The Court Of Appeal for Bermuda

CIVIL APPEAL No. 4 of 2008

Between:

HORIZON BANK INTERNATIONAL LTD.

Appellant

-V-

ALLEN WALSH
HANS TAAL and
BOOMER TRADING CO. LTD.

Respondent

Before: **Hon. Justice Zacca, President**
Hon. Justice Nazareth, JA
Hon. Justice Evans, JA

Date of Hearing: **13 & 14 November 2008**
Date of Judgment: **19th March 2009**

Appearances: Mr. Fenwick, Q.C. with Ms. Bell for the Appellant
Mr. Hargun and Mr. Luthi for the Respondent

JUDGMENT

EVANS, JA:

1. The Bermuda Commercial Bank holds a large sum for the account of Horizon Bank International Ltd. ("HBI"), a privately owned bank which was incorporated in Antigua and is now being wound up both in Bermuda and in St. Vincent and the Grenadines. HBI's entitlement to this money is challenged by two Canadians, Allen Walsh and Hans Taal ("the Investors"). On 31 March 2008 Mr. Justice Kawaley held that they are entitled to trace i.e. exercise proprietary remedies to the extent of about US$4 million, plus interest totalling about US$1.4 million, and he further awarded them damages against HBI of about US$20 million, subject to deducting any monies traced. The Joint Provisional Liquidators of HBI now appeal.

2. The third plaintiff, and the third respondent to the appeal, is a Bahamian company, Boomer Trading Company Ltd. ("Boomer"), which was incorporated by the Investors in 1997 in the circumstances described below. We shall refer to the Investors and Boomer either separately or collectively as "the Respondents" as it is appropriate to do so.

3. The Investors allege that about US$14 million of the sums held by BCB for the account of HBI represent the proceeds of a large number of Microsoft Inc. shares worth in excess of US$20 million which they entrusted to HBI (and others) for the specific purposes of an Offshore Investment Programme in about September 1997. They say that from about November 1998 the Bank and others used the shares for their own purposes, acting dishonestly and in breach of fiduciary duties they owed to the Investors and/or to Boomer. They also claim damages for the tort of conspiracy.

History

4. The story began in the early part of 1997. Mr. Walsh was about to retire from his employment with Microsoft Canada Inc. He held a large number of Microsoft Inc. shares and share options. He was advised by his accountant in Toronto, Mr. Hutchings, that if he continued to hold the shares at the time of his death, his estate would become liable to pay capital gains tax, not only in Canada but also in the United States, where Microsoft is based. The combined level of taxes could amount to 70% of the value of the shareholding at that time.

5. Mr. Walsh instructed Mr. Hutchings to advise him what options were available to him so as to avoid this exposure to the double tax liability. They consulted Mr. Robert Hindle, described as a legal specialist in offshore estate and tax planning structures, based in Montreal. Mr. Hindle's advice was that relief from the Canadian tax would be obtained if the shares were transferred to an offshore company, provided that the company was carrying on an "active business" abroad. Transfer to an offshore holding company or to a bank account, of itself, would not have that result.

6. This advice led to a breakfast meeting in Markham, Ontario, in late May 1997. Mr. Walsh, together with Mr. Hutchings and Mr. Hindle, met Mr. Prucha who introduced himself as a financial adviser to, and the Toronto representative of, HBI. Also present were Mr. Taal, the second plaintiff, and a Mr. Michael Barnaby, who is not concerned in these proceedings.

7. At the meeting, Mr. Prucha outlined the scheme which later became the Offshore Investment Programme, following an exchange of letters dated 11 July 1997 (Mr. Prucha's proposal, which he signed on behalf of HBI) and 21 July 1997 (Mr. Hindle's acceptance on behalf of the Investors). Essentially, the scheme required the Investors to transfer their Microsoft shares and options ("the Shares") to companies known as IBCs (International Business Corporations) which each of them would form in the Bahamas. The two IBCs would then incorporate a third Bahamian company ("the trading company") which would undertake daily trading in US Treasury Bills ("T Bills") through Lehman Brothers in New York, utilising the services of another Bahamian company as its trading manager. It was specified that the two IBCs would open bank accounts and trading accounts with HBI, that the trading manager would be owned by HBI, and that whilst any trading profits would be split between the Investors and HBI, the latter would indemnify them against any trading losses that might be incurred.

8. A further meeting between the Investors and Mr. Prucha took place on 28 August 1997. He recommended that they should appoint Mr. Kevin Coombes as their nominee officer and director of each of the IBCs and of the trading company which was to be formed, and they agreed to do so. Mr. Coombes was a director and effectively the only officer of HBI. Mr. Prucha also recommended that the Investors should give him a written mandate to instruct Mr. Coombes (1) to open the necessary accounts with HBI, (2) to authorise HBI to sell the Shares and to loan the proceeds to the trading company, after deducting 1.5% in respect of HBI's costs. Mr. Coombes would then be required to cause the trading company (a) to use the loan proceeds (less the first instalment of fees due to the trading

manager) to purchase Microsoft shares at the current market price, (b) to use the shares as security for a loan to be obtained from Lehman Brothers, and (c) to use the loan to finance trading in T Bills on a daily basis. The Investors each signed a letter giving Mr. Prucha this mandate, on about 28 August 1997.

9. The two IBCs and the trading company were duly incorporated, the two former being called Allington Investments Ltd. (for Mr. Walsh) and Wooden Shoe Holdings Ltd. (for Mr. Taal). The trading company, now the third plaintiff, was Boomer (ref. paragraph 2 above). The trading manager was Extant Management Ltd. a wholly owned subsidiary of HBI of which Mr. Coombes was a director. On 15 September 1997 Boomer and Extant entered into a Trading Services Agreement which authorised ("mandated") Extant as trading manager to use the shares forming the assets of the trading company (Boomer) to obtain cash collateral from Lehman Brothers in order to trade in and out of the US Treasury market on behalf of Boomer. Clause 7(b) provided that trading decisions would be made by two expert advisors who between them had 45 years of experience in that market.

10. The Investors had been told by Mr. Prucha that they could remove their shares, T Bills or other assets from Boomer and the Investment Programme at any time and, in any event, all assets would be returned to them when the trading programme ended in the summer of 2003.

