

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. T-068 OF 1998

BETWEEN	THERMO PLASTICS (JA.) LIMITED (In Receivership)	PLAINTIFF
A N D	JEAN-MARIE DESLUME	FIRST DEFENDANT
A N D	WASHINGTON TRUST LTD.	SECOND DEFENDANT

Mr. Michael Hylton Q.C., and Miss Hilary Reid for Plaintiff.

Mr. Donald Scharschmidt Q.C., and Anthony Levy for First Defendant.

Miss Debra Newland for Second Defendant.

HEARD: 16th and 17th June, 1999

F.A. SMITH, J.

By Notice of Motion dated 28th May, 1998 the plaintiff seeks judgment in default or in the alternative summary judgment against the Defendants pursuant to Section 79(1) of the Civil Procedure Code Law.

The judgment sought as per the Minute of Judgment attached to the Notice is as follows:

1. Against the First and Second Defendants for:

A Declaration that the Plaintiff is the beneficial owner of of properties known as 8 Upper Carmel Way and being the land comprised in Certificates of Title registered at Volume 1188 Folio 20 and Volume 1193 Folio 600 of the Register Book of Titles.

2. Against the First Defendant for:

(a) The sums of \$11,386,340, \$1,765,750 and \$245,360 as moneys had and received and damages to be assessed.

(b) An account in respect of any profit derived directly or indirectly as a result of his breach of fiduciary duty.

(c) An order that within fourteen (14) days of being requested to do so, the First Defendant do execute a transfer of the said properties to the Plaintiff or to its order.

- (d) An order that the Registrar of the Supreme Court do execute the said transfer if the First Defendant fails to do so.
- (e) An order that the First Defendant pay the costs of transferring the said properties.
- (f) An order that the First Defendant forthwith deliver up possession of the said properties to the Plaintiff.
- (g) Interest pursuant to the Law Reform (Miscellaneous Provisions) Act.
- (h) Costs to be taxed or agreed.

The Writ of Summons dated 27th April, 1998 was accompanied by a Statement of Claim. In its Statement of Claim the plaintiff avers:

1. The Plaintiff is a company incorporated under the Companies Act. On March 1, 1998, Mr. Richard Downer was appointed Receiver and Manager of the Plaintiff pursuant to a Debenture date the 19th July, 1997.
2. The First Defendant was at all material times a director and employee of the Plaintiff and received a salary for his services as President of the Plaintiff.
3. The Second Defendant is a company incorporated under the Companies Act.
4. The First Defendant owed a fiduciary duty to the Plaintiff including but not limited to a duty to:
 - (a) act in its best interest;
 - (b) act in good faith;
 - (c) not enter into contracts and/or agreements which were not in its best interests;
 - (d) exercise his powers as director for proper purposes only;
 - (e) not misuse the Plaintiff's assets;
 - (f) not place himself in a position where there would, or alternatively could be a conflict of interest between his duty to the Plaintiff and his personal interests;
 - (g) ensure that the Plaintiff carried on its business in accordance with its Articles of Association and the Companies Act.

5. In breach of his said fiduciary duty the First Defendant caused and/or allowed the Plaintiff to enter into the transfer more particularly described below, and into the transactions described in paragraphs 11 to 13 hereof.

PARTICULARS

- (a) Up to April 9, 1995, the Plaintiff was the registered proprietor of the properties comprised in Certificates of Title registered at Volume 1193: Folio 600 and Volume 1188 Folio 20 of the Register Book of Titles ("The Properties").
 - (b) The Properties are known as 8 Upper Carmel Way, Cherry Gardens in the parish of Saint Andrew, and at all material times a substantial dwelling house was erected thereon. The Properties are, and were, at all material times, worth not less than \$30 million dollars.
 - (c) By an instrument in writing dated the 10th day of April, 1995 the Properties were transferred from the Plaintiff to the First Defendant, purportedly by way of gift. The transfer was signed on behalf of the Plaintiff by Ernest George Goodin, and, purportedly by Thomas Desulme.
 - (d) The Plaintiff was at the material time suffering substantial losses and was insolvent.
 - (e) Despite the substantial value of the Properties they were transferred to the First Defendant with no benefit accruing to the Plaintiff from its disposal and in circumstances which were not in the best interests of the Plaintiff.
6. The said transfer was a sham and unenforceable in that inter alia:
- (a) it was not at arm's length;
 - (b) it was not for value;
 - (c) it was in breach of the First Defendant's fiduciary duty to the Plaintiff; and
 - (d) it took place in circumstances which were fraudulent.

