the personal attributes of the third party. It seems to this court, this must include the profession of the third party; and if the third party is an attorney at law, the court must have regard to his or her area of practice as well his or her experience and intelligence. In other words, the subjective attributes of the person is taken into account is asking whether an honest person, with the profession, knowledge, experience and intelligence, of the defendant would behave in the manner that the defendant did.

[49] In his Lordship's review of the law, the issue of negligence was dealt with. While not stating it explicitly, it is obvious that negligence is not part of the basis of liability for an accessory who does not receive trust property. The liability in negligence will usually arise where the third party owes a duty of care to the trustees. The beneficiary will usually be required to prove (a) a duty of care was owed to the trustee; (b) that duty was breached; (c) there was consequential damage and (d) the trustees are either unable or unwilling to take action. In these circumstances it is open to the beneficiaries to take action against the negligent party. But even here, Lord Nicholls was concerned to limit the exposure of third parties to the beneficiaries because it would be intolerable if everyone who dealt with a trustee should find himself liable to the beneficiaries for any loss which occurred. For this reason, his Lordship, without articulating a definition or giving examples said that the beneficiary may have a claim 'in a suitable case' (page 391).

[50] The learned Law Lord dealt briefly with the third party who acted for or dealt with a dishonest trustee and the person who acted owes no duty of care to the trustee and the law does not impose one. Dishonesty has the same meaning in the context of the dishonest trustee as it has for the accessory. For liability to be established, in these circumstances, Lord Nicholls insisted that the accessory must be dishonest in the sense described in his advice. The reason for this limitation is that, generally, the beneficiaries cannot expect that every person, acting honestly and dealing with the trustee should embark upon enquiry to determine whether the trustee is acting honestly.

[51] This court adopts Lord Nicholls' analysis because it has overcome the serious difficulties that got in the way of understanding and applying Lord Selbourne's propositions as developed by cases subsequent to ***Barnes v Addy***. The law has been simplified considerably. It is expressed in terms that are easy to understand, certainly easier to apply than what existed before and will lead to greater consistency in outcome.

[52] The case before this court is a statutory trust created by an Act of Parliament. The trustee is deemed to know the law and so too the attorney, particularly if the statute applies in an area in which the attorney practices. In the case before the court, it is common ground that the firm of attorneys is very experienced in conveyancing matters and as a specialist in this area must be taken to be aware of the provisions of the REDDA which requires that developers/vendors of schemes falling within the legislation are required to establish a trust account.

[53] Mr. George submitted that the firm of attorneys is not accountable to Dr. Wright-Pascoe. This court disagrees. The statute is prescribing that the money must be kept separate from other moneys so that the trust property at all times can be identified. When the firm of attorneys received the money from Dr. Pascoe-Wright, as pleaded by her and admitted by the fifth defendant, the firm, at the moment of receipt of the property on behalf of Mrs. McHugh and KES was receiving property which became impressed with the statutory trust. It is impressed with a trust from that point and can only be used, by the vendor, in the manner indicated by the Act. It is not the placing of the money in the trust account that creates the trust. It is the statute. The trust comes into place one the attorney received the money

under prepayment contracts governed by REDDA. The placing of the money in the account only lets us know where the trust property is. Can it be said that if the attorney received the money after banking hours, the money is not trust property until the banks reopen and the money placed in an account? The moneys received by the attorney in the case of prepaid contract under REDDA were not moneys received by an attorney in an ordinary sale transaction. Prepayment contracts under REDDA are a class apart from other conveyancing contracts. The attorney is not free to say, 'I handed over the money to the vendor even though I knew or strongly suspected that he intended to misapply the funds when I handed it over to him.' REDDA stops this. The circumstances under REDDA are unique.

[54] When Dr. Wright-Pascoe pleaded that she handed over the money to the firm of attorneys, she was saying that she handed over money which became trust property. The attorney at law being a conveyancer must be taken to know that the money received is impressed with a trust and consequently must account for it in either of two ways: the attorney either establishes that it was handed over to the vendor to be used in accordance with the statute or the attorney used the money, as instructed by the vendor, but such use must be in accordance with purposes for which the money can be used according to the statute. There is no third possibility, save to return the money to the purchaser.