11. These arrangements were implemented, and the trading programme operated "broadly as envisaged" and with some success until November 1998. During this period, some of Mr. Walsh's shares were sold at his

request, the proceeds were invested in T Bills and $1,350,000 was paid out to him when they were realised.

The November 1998 transactions

12. In this month, however, the Shares were pledged to Lehman Brothers as security for a loan which was made by a Lehman associate, Lehman Brothers Finance S.A. ("LBFSA"), a Swiss company, to Extant, not to Boomer as had occurred previously. The Shares and T Bills held by Lehman Brothers were removed from the account maintained in Boomer's name, first, to a second account also in Boomer's name, then to a third account which was opened in the name of "LBS and Pledgee of Extant Management".

13. The loan made to Extant was covered by a Loan Agreement dated 27 November 1997 and it amounted to US$15 million. Boomer's assets consisting of 110,290 Microsoft shares and a T Bill of US$7,695,000 were pledged as security pursuant to a Pledge Agreement of the same date. The loan proceeds were used by Extant to subscribe for shares in a newly formed investment fund, Irwin Arbitrage, in its own name. It was the only subscriber.

14. A second loan was made by LBFSA to Extant in February 1999, in the amount of US$5 million, again against the security of Boomer's assets. US$3.665 million was transferred by Extant to another investment company, Hamilton Securities Group LLC.

15. The loan made to Hamilton was later repaid to Extant in the same amount ($3.665 million). Irwin Arbitrage, however, incurred substantial trading losses and expended more than $1.5 million on fees and other expenses.

In the result, only US$9,262,612 was repaid. These repayments were made to an account with the Bermuda Commercial Bank operated by HBI in the name of Extant. No repayment was made to the lender, and the assets pledged to Lehman Brothers were later sold on the market and the proceeds used to repay the loans.

The authority issue

16. Much of the judgment was concerned with the question whether the 1998 transactions described above, where the Shares were pledged to Lehman Brothers as security, not for loans to Boomer to support trading in T Bills, but for loans to Extant which were used to establish and support investment funds managed by Irwin and Hamilton, were within the authority given by the Investors under Investment Programme. Unsurprisingly, the Judge held that they were unauthorised, and this part of his judgment is not appealed. However, the Appellants do contend that they were authorised by Boomer, because Mr. Coombes' undoubted participation in them should be attributed to Boomer, with the result, they say, that the Investors are entitled to claim only against him. This is just one example of the Appellants` main submission on the central issues, which is that a detailed consideration of the parts played by the different individuals, and of their respective corporate roles, shows that no liability attaches to HBI, whether for breach of duty or any other unlawful conduct. It is appropriate, therefore, at this stage to identify the various individuals involved.

Individual actors

17. The Investors were approached by Mr. Prucha who held himself out as acting on behalf of HBI. That of itself does not make HBI liable as his

principal, but he corresponded on HBI writing paper and the Investors` replies were addressed to him at HBI. That too would not necessarily be decisive on the issue of agency, but the Investment Programme was implemented by HBI which, as the Judge found, agreed to establish the offshore structure which Mr. Prucha had proposed, ostensibly on its behalf. The Appellants maintain their contention that HBI did not, in the circumstances, owe the Investors any fiduciary duty in relation to the assets which they entrusted to the programme, but on the question of agency there is no room for doubt. HBI clearly ratified the arrangements made by Mr. Prucha ostensibly on its behalf, whether his initial approach was authorised, or not.

18. Mr. Prucha was one of a group of four Canadian business men and financiers who together are known as 'the Toronto defendants', by reference to other proceedings which have been commenced there. The others are William F. Presnail, Daniel O'Connor and Mark Edwards. Each of these was closely involved in what the Judge described as the offshore structure established pursuant to the Investment Programme. Presnail and O'Connor were the initial directors and (through trusts) the owners of HBI, which was incorporated in 1996. They were the two experienced traders who the Investors were assured would conduct T Bill trading operations on behalf of Extant, the trading manager (a wholly owned subsidiary of HBI), and Boomer (the trading company indirectly owned by the Investors through their two SBIs). Presnail it appears had a significant beneficial interest in Irwin Arbitrage. Mark Edwards was the owner of a management consulting and marketing company located in Toronto, and HBI stated, in a letter dated 28 May 2002 to the Bermuda Commercial Bank, that he "provides administrative and accounting

assistance to [HBI] on a daily basis". The same letter stated that Mr. Jerry Prucha was employed by that company and was "responsible for marketing the services of [HBI] worldwide……… mainly to Canadian lawyers and tax professionals". Mark Edwards was also the permanent managing director of Hamilton Securities, and he owned or controlled at least 25% of its shares.

19. The individual most directly involved in the implementation of the Investment Programme, however, was Mr. Coombes. He was a director and senior vice-president both of HBI and of its subsidiary, Extant. He conducted the day-to-day operations of HBI in the Bahamas, with the assistance of one administrative-level employee. He was appointed the sole director of Boomer and he conducted the business of that company, as the Investors, on the recommendation of Mr. Prucha, had agreed that he should (paragraph 8 above).

20. In the November 1998 transactions, Mr. Coombes played the central role. He pledged the Boomer assets to Lehman Brothers as security for LBFSA's loans which he agreed on behalf of Extant, and he caused the proceeds of the loans to be transferred to Irwin Arbitrage and to Hamilton Securities, respectively. When repayments were made to Extant, he directed that the proceeds should be directed to HBI, not used to repay LBFSA. He was president of a company which owned 75% of the shares in Hamilton Securities and therefore had or may have had a beneficial interest in that company. It is admitted by the Appellants that he acted in these respects on the instructions of the Toronto Defendants.

21. It is also admitted that Mr. Coombes was "at all material times … the controlling and/or directing mind of HBI who acted upon the instructions

of the other individual Toronto Defendants" (judgment paragraph 95), and specifically that HBI's accounts with BCB in Bermuda were operated and managed by him under the direction of Presnail, Edwards and O'Connor (judgment para.31).

22. It is further admitted that the Investors were not informed of the November 1998 transactions and the subsequent dealings with Irwin Arbitrage and Hamilton Securities, and they remained unaware that the Shares and other Boomer assets were pledged to Lehman Brothers as security for loans to Extant and were sold to repay those loans, until long after the event.