PARTICULARS OF FRAUD

- i. The First Defendant was aware of the true value of the Properties and as a director would have been aware that the Plaintiff was insolvent at the material time.
 - ii. At the date of the transfer Thomas Desulme was deceased and incapable of executing the said transfer.
7. By an instrument in writing dated the 26th day of June, 1997 the First Defendant mortgaged the Properties in favour of the Second Defendant for the sum of \$431,000.00.
 8. The Properties have and have had at all material times a monthly value of not less than US\$3,000.00.
 9. The First Defendant has not accounted to the Plaintiff for the income received from, or the use of the Properties since 10th April, 1995, the date of the aforesaid transfer.
 10. As a result of the First Defendant aforesaid breach of fiduciary duty, the Plaintiff has suffered loss and damage.

PARTICULARS

- (a) Value of the Properties J\$30 million (approximately)
 - (b) 36 months (to date) @US\$3,000 per month US\$108,000.00
11. In addition to the salary and emoluments to which he was entitled, the First Defendant has received various sums from the Plaintiff which he has failed and/or refused to repay. Furthermore, in order to conceal the true destination of the funds, the First Defendant caused the payments to be recorded in the Plaintiff's book in various accounts, many of which appeared to have no connection with the First Defendant.

PARTICULARS

<u>Name of Account Used</u>	<u>Sums Received and Not Repaid(\$)</u>
Special Advances	5,344,987
Salary Advances - All Employees	3,226,338
Directors' Loan Account	539,865

Staff Loans - All Employees	1,115,856
Salaries - President's Office	585,000
Subsistence Account	449,294
Gift and Donation Account	<u>125,000</u>
	<u>11,386,340</u>

12. Between November, 1995 and January, 1998 the First Defendant also caused the Plaintiff to pay the sum of \$1,765,750 to his Attorneys in payment for legal fees incurred by him personally and for which the Plaintiff received no benefit.
13. Between May, 1995 and January, 1998 the First Defendant drew a number of cheques totalling \$245,360 in favour of the Plaintiff, and caused the Plaintiff to give him cash in exchange therefor. Upon the cheques being presented for payment, they were dishonoured by the First Defendant's banker. Despite receiving notice of dishonour, the First Defendant has failed and/or refused to reimburse the Plaintiff.

Defence and Counterclaim

In his Defence and Counterclaim dated 25th March, 1999 he states:

1. Save that this Defendant admits that the Plaintiff is a company incorporated under the Companies Act, no admission is made as to paragraph 1 of the Statement of Claim.
2. Paragraph 2, 3 and 4 of the Statement of Claim are admitted.
3. As to paragraph 5 of the Statement of Claim this Defendant denies that he committed breaches of his fiduciary Duties as alleged or at all.
4. In further answer to paragraph 5 of the Statement of Claim this Defendant says that the property known as 8 Carmel Way, Cherry Gardens was purchased by him with his own funds and a loan from the Plaintiff Company.
5. This Defendant further says prior to the purchase of the property, he discussed the matter with his late father, Thomas Desulme, who was the founder of the Plaintiff company and who at the material time was a Director and its Executive Chairman.
6. At all material times the late Thomas Desulme was acting as the agent of the Plaintiff Company.