[55] This court therefore concludes that the pleaded case is sufficient in law and cannot be struck out at this stage. The response of the attorney that it was handed over to the vendor is not the end of the matter. If, at the trial, the evidence shows, that at the time the money was handed over the attorney knew or strongly

suspected but did not ask, that the money was going to be used for purposes not permitted by the statute then the attorney may be liable as an accessory to breach of trust.

[56] Yes, there are gaps in the pleaded case by Dr. Wright-Pascoe but these are not such that the case should be struck out. The gaps have been filed by the attorneys pleaded case in response to the main claim and the ancillary claim.

[57] As noted earlier, the trust account is for the use of vendor for the benefit of the purchaser. The moneys must be used in the manner laid down by the statute. The allegations in the ancillary claim and what may well be termed admissions in the defence to the ancillary claim do suggest that the moneys were not used in accordance with the statutory provisions. The vendor is saying that the moneys were not paid over by the attorney while the attorney is saying that the moneys were paid over and, if what was pleaded by the attorneys is true, then some, if not all of the moneys were paid out, with the assistance of the attorneys in a manner not authorised by the legislation. The attorneys must be taken to know what the statute requires. If the allegations are correct, then there is a case for the attorneys to answer and to explain, if they can, how and why the moneys were used in the way it was. It is not defence for the attorneys to say that they did not intend to defraud anyone and they were doing it in the best interest of all concerned. The standard of honesty is objective. Dr. Wright-Pascoe does not have to prove that the firm of attorneys set out on a deliberate scheme of rascality and formed the subjective intent to defraud her or other purchasers. All that needs to be established is that an honest person with the professional training,

knowledge, expertise and experience of the firm of attorneys placed in the circumstances in which the attorneys were placed would not have acted in the manner the attorney did. If loss results then the attorney is liable under the accessory principle. It matters not that the firm did not benefit from moneys paid out. It matters not that the attorneys did not receive any of the money. It is irrelevant whether or not the vendors were dishonest. It is the conduct of the attorneys that is view here.

[58] Let this court be quite clear. This court is not saying that the allegations are true but simply that based on all the pleadings (claim, ancillary claim and defence to ancillary) in the case, it is not appropriate to strike out the claim against the firm of attorneys at this point.

Conclusion

[59] Mr. Robinson and Mr. Dabdoub submitted that costs should be awarded against the firm of attorneys in favour of Mrs. McHugh and KES. I do not agree. The application by Jennifer Messado and Company was directed at the main claim. The firm did not make any application in relation to the ancillary claim made by Mrs. McHugh, though admittedly, failure of the main claim against the firm will necessarily prevent the ancillary claimant from getting any contribution from the firm, if Mrs. McHugh is found to be liable. Even if the case were struck out against the firm of attorneys, that is not necessarily a bar to an ancillary claim against the firm. To put it another way, the ancillary claimant's right to seek contribution from the firm is not affected by the striking out. The striking out does not necessarily

mean that the firm of attorneys was not a fault in some way. It may be that a claimant does not have enough information to join a particular party as a defendant but that does not preclude any existing defendant from making the assertion that another party is responsible in full or in part for the claimant's loss and file an ancillary claim against that person. For these reasons the court declines to award costs to Mrs. McHugh and KES against Jennifer Messado and Company.

[60] The court grants KES's application to extend time within which to file a defence to the ancillary claim. Costs of KES's application to be costs in the claim. Jennifer Messado and Company's application to strike out is dismissed. Costs of Jennifer Messado and Company's application to Dr. Wright-Pascoe to be agreed or taxed.

[61] The order prepared to capture the outcome of the applications should indicate that the application to extend time was granted on October 6, 2011 and the application to strike out was dismissed on October 21, 2011.