Subsequent false representations

23. To complete the relevant history, reference must be made to three occasions when false representations were made as to the state of Boomer's account with Lehman Brothers after the November 1998 transactions took place. The effect of transferring Boomer's assets to a second and then a third Lehman Brothers account (paragraph 12 above) was to leave the first account with a nil or a nominal balance. In order to conceal this from the Investors, Mark Edwards forged Lehman Brothers account statements purporting to show that Boomer's assets remained in the first account, covering the period from December 1998 until 30 June 2002. He sent the forged statements to Coombes at Boomer for onward transmission to the Investors or their professional advisers.

24. Secondly, the following facts were admitted –

> "242. After the Shares were sold by LBFSA by June 2001, HBI continued to make representations both to its auditors and to the

[Offshore Finance Authority] in St. Vincent & the Grenadines that it held the Shares as security for loans. These representations were false and HBI knew they were false. In particular… [there followed references to (a) filings with the OFA for the period 30 June 2001 through to January 2003 which Coombes certified gave a true and fair view of the bank's position, (b) audited financial statements dated 1 September 2002 and thereafter, and (c) a letter dated 20 December 2002 signed by Coombes]."

25. Thirdly, on 14 January 2003 Coombes signed a document for HBI that was filed with the same OFA, which stated that 250,000 Microsoft shares had been pledged by Boomer in support of a multi-million loan granted by HBI to Boomer (Admitted Fact No.240). This was entirely false.

The judgment

26. The Judge noted in paragraph 37, first, the submission made for the liquidators, which he accepted (as we do), that "proof of allegations as grave as fraud requires particularly cogent evidence or, to put it another way, requires clearer evidence than would be required to prove less improbable or controversial matters: *AIC Ltd. v. ITS Testing Services Ltd. ('The Kriti Palm')* [2007] 1 Lloyd's Rep.555; and secondly, that in the present case the Defendants had elected to call no positive evidence in support of their case on liability, effectively putting the Plaintiffs to strict proof of their case. "….the Court is not required to decide between conflicting witnesses and decide where the truth lies…….[but to decide] whether the Plaintiffs have proved their case on a balance of probabilities, and whether their interpretation of the largely uncontested primary facts is sufficiently cogent to justify concluding that individuals

not before the Court were guilty of fraud and/or breaches of fiduciary duty." It appeared that Mr. Coombes had agreed to be available to give evidence, but the liquidators elected not to call him as a witness; certainly, there was no evidence that they were unable do so.

27. The judge considered 'The knowledge of Coombes' in some detail in different parts of the judgment, and he concluded that he was "at the very least negligent in personally executing the Pledge Agreement together with the First and Second Extant Loan Agreements on behalf of both Boomer and Extant…….without obtaining written confirmation from [the Investors] that they wished to modify the investment restrictions in departing from the investment restrictions embodied in the TSA and the earlier mandate letters" (paragraph 72). He also held that Mr. Coombes had the requisite degree of knowledge which, attributed to HBI, constituted a breach of fiduciary duty owed by that company (this is the overall effect of paragraphs 83, 98, 101 and 113 of the judgment). However, he declined to hold that Mr. Coombes was proved to have acted fraudulently or dishonestly (paragraph 77 and, in relation to the conspiracy allegation, paragraph 132).

28. The Respondents challenge this finding, contending that the Judge should have found that "the breaches of fiduciary duty committed by Coombes were indeed dishonest" (Respondents` Notice para.1.3).

29. The Judge further found that two of the Toronto Defendants, Prucha and Edwards, knew that the 1998 transactions involved breaches of fiduciary duties owed to the Investors (paragraphs 64 and 102) and that they were parties to the unlawful conspiracy (paragraphs 133-4). He was uncertain,

however, about the parts played by the other two, Presnail and O'Connor (paragraphs 112 and 136). These findings are not challenged by the liquidators, though they dispute the further findings that Prucha's and Edwards` knowledge can be attributed to HBI.

The grounds of appeal

30. These can be grouped as follows, in the order in which they were argued before us –

(A) Illegality (section II in the Notice of Appeal).

It is contended that the Offshore Investment Programme was unlawful under the revenue laws of Canada, and that the claims are barred by the maxim *ex turpi causa non oritur actio*.

(B) Neither the Investors nor Bloomer is entitled to claim against HBI (the *locus standi* issue) (section III in the Notice of Appeal).

(C) Breach of fiduciary duty by HBI (section IV).

(D) Knowing assistance by HBI (section V).

(E) Conspiracy (section VI)

(F) Procedural Unfairness (application for a new trial) (Section I in the Notice of Appeal).

(G) Quantum, and other issues (paragraphs 13 and following in the Notice of Appeal).

31. Of these, (C) to (E) are substantive issues, and (B) (*locus standi*) is closely related to them, on the facts. We therefore will consider them first, beginning with a reference to the Appellants` submission regarding the need to distinguish carefully between the concepts, first, of attributing

an individual person's knowledge to a company in connection with an allegation that the company itself has acted unlawfully or in breach of duty, and secondly, of holding a company vicariously liable for a wrong committed by its servant or agent in the course of his employment. The Appellants contend that the Judge wrongly conflated the two concepts throughout his reasoning (skeleton argument, para.53). We do not believe that the Judge failed to distinguish between them, but we bear in mind the importance of doing so.

32. We also make the following general observations before considering the substantive issues concerned with the alleged breaches of fiduciary duty. Three times in the course of his judgment, the Judge reminded himself of the need to exercise commonsense when applying the relevant legal principles in the circumstances of a particular case. Thus –

> *"Coombes' knowledge must in these circumstances be attributed to HBI, because HBI's conduct involving himself as its primary de jure and de facto agent makes any other conclusion almost perverse." (para.91)*
>
> *"Putting aside the somewhat technical rules on the attribution of knowledge, in commonsense terms HBI clearly knew that it was assisting Prucha and/or the Toronto Defendants to breach their fiduciary duty to Walsh and Taal by receiving the proceeds of the Extant Loans and concealing them from its own auditors and [from] the SVG OFA the true status of Boomer's principal assets……..The practical realities must form part of the factual framework within which the technical rules of attribution must be applied." (para.94)*

> *"Applying traditional agency principles to a factual matrix in which a single officer appears to be the directing mind of all the key corporate actors seems, to my mind, highly artificial." (para.99)*

We agree with this approach, doubting only whether the rules are indeed 'technical' if that means that they operate without regard to the business realities of the situations in which they are applied.