7. Prior to the purchase of the property, this Defendant who was an employee of the Plaintiff Company and then the Vice-President in charge of manufacturing as a part of his emolument from the said Plaintiff Company lived in an apartment owned by the Plaintiff Company for which he paid no rent.
8. That this Defendant informed the late Thomas Desulme that he proposed to make a down payment on the property and obtain a mortgage from Mutual Life Assurance Society for the balance of the purchase money whereupon the late Thomas Desulme advised him that the Plaintiff Company would advance the deposit and give him a mortgage. He further advised that this Defendant should put the title in the Company's name as Tax Benefits were to be gained in doing so.
9. That it was agreed between this Defendant and the late Thomas Desulme acting on behalf of the Plaintiff Company that the Company would advance the deposit and that this Defendant would be given a housing allowance to compensate him for the loss of entitlement to the apartment and that the said housing allowance would be deemed as payment to the Plaintiff Company in respect of the mortgage.
10. That acting in pursuance of the agreement referred to supra the Plaintiff Company advanced the deposit, the title was put in the name of the Plaintiff Company and the Defendant repaid his indebtedness to the Company out of foreign funds and the housing allowance referred to above.
11. That in the year 1986, the Plaintiff Company wrote its bank Mutual Security Limited and indicated that the property, 8 Carmel Way, belonged to Jean-Marie Desulme and was not a part of the security the Plaintiff Company was offering in respect of its indebtedness to the bank, and the bank wrote back confirming same.
12. This Defendant says that in or about December 1986, the Company executed an Instrument of Transfer of the said property to this Defendant. The said transfer was prepared by Keith Brooks, Attorney-at-Law and signed by two Directors of the Company, one of whom was the late Thomas Desulme and

the company's seal was affixed thereto.

13. That after making certain additions to the house at 8 Carmel Way, this Defendant went to reside there and has continued to reside there.
14. That subsequently, the Instrument of Transfer was sent to Milholland, Ashenhein and Stone, Attorneys-at-Law, but due to cash flow problems of the Plaintiff Company, the said transfer was not registered and was returned to Milholland, Ashenheim and Stone with a covering letter dated November 21, 1991.
15. That the said transfer was mislaid and in September, 1993, a new transfer was prepared and the late Thomas Desulme and Ernest Goodin both Directors of the Plaintiff Company signed on behalf of the Company and same was witnessed by Sharol Gill, Secretary of the late Thomas Desulme and this is the transfer that was ultimately registered.
16. This Defendant denies paragraph 6 of the Statement of Claim and refers to paragraphs 5 to 13 hereof.
17. Paragraph 7 of the Statement of Claim is admitted.
18. No admission is made as to paragraph 8 of the Statement of Claim.
19. In answer to paragraphs 9 & 10 of the Statement of Claim this Defendant repeats paragraphs 5 to 13 hereof.
20. In answer to paragraphs 11 & 13 this Defendant denies being indebted to the Plaintiff Company in the sum alleged in the Statement of Claim or at all and says that the Plaintiff Company with the approval of its Directors made regular contributions to a particular political party. The said contributions were made in cash and recorded in the books as money received by the Defendant
21. This Defendant denies the allegation made in paragraph 12 of the Statement of Claim and says that the sum expended was spent on behalf of the Plaintiff Company.
22. This Defendant denies that the Plaintiff is entitled to any of the reliefs claimed or to any relief at all.

COUNTERCLAIM

1. This Defendant says that as from 9th March, 1998, he has been barred from entering the premises of the Plaintiff Company and prevented him from performing his services as President thereof. That his services were terminated without notice and that he is entitled to at least one years notice or salary in lieu thereof.
2. This Defendant further says that in or about the year 1983, while he was employed to the Plaintiff Company the Plaintiff company established a Pension Scheme to which he and the other workers contributed and that this Defendant has been deprived of the contributions made to the said Pension Scheme.

This Defendant counterclaims for one year's salary	\$1,800,000.00
Alternatively, this Defendant claims redundancy payment of	\$1,730,750.00
The Defendant counterclaims being the sum contributed to the said Pension Scheme	\$1,600,000.00

The Plaintiff's reply and Defence to Counterclaim was filed and served on the 9th April, 1999. In this the Plaintiff states:

1. No admission is made as to paragraphs 5 to 10 of the Defence and Counterclaim, save and except that the late Thomas Desulme was the father of the first Defendant, founder of the Plaintiff, and at some time Director of the Plaintiff. The Plaintiff specifically denies that the first Defendant has paid any sums to the Plaintiff with reference to the property. The Plaintiff further says that at all material times the first Defendant was treated as living in property owned by the Plaintiff and the accommodation was treated as a taxable emolument. At no time was the first Defendant given, nor entitled to a housing allowance which was treated as payment in respect of the property.
2. In further answer to paragraphs 5 to 10 of the Defence and Counterclaim, the Plaintiff denies that the late Thomas Desulme acted as agent of the Plaintiff as alleged.

3. Paragraphs 11, 12, 13 and 14 of the Defence and Counterclaim are not admitted.
4. The Plaintiff makes no admission as to the contributions alleged in paragraph 20 of the Defence and Counterclaim and denies that any such contributions were recorded in the manner alleged by the first Defendant.

DEFENCE TO COUNTERCLAIM

5. Save and except that the first Defendant has been barred from entering the premises of the Plaintiff and prevented from performing services as President thereof, the Plaintiff denies paragraph 1 of the Counterclaim.
6. The Plaintiff further says that the services of the first Defendant were not wrongfully terminated, but terminated by operation of law upon the appointment of the Receiver on March 9, 1999.
7. Further and in the alternative, the Plaintiff will say that by reason of the matters set out in the Statement of Claim, it was entitled in any event to dismiss the first Defendant summarily and without notice.
8. Further and in the alternative, the Plaintiff will say that the first Defendant having not made any claim for a redundancy payment within six months of his services having been terminated he is not entitled to a redundancy payment. In any event, the plaintiff says that the sum to which the first Defendant could have been entitled as redundancy payment would not be one year's salary but a payment based on the number of continuous years of service by the first Defendant to the Plaintiff.
9. Save and except that the plaintiff established a Pension Scheme to which the first Defendant and other employees contributed, the Plaintiff makes no admission as to paragraph 2 of the Counterclaim. The Plaintiff will say that any sums to which the first Defendant is entitled in respect of contributions to a Pension Scheme are to due to him from the Trustees of the Scheme and cannot be set off against any sum due to the Plaintiff from the first Defendant.

10. Save as is hereinbefore expressly admitted the Plaintiff denies each and every allegation contained in the Counter-claim as if the same were set out and traversed seriatim and repeats and relies on the matters set out in the Statement of Claim.

Mr. Richard Downer the Receiver and Manager of the Plaintiff pursuant to a Debenture, in his affidavit dated 28th May, 1998 in support of the Motion for Summary Judgment verifies the claim set out in the Statement of Claim and states that in his belief the Defendant have no defence.

In another affidavit dated 27th April, 1998 (pargraphs 4-11) Mr. Downer swore that:

4. The first Defendant, Jean-Marie Desulme, is and was at all material times a Director of the Plaintiff.
5. Up to April 9, 1995, the Plaintiff was the registered proprietor of the properties comprised in Certificate of Title registered at Volume 1193 Folio 600 and Volume 1188 Folio 20 of the Register Book of Titles ("the Properties"). Exhibited hereto are copies of the titles referred to above, marked "RD 3" and "RD 4" respectively.
6. The properties known as Upper Carmel Way, Cherry Gardens, in the parish of Saint Andrew and at all material times, a substantial dwelling house was erected thereon.
7. On the 10th day of April, 1995 the properties were transferred from the Plaintiff to the first Defendant, purportedly by way of gift. The transfer was signed on behalf of the Plaintiff by Ernest George Goodin, and, purportedly by Thomas Desulme. I exhibit hereto marked "RD 5" a copy of the transfer, along with a Declaration of Value which is attached thereto, which I have obtained from the Titles Office.
8. I have been informed by his son, Yvon Thomas Desulme, and do verily believe that the said Thomas Desulme died on the 9th December, 1993 and was buried on the 19th December, 1993.
9. Since the said transfer the first Defendant has mortgaged the properties in favour of the second Defendant for the sum of \$431,000.00. I exhibit hereto marked "RD 6" a copy of the said mortgage.