33. The relevant legal principles include these –

(a) a fiduciary duty is owed in the circumstances described by Millet LJ in *Bristol and West Building Society v, Mothew* [1998] Ch.1, approved by the Privy Council in *Arklow Investments Ltd. v. Maclean* [2000] 1 WLR 594. Only one sentence need be quoted here - "The distinguishing obligation of a fiduciary is the obligation of loyalty".

(b) Liability for "knowing assistance" in the breach of a fiduciary duty owed by another person requires proof of dishonesty, not merely actual or constructive knowledge of the relevant facts : *Royal Brunei Airlines v. Tan* [1995] 2 AC 378, and *Barlow Clowes etc. v. Eurotrust International Ltd. and others* [2005] UK PC 37;

(c) A person's knowledge may be attributed to a company when acquired in the course of his employment as a servant (or *mutates mutandis* as agent), or when he is the "directing mind and will" of the company, or in other "exceptional cases" where it

is appropriate to do so and the ends of justice so require (judgment para.82, citing Lord Hoffman's speech in *Meridan Global etc. v. Securities Commission* [1995] AC 500).

(d) Vicarious liability cannot be established unless "all the features of the wrong which are necessary to make the employee liable .. have occurred in the course of the employment";
Dubai Alumimium Co. Ltd. v. Salaam [2003] 2 AC 366.

The Appellants do not criticise the Judge's statements of these principles, apart from their submission that he wrongly "conflated" the two concepts of attribution and vicarious liability (paragraph 31 above).

34. Finally, in relation to the judgment overall, we note that the Judge applied the rigorous standard of proof to which he referred (paragraph 26 above), as is demonstrated by his findings (1) that there was no unlawful conspiracy when the Offshore Investment Programme was agreed and implemented (para.124), and (2) that Coombes was not proved to have acted dishonestly in relation to the November 1998 transactions, for the purposes of the conspiracy allegation (paragraph 132). The second of these findings is challenged by the Respondents by their Counter-Notice, but the first is not.

(C) Breach of fiduciary duty by HBI?

(a) Duty

35. The first question is whether HBI owed a fiduciary duty to the Investors. The Judge held that it did. He concluded as follows –

> "56. I further find as a fact that HBI owed fiduciary duties to [the Investors] flowing from its role as their actual or de facto agent in establishing the entire offshore structure and, in particular, [the Investors`] assets and the companies created to hold such assets. Of course, HBI may not have assumed fiduciary obligations when providing ordinary banking services, nor indeed when indirectly controlling ordinary corporate administration functions. But in agreeing to establish an offshore structure which entailed [the Investors] placing assets into companies which HBI would control on their behalf (i.e. by providing its own manager, Coombes, to be the manager of Boomer), HBI in my judgment became a fiduciary of [the Investors] to the extent that it was trusted to ensure that Boomer would be managed consistently with the interests of [the Investors] and, most importantly, within the parameters of the mandate [they] gave HBI (through the July 23, 1997 and August 28, 1997 letters ……), unless otherwise agreed."

The Judge added –

> "59. In my judgment, HBI entered into a fiduciary relationship with [the Investors] and Boomer because it agreed to manage their assets, which were to be kept separate from HBI and Extant's assets, subject to certain broad guidelines through a structure over assets of which [the Investors] had relinquished operational control…….HBI in substance agreed to manage the corporate entities holding [the Investors`] assets according to their specific mandate. It is obvious that [they] were extremely anxious about the security of their capital and were extremely risk averse. In these circumstances HBI's implied agreement to follow their instructions

with respect to the type of investment activity they authorised in the August 28, 1997 mandate letters was a fiduciary obligation."

36. This conclusion is challenged by the Appellants on the ground that Prucha was not acting on behalf of HBI when he negotiated and agreed the scheme with the Investors, and they seek support from a passage in Mr. Walsh's cross-examination where he initially agreed that there was no contract between himself and HBI. This second point is worthless, not least because Mr. Walsh himself immediately qualified his answer –

> *".. I believe this letter is to Mr. Prucha at HBI Bank, so I mean, I'm – I believe that the structure that we're proposing and the structure that we agreed upon in the agreements that we signed all went to HBI Bank. So I don't know if this is – if this is a contractual agreement with HBI Bank." (ref. judgment para.57).*

Counsel for HBI responded "I'm not going to pursue that". Nevertheless, the Appellant's Skeleton Argument asserts that the Investors did not regard themselves as entrusting their assets to HBI. This is clear from Walsh's own evidence that he was unsure as to whether he and Taal had contracted with HBI" (para.69a). We disagree. It is clear, even from that passage in his evidence, and certainly from the whole story of the Investors' negotiations and agreement with Prucha, that they did regard themselves as entrusting their assets to him and to HBI, whilst the question whether they contracted with HBI was not for them to say. That is a question of law to which in our view only one sensible answer can be given. It depends upon, first, whether Prucha had authority to act on behalf of HBI, or more precisely, whether HBI was a party to the arrangements made pursuant to the exchange of letters in July/August

1998, and secondly, whether HBI as a party undertook the express and implied obligations described by the Judge.

37. As regards the first (agency), to which we have already referred, we are content to adopt the Judge's single sentence – "The suggestion that Prucha was not, at this stage at least, acting as HBI's agent would be inconsistent with all the available evidence" (para.57). We add only that HBI clearly ratified the agreement by participating in the Programme as it did.

38. With regard to HBI's participation, the Programme described in the letters included the following –

(a) each of the IBCs and Boomer, the trading company they were to incorporate, were to open bank accounts and trading accounts with HBI;

(b) the trading entity would be owned by HBI and would hold bank and trading accounts with HBI;

(c) HBI would be involved in selling and repurchasing the Shares and would receive 1 ½ per cent. of their value on that account;

(d) the T Bill trading would be conducted by HBI through its brokers in New York;

(e) trading profits would be shared between the trading company and the trading manager, HBI's subsidiary, and HBI undertook to provide a full indemnity against losses incurred on T Bill trading activity; and

(f) the Investors mandated Prucha to instruct Coombes, who conducted the day to day operations of HBI in

the Bahamas, *inter alia* to conduct the business of the IBCs and the trading companies on their behalf.