10. I have seen nothing in the files or records of the Plaintiff to indicate that as at April, 1995, or at any time prior to or subsequent to that time, there was a Director's meeting approving or ratifying this "gift" to the first Defendant or that the disposition had even taken place.
11. Exhibited hereto and marked "RD 7" are the financial statements of the Plaintiff for the years ended 30th September, 1994 and 30th September, 1995 which show that at all material times the Plaintiff was suffering substantial and increasing losses and declining net current assets and was clearly headed towards insolvency.

In yet a third affidavit dated 8th December, 1998 Mr. Downer stated that:

"In paragraph 3 of the Desulme affidavit it is alleged that there was an agreement between the first Defendant and the Vendor of the premises at 8 Carmel Way and that the late Thomas Desulme paid a deposit of \$100,000.00 on the behalf of the first Defendant.

The documents in the Plaintiff's files indicate that:

- (a) The agreement was between the Plaintiff and the Vendor.
 - (b) The deposit was infact \$210,000.00 not \$100,000.00.
 - (c) The deposit was paid by the Plaintiff and not by the late Thomas Desulme.
 - (d) The balance purchase price was paid by the Plaintiff.
4. I exhibit hereto as exhibit "RD 8", "RD 9" and "RD 10" respectively, copies of cheque number 48497 dated 18th April, 1986 fromt he Plaintiff to Dunn, Cox & Orrett in the sum of \$210,000.00; cheque number 50886 dated 28th August, 1986 in the sum of \$504,548.81 from the Plaintiff Dunn, Cox & Orrett addressed to the Plaintiff.
 5. In paragraph 4 of the Desulme affidavit, it is alleged that a housing allowance due to the first Defendant was to be applied to reduce and pay off his obligation to the Plaintiff for the monies allegedly advanced on his behalf for the purchase of the property. The Plaintiff's records

for the period 1996-1997 indicate that during this period, the first Defendant did not receive housing allowance, but instead occupied a company-owned house.

6. As a result, and in accordance with the law, the first Defendant was treated as receiving a taxable emolument in the form of the accommodation, which was valued at 15% of his basic salary, and he paid income tax on that sum. Exhibited hereto marked "RD 11", "RD 12" and "RD 13" respectively, are copies of the Plaintiff's annual PAYE returns to the Income Tax Department for the years ending December 31, 1988, 1989, 1990 and 1991, respectively.
7. The records of the Plaintiff also indicate that there were no deductions from the first Defendant's salary during the period 1986 to 1997 towards a housing loan.
8. The records of the Plaintiff have at all material times shown the said property as an asset of the Plaintiff. I have seen no records of the Plaintiff which indicate that the first Defendant has any interest whatsoever in the property. Exhibited hereto by way of example and marked "RD 15" is a copy of the Plaintiff's fixed asset schedule as at the end of 1994, which shows the property as one of the assets of the Plaintiff.
9. In paragraph 3 of the Desulme affidavit, it is also alleged that in 1986 the first Defendant transferred the sum of US\$16,000.00 to his father's account, purportedly to be used for the payment for goods used by the Plaintiff. The Plaintiff's records show that there were only two occasions between 1985 and 1987 that the late Mr. Thomas Desulme paid for purchases for the company. These purchases were in January, 1986 and August, 1986 from Melam Plastic, a company owned by the late Thomas Desulme. In posting the relevant accounting entries, the payments were credited to the late Mr. Thomas Desulme's director's loan account, and therefore the Plaintiff did not receive the benefit of those payments.
Cynthia Desulme the sister-in-law of the first Defendant and the Secretary of the Plaintiff from its incorporation until around December, 1993 testified that her father-in-law the late Thomas

Desulme died on the 9th December, 1993 and was buried on the 19th December, 1993.

She exhibited a copy of the instrument of transfer dated 10th April, 1995 signed on behalf of the Plaintiff by Ernest George Goodin and purportedly by her father-in-law Thomas Desulme.

Of course Mr. Thomas Desulme could not have executed a transfer in April, 1995. Mrs. Desulme also swore that she was very familiar with her father-in-law's signature and in her opinion the signature on the transfer is not his true signature.