39. In these circumstances, together with other factors mentioned by the Judge (paragraph 35 above), the Appellant' submissions that "HBI's role in the offshore structure…. was extremely limited and peripheral", and that HBI was "a mere peripheral actor in [the Investor's] offshore scheme" (Skeleton Argument paras. 14 and 98) in our view are wholly unrealistic and, in the Judge's words already quoted, simply "inconsistent with all the evidence".

40. The Judge's holding that HBI owed a fiduciary duty to the Investors, to safeguard their assets by ensuring that the Offshore Programme was implemented and managed in accordance with their written mandates, was undoubtedly correct.

(b) Breach

41. The Judge addressed the question whether HBI's duty to the Investors was broken, in paragraphs 62 and following, which were also concerned with the claim that HBI "knowingly assisted" in a breach or breaches of duties owed by others "to the Plaintiffs or any of them" i.e. to Boomer as well as the Investors. He also took account of the duty which undoubtedly Coombes owed to Boomer, in his capacity as a director and officer of that company. If we concentrate on the issue whether HBI's duty to the Investors was broken, we can identify the following findings.

42. First, the decision to enter into the 1998 transactions was made by Prucha and/or the Toronto Defendants, and "such a dramatic change of course

should not have been embarked upon without [the Investors`] written instructions" (paragraph 64).

43. Secondly, the November 1998 transactions were carried out by Coombes, in his capacity as a director of Boomer (and sc. of Extant also), acting on their instructions (paragraph 66).

44. Thirdly, "Coombes was aware that [the Investors] were being deceived while Boomer's assets were being invested with his active participation in Irwin and Hamilton.Coombes himself in his capacity as Vice-President of HBI participated in deceiving HBI's auditors and the OFA by falsely representing that Boomer's assets were safe when (a) he knew that they were not and (b) must have known that a breach of fiduciary duty owed to [the Investors] by the persons whose instructions he followed had occurred or was occurring. This HBI assisted Prucha and the Toronto Defendants in their breach of fiduciary duty by (a) concealment while the proceeds of the Boomer assets were being dissipated, and (b) by providing banking services through which the dissipation occurred. Coombes' knowledge must in these circumstances be imputed to HBI, because HBI's conduct involving himself as its primary *de jure* and *de facto* agent makes any other conclusion almost perverse." (para.91).

45. Finally, as regards the Toronto Defendants, Prucha and Edwards both knew that the November 1998 transactions were unauthorised by the Investors and were in breach of fiduciary duties owed to them, and their knowledge was attributable to HBI under the directing mind principle and, in Prucha's case, on agency principles also (paras.107-109).

46. It was on the basis of these findings that the Judge found that the Investors “proved their claims against [HBI] for breach of fiduciary duty by HBI and/or HBI knowingly assisting a breach of fiduciary duty owed by Prucha” (para.113). Combining the two issues of ‘breach’ and ‘knowing assistance’ in this way was consistent with his earlier observation that a breach of duty “only clearly occurred if the requisite knowledge can be imputed to HBI, so the position of HBI as a primary actor or as a party providing knowing assistance is (in terms of the seriously contested facts) effectively the same” (para.67). By this, as we understand it, the judge meant that the issue as to a breach of duty by HBI depended on the knowledge of Coombes and/or Prucha and/or the Toronto Defendants being attributed to it.

47. The Appellants contend that there was no breach of duty by HBI, because—

> “a………………..
>
> b. The Learned Judge expressly found that there was no or no clear evidence that HBI itself participated in any investment decisions (illegitimate or otherwise) or that Prucha was acxting on behalf of HBI in giving ongoing instructions to Coombes (para.65-66 of the Judgment).
>
> c. The Learned Judge found that HBI was providing ordinary banking services to Walsh and Taal’s companies (paragrah 70 of the Judgment).” (Appellant’s Skeleton para.71)

48. Paragraphs 65 and 66 of the Judgment under the heading “The position of HBI as a primary actor” contain statements to the effect that HBI was not involved in allegedly illicit investment decisions (sc. the November 1998

transactions) nor was Prucha acting on its behalf in giving instructions to Coombes. He said this –

> "The decision to invest Boomer's assets for the benefit of Extant was not, on the evidence, a decision made *by* HBI…..there is no cogent evidence HBI played a primary role in this regard……Executing the November 1998 transactions and the subsequent Extant Loans did not constitute any actionable breach of fiduciary duty on HBI's part."

49. It is not surprising that the Appellants rely upon these "findings", but they have to be read in conjunction with other parts of the judgment, referred to above. If, as the Judge found, Coombes knew that the Investors were being deceived, and his knowledge must be imputed to HBI (paragraph 91), there was a breach of duty by HBI, and the exculpation of "HBI" in paragraphs 65-66 clearly means "otherwise than through Coombes", and Prucha and/or the Toronto Defendants likewise.

50. The reference in paragraph 70 to HBI "providing ordinary banking services", upon which the Appellants also rely, does not purport to say that HBI's involvement was limited in that way. If it did, it would be wrong.

51. The grounds of appeal, therefore, provide no basis for contending that the Judge's finding, that there was a breach of the fiduciary duty owed by HBI to the Investors, was wrong. We are satisfied that it is correct, indeed that it was inevitable, given the basic facts concerning the Investment Programme, the offshore structure which implemented it, the parts played by individuals particularly Coombes, Prucha and Edwards,

the blatant disregard of the Investor's mandate in November 1998 and the subsequent fraudulent activities for which the Bank was certainly liable (ref, the judgment, para. 67).

52. So far we have been concerned only with the fiduciary duty owed by HBI to the Investors. We will consider the alternative claim by Boomer, below.

(c) Remedies

53. As the Judge observed, the above finding of a breach of fiduciary duty owed by HBI to the Investors supports their claim for a tracing remedy, as well as for damages (paragraph 113).

(d) Knowing assistance

54. We say no more, at this stage, about the claim for "knowing assistance" given by HBI to breaches of fiduciary duties owed by others i.e. Coombes and/or Prucha and/or the Toronto Defendants, to the Investors and/or to Boomer.

(e) Conspiracy

55. The Judge directed himself, correctly, that what is alleged is an 'unlawful means' conspiracy, requiring proof that HBI with others conspired to defraud the Investors, in consequence of which damage has been suffered. He found that there was undoubtedly an unlawful conspiracy in respect of the November 1998 transactions and the subsequent fraudulent misrepresentations made on behalf of HBI, but there was "no clear evidence that this arrangement [to make unauthorised use of the Shares] was first conceived when [the Investors] were being encouraged to

consider placing assets into the offshore structure that HBI was involved in marketing to them" (para.124). He had already rejected the contention that the Investors had authorised the November 1998 dealings (para.125).

56. He held that at least two of the Toronto Defendants were parties to the unlawful combination (para.126) and that they had "actual knowledge of all the facts which made the transaction illegal" and that their fraudulent intent had been proved (paras.133-4). Furthermore, their knowledge could properly be attributed to HBI (para.1335). On this basis, HBI was liable to the Investors for the tort of conspiracy to defraud.

57. Coombes on the other hand had received his instructions from the Toronto Defendants, and the Judge was not satisfied that he had actual knowledge that the Investors had not authorised the relevant transactions (para.132). He had found "applying the ordinary standard of proof with respect to the breach of fiduciary duty claims, that [Coombes] knew or must have known that the Extant instruments were unauthorised", and for the purposes of the breach of fiduciary claims "there is no question that constructive knowledge or wilful blindness is sufficient" (para. 131). But "having regard to the high standard of proof required for allegations for fraud, combined with the requirement …….that actual knowledge of all the facts which made the agreement illegal is required, I am not satisfied that Coombes had actual knowledge that [the Investors] (who did not ordinarily give him their instructions directly) had not authorised the relevant transactions directly. I am not satisfied that, as a matter of law, constructive knowledge suffices". He concluded –

> "For these reasons Coombes' knowledge which may undoubtedly be attributed to HBI has not been clearly shown to reach the

> necessary threshold to implicate HBI as a participant in the conspiracy to defraud that has been clearly made out." (para.132)

58. The Appellants raise a number of points. They say that the Judge was wrong to attribute Prucha and Edwards` knowledge to HBI, because they had no authority to act on behalf of HBI in these respects. Moreover, they assert that the Judge found that the misapplication of the Shares was "actually concealed from HBI" (Skeleton Argument para.81.b.iii). Alternatively, if there was an unlawful conspiracy, the relevant loss was suffered by Boomer, and even if that company could sue (which it could not, because Coombes' knowledge of the transactions should be attributed to it), the Investors, even if its shareholders, could not.

59. First, however, it is necessary to consider the Respondents' contention that the Judge ought to have found that Coombes had the necessary fraudulent intent for the purposes of the conspiracy claim. The Judge concluded, in the passages quoted above, that the evidence did not prove that Coombes had actual knowledge of a material fact, namely, that the Investors had not authorised the relevant (November 1998) transactions. This was on the basis, apparently, that the Investors might have given oral (or perhaps other written) instructions, of which he was unaware.

60. The Respondents rely primarily on the difficulty of reconciling this conclusion with the express findings earlier in the judgment, relating to the breach of fiduciary duty claim. The opening sentence of paragraph 91 has been quoted above (paragraph 44). There, the evidence satisfied the Judge that Coombes knew that the Investors were being deceived. He

also found that Coombes "probably knew in November 1998 that Prucha and/or the Toronto Defendants and/or HBI had breached his/their fiduciary obligations to [the Investors] by unilaterally deciding without [their] consent or even knowledge" to undertake the unauthorised transactions (paragraph 83).

61. An important consideration is that the November 1998 transactions involved, not only pledging the Shares as security for a loan to Extant, not to Boomer, and placing them in a fresh Lehman Brothers account whilst keeping open the existing account, but also using the proceeds of the loan to provide initial capital for an investment fund newly formed by or on behalf of one or more of the Toronto Defendants, not for T Bill trading. It is inconceivable, in our judgment, that Coombes might have believed that the Investors, without reference to him as their nominee and director of their trading company, had informally authorised this departure from the terms of their written mandate. In paragraph 64 he held that "such a dramatic change of course should not have been embarked upon without [their] written instructions".

62. The Judge's findings as to Coombes' actual knowledge in paragraph 91 of the judgment are amply supported, in our view, by the evidence which, on this issue like many others, is entirely documentary. In our judgment, even if some higher standard of proof is required for the conspiracy than for the breach of duty claim (we need not decide whether it is), the evidence satisfies that standard also. We therefore hold that Coombes was a party to the unlawful conspiracy, and it follows that HBI is liable accordingly, whether on the basis that his knowledge is attributed to HBI, or vicariously.

63. It follows also that his knowledge is not attributed to Boomer, which was a victim or intended victim of the fraud (*In re Hampshire Land Company* [1896] 2 Ch.743). As with the breach of duty claim, we will revert to the question of Boomer's rights after considering the *locus standi* issue.

(B) Locus standi

64. The Judge gave leave to the Plaintiffs at the commencement of the trial to add Boomer as the Third Plaintiff. The application was made because the Defendants in their Skeleton Argument served shortly before the trial advanced an argument that the Investors as individual Plaintiffs lacked the standing to sue. The causes of action they relied upon could only be raised, it was contended, by Boomer (judgment para.13).

65. The Defendants previously had never disputed the Plaintiffs' right to sue, but neither had they formally admitted it. The Judge rightly observed that the point ought to have been explicitly pleaded. He was also correct, in our view, to give leave to join Boomer and to refuse the Defendants' application to adjourn the trial, which followed (judgment para.16). He bore in mind throughout that the late joinder of Boomer meant that factual and legal issues relating to its claim were not fully explored (paragraphs 18 and 73). So far as legal issues are concerned, this deficiency has not persisted on the hearing of the appeal. All legal aspects of Boomer's claim have been addressed in detail by both parties. This has made the number and the complexity of the issues considerably greater than they were before.