Mr. Yvon Thomas Desulme a son of the late Thomas Desulme and brother of the first Defendant, a director of the Plaintiff from 1972 to 1996 in an affidavit dated 27th April, 1998 swore that the properties known as 8 Upper Carmel Way were purchased by the Plaintiff.

He, too, swore that, in his opinion the signature on the transfer which purports to be his father's was not written by his father. He exhibited an affidavit from Mr. Wilford Williams an handwriting expert of over twenty (20) years experience.

There are two affidavits filed on behalf of the first Defendant. One sworn to by Mr. Ernest Goodin and the other by the first Defendant himself both dated 23rd June, 1998. In his affidavit the first Defendant claims that in early part of 1986 he came to an agreement with Mr, Sinclair Shirley to purchase premises now known as 8 Carmel Way for the sum of \$700,000.00. The premises were partly completed but construction had ceased. He discussed the matter with his father, the late Thomas Desulme who agreed to advance the deposit of \$100,000.00 on his behalf on the understanding that he would re-imburse him out of monies held by him in Miami, Florida (Para. 3).

He further claimed that in order to protect his interest his father had an Instrument of Transfer prepared by Mr. Keith Brooks and that this was executed by his father and Mr. George Johnson as Directors of the Plaintiff and himself and the seal of the company affixed (para. 5).

At paragraph 10 he states that the Instrument of Transfer dated 10th April, 1995 was in fact executed in September, 1993. Mr. Goodin a director of the company at the time, in his affidavit speaks to discussions he had with and instructions given to him by the late Thomas Desulme with a view to taking "step to tidy up his affairs."

It is important to note that these instructions which support the first Defendant's defence were not given to him by the Plaintiff but allegedly by Mr. Thomas Desulme.

Summary Judgment

S.79(1) of the Judicature (Civil Procedure Code) provides:

Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. **The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."**

Preliminary Requirements

- (a) The Writ of Summons must have been specially endorsed with or accompanied by a Statement of Claim under S.14 of the Civil Procedure Code.
- (b) The defendant must have entered appearance to the Writ of Summons.
- (c) The application must be supported by an affidavit which verifies the facts and contains a Statement of the defendant's belief that there is no defence to the action.

It is not in dispute that these requirements have been met.

These requirements having been met, the burden thereafter shifts to the defendant to:

- (a) Satisfy the court that he has a good defence to the action on merits or
- (b) disclose such facts as may be deemed sufficient to entitle him to defend the action generally.

Mr. Hylton Q.C., submitted that there are two separate issues:

- (a) Has the first Defendant shown a good or arguable defence to the Plaintiff's claim for the house?
- (b) Has the first Defendant shown a good and arguable defence to the Plaintiff's claim for the money?

Counsel for the Plaintiff contended that the first Defendant, as a director of the Plaintiff, owed the Plaintiff a fiduciary duty to apply its assets only for the purposes of the company. For this he relied on Aberdeen Railway Company v. Blaikie 1843-1860 All E.R. Rep. 249; International Sales and Agencies Ltd. and Another v. Marcus and Another (1982) 3 All E.R. 551; Halsbury's Laws of England 4th Edition Volumes 7 and 16 paragraphs 518 and 911 respectively.

He also submitted that the liability resulting from a breach of these fiduciary duties is independent of fraud, intent or personal incompetence and exists where the breach is innocent or merely technical. Consequently the claim is not based on allegations of fraud, although it arguably discloses instances of fraudulent behaviour. Here he relies on Hanbury & Maudsleys Modern Equity at page 598.

Mr. Scharschmidt is not disputing that the first Defendant owed the plaintiff a fiduciary duty. In his defence the first Defendant denies that he committed breaches of his fiduciary duties. Mr. Scharschmidt's contention is that there is a misconception that the court is involved in a trial. He submitted that what the defendant is required to do is to show that he has a defence to the action on the merits. Once the defence discloses a credible defence, that is enough, and the defence may do so by affidavit or otherwise. This is indeed so, however, in my view the nature of the duty of a director of a company is relevant to the decision which the court has to make.