66. Notwithstanding Mr. Walsh's belief that he and Mr. Taal had retained beneficial ownership of the Shares throughout, the Judge held that the assets in question belonged to Boomer and not the Investors, when the Programme was implemented (paras.141-2). Nor could the Investors rescind the arrangements *ab initio* on the ground that they were induced by fraudulent misrepresentations, because he rejected the claim that they were vitiated by fraud from the outset (para. 142). These findings are not challenged on appeal.

67. The Investors claimed, however, that the arrangements were rescinded by notices given 14 February 2003 to the managers of Boomer and of the two IBCs rescinding "all agreements to which we are a party with [Boomer]". The notices were not expressly accepted, but neither were they disputed by any of the companies. The Investors contend that they were effective to revest in them the right to bring these proceedings in their own names. The Judge accepted this contention (para. 144).

68. The Appellants submit that he was wrong to do so. First, because there was no express rescission of the agreements between the Investors and their respective IBCs. Secondly, because the parties could not be restored to their original i.e. pre-contract positions. Thirdly, because "the Learned Judge seems to have had in mind something more akin to an assignment; but this too could not operate to give [the Investors] any better right than that possessed by Boomer" (Skeleton Argument para. 42a).

69. We hold, first, that there is no requirement that the parties shall be restored to their original pre-contract positions, except when a party seeks to rescind the contract *ab initio*, in other words, to set it aside

altogether, as in the case where it was induced by a fraudulent misrepresentation. As the Judge observed, that does not arise here, in the light of his finding that there was no initial fraud.

70. Secondly, the phrase "rescission by agreement" uses "rescission" in a different sense. "Termination" might be more accurate. The Judge found that there was an agreement to that effect, in consequence of which the Investors became entitled to make "any common law or equitable claims, *inter alia*, in their personal capacity, in respect of losses flowing from breaches of the TSA by Boomer and Extant" (judgment para.143, quoting from the Notices of Rescission). The effect of terminating the arrangements was to restore to the Investors the rights to which Boomer and/or the IBCs were entitled as the previous owners of the Shares.

71. The Appellants` objection to this analysis is that the Notices did not expressly terminate the existing arrangements between the Investors and the IBCs. It is unclear whether this is an implied suggestion that the IBCs should be added as parties, but that possibility has not been canvassed (cf. judgment para.148). If they had become Plaintiffs, the Appellants presumably would have raised the same time bar defences as they did against Boomer. But the point stands as a defence to the claims made by the Investors.

72. The short answer to it is that the Judge was entitled to take account, not merely of the terms in which the Notices were expressed, but also of the circumstances in which they were given. "In my judgment an agreement to rescind any such agreements so as to permit [the Investors] to sue personally for all losses, whether equitable or sounding in damages,

arising from the breaches of the TSA by Extant may properly implied in all the circumstances of the present case. It is clear that [they] several years ago decided to abandon the offshore entities altogether and to seek relief in their personal capacity" (judgment para.144). We add that the rights thus released or restored to them included the claims for equitable and common law relief they assert in these proceedings (cf. *Shalson v. Russo* [2005] Ch.281).

73. We would also go further, though it is not necessary for us to do so. By their conduct, including the Notices of Rescission but also by commencing proceedings in their personal capacities both in Toronto and in Bermuda, the Investors gave clear notice that they were claiming to set aside the whole of the Investment Programme and the offshore structure which resulted from it, including the creation of the IBCs as well as Boomer.

74. Moreover, it appears to us that grounds exist for holding that the present Appellants accepted that that was the Investors` position. They consented to the lifting of the statutory stay of proceedings against HBI (in liquidation) without suggesting that the Investors had no right to pursue the claims. They admitted that the relevant assets were the First and Second Plaintiffs' at all material times (Re-Amended Points of Defence paras.47 to 60 *passim*.). They did not demur when it was asserted that all parties, including the two IBCs, accepted and affirmed that the agreements giving rise to the offshore investment programme had been rescinded.

75. A possible objection to the finding that there was "rescission by agreement" is that there was no express acceptance of what was, on this analysis, the Investors' offer to terminate the arrangements. But if overall there was an implied agreement to that effect, the point does not arise. Another interpretation of the facts is that the other parties to the arrangements, including HBI, had wrongfully repudiated them, and the Investors were entitled to "rescind" i.e. bring them to an end, unilaterally. We need not pursue this further.

76. The Respondents' second submission under this head was that the Courts should "pierce the corporate veils" worn by the two IBCs so as to enable the Investors to sue in their stead. The Judge was prepared to do so in order to overcome what he called a "legal technicality of the highest order" (para.144). We sympathise with his approach, but the Appellants contend that, were the Courts to adopt it, the consequences could be far-reaching. It is not necessary for us to decide this issue, and we do not do so.

77. We hold, therefore, that the Investors have *locus standi* in respect of their claims. We will consider Boomer's position below.

(A) Illegality

78. This issue too was raised at a late stage by the Appellants. They had not pleaded it as a defence or given any other forewarning to the Respondents. It became their primary ground of appeal both in the Notice of Appeal and at the hearing. On the fourth day of the trial, the Judge refused their application for leave to raise the issue in their pleadings and

to call an expert in Canadian tax laws as a witness. The history of the matter was relevant to his decision.

79. At the hearing of the Originating (Interpleader) Summons, some creditors raised the issue whether the scheme was in breach of Canadian revenue laws. The Judge did not rule upon it, and the proceedings thereafter became an action between the Investors and the liquidators. The latter did not raise the issue in their Points of Defence, filed on 4 July 2006, and they could perhaps be said to have elected not to do so. It was raised for the first time in the Skeleton Argument served by counsel one week before the trial. At the trial, counsel for the Investors submitted that it should have been pleaded, and that there was no evidence to support it. That led to the application on day four which was refused. Nevertheless, the Judge accepted that the Court might have to rule on the issue of its own volition, and he did so, on that basis (para.152).

80. He summarised the Appellants' contention as follows –

> "……the Court should of its own motion decline to grant relief on the grounds that, in the light of the Plaintiff's case that they retained beneficial ownership in Boomer's assets and/or were entitled to receive capital returns without reporting them, this was an obvious violation of Canadian revenue laws and the entire structure was a fraud on the Canadian revenue" (para.152).

81. He held that that was not the nature of the scheme and that "it is far from clear, based on the oral evidence of Walsh……that Walsh and Taal either (a) knew that they were breaking the law at the time, or (b) knew of facts which constituted an illegality" (para.154). He noted a "strong public policy interest for the courts in all offshore financial centres concerned to

grant the victims of a proven fraud substantive relief" and he held that this is not a case where the Court of its own motion would be justified in refusing an otherwise deserving plaintiff substantive relief" (para.155).

82. The Appellants contend that, because the Investors had pleaded that they remained the beneficial owners, their claims "ought on a proper analysis to have been barred by virtue of the maxim *ex turpi causa non oritur action*." (Skeleton Argument para.31), and that the Judge "ought to have found that the scheme was indeed a fraud on the Revenue" (para.32c). Moreover, their knowledge was irrelevant (para.32d) and their action "is based on, arises out of and/or is inextricably linked with a scheme which they sought to put in place for the purpose of avoiding disclosures and payments to the Canada Revenue Agency" (para.34).

83. These submissions are not easy to follow, nor do they sit comfortably alongside other grounds of appeal. The Judge held that what became Boomer's assets were <u>not</u> beneficially owned by the Investors (judgment para.154, not challenged by the Appellants overtly, but perhaps impliedly in para.32c). For the purposes of their defence to the substantive claims, specifically the conspiracy allegation, they rely on the Judge's finding that there was no wrongdoing when the arrangements were first conceived i.e. in 1997 (Skeleton Argument para.81a; judgment para.124).

84. We can express our conclusions shortly. First, the Investors received qualified professional advice throughout, to the effect that the scheme was a form of lawful tax (estate duty) avoidance; they relied upon that advice, and had no reason to believe otherwise. Second, their belief that they retained a beneficial interest in the Shares was in fact wrong, but

that does not disqualify them from succeeding in their claims on the correct basis. Third, they had no intention of deceiving or defrauding the Revenue, nor was that the reason why they entered into the arrangements (thus distinguishing *Regazzoni v. K C Sethia [1944] Ltd.* [1958] AC 301 and later authorities, on which the Appellants rely). Fourth, their claims are not "based upon" the offshore scheme, but upon their pre-scheme ownership of the Shares and the rights which they regained when it was terminated; nor do they "arise out of" or are "inextricably linked" with the scheme, save in a narrow historical sense. In no way are their claims dependent upon it, and in our judgment *Tinsleyv.Milligan* [1994] 1 AC 340 is direct authority in their favour.

85. For these reasons, we agree with the Judge that the claims are not barred by any defence of illegality and that this is not a case where the Court would be justified in refusing relief on such grounds. It would indeed be strange if the Court was required to refuse relief in a case where the claimants were the innocent victims of what they understandably describe as a massive fraud, and where they have consistently sought to obtain relief independently of it, ever since it came to their knowledge. In one sense it is the Appellants who rely upon the scheme, by asserting that only Boomer and/or the two IBCs, both creatures of it, might be entitled to sue in respect of their (HBI's) breaches of it.

Procedural Unfairness

86. The essence of the Appellants' contention (ground I in the Notice of Appeal but last in their Skeleton Argument) is that the late joinder of Boomer as Third Plaintiff deprived the parties and the Court of a full opportunity to consider the factual and legal issues which arose from it. It

was, however, the inevitable consequence of the Appellants` own failure to challenge the Investors' *locus standi* until the very last moment before the trial. The Judge was clearly entitled to make the Rulings that he did, and we would hold that he was correct to do so. In the result, it has not been necessary for this Court to give separate consideration to Boomer's claim, because the Investors' claim succeeds. One look at the comprehensive judgment shows, first, that the Judge made allowances for the fact that issues relating to Boomer alone might not have been fully canvassed, and secondly, that the introduction of Boomer's claim, made necessary by the Appellant's late challenge, had the effect of widening and complicating the scope of the proceedings enormously. This ground of appeal is rejected

Conclusion

87. For the reasons given above, we dismiss the appeal against the judgment given in the Investors' favour. There remain a number of issues raised under the heading 'Quantum'. Before considering them, however, we should indicate that, were it necessary to do so, we would uphold the Judge's rulings –

(i) that HBI is liable to the Investors for giving "knowing assistance" to breaches of fiduciary duty owed by others, namely, by Prucha and/or the Toronto Defendants and/or Coombes to the Investors, and so far as relevant, by Coombes to Boomer; and

(ii) that Boomer is entitled to succeed against the Defendants, if the Investors do not have *locus standi* to do so.

Quantum

(a) Tracing remedy

88. The Appellants contended that the amount which the Investors are entitled to trace into the sums held by BCB in should be reduced by $835,000 for the reasons set out in paragraphs 156 and following of the judgment. Briefly, Hamilton made a capital payment to Extant of $850,000 on 27 November 2003, but shortly thereafter $835,000 was paid out of the account to Hamilton Properties, an affiliate of Hamilton. Later, Extant and Hamilton Securities, another Hamilton affiliate, accounted to the Investors for that sum, under a Settlement Agreement between them dated 21 September 2005. It was accepted that the two payments were linked, and the Appellants' contention was that the payment out by HBI ($835,000) should be regarded as having been made out of the $850,000 it received. That sum had been repaid to them, and they should not be allowed to recover it again.

89. However, there was a credit balance in the account even after the payment out. Therefore, applying the principle of *Re Hallet's Estate*, the payment out was not attributable to the monies for which HBI must account to the Investors. The Appellants submitted that applying the usual rule on the facts of the present case is unjust. The Judge disagreed, and so do we. There is no good reason for departing from the usual rule, in favour of HBI, and it might be added that HBI's payment out to Hamilton Properties was a further breach of the duty it owed to the Investors.

90. Similarly, the Judge was correct to hold that a payment of $100,000 made by HBI to the SVG Financial Authority should be treated as having been

made out of HBI's own funds, notwithstanding that after payment it became the Authority's own property (judgment paras.160-1).

91. The Appellant's third contention in respect of the tracing remedy was that the Judge was wrong to include interest to the date of judgment in the amounts which could be traced. The effect of doing so, of course, is to increase the amounts in respect of which the Investors have priority over HBI's other depositors. They say that any recovery of interest should be limited to "whatever bank interest was in fact earned at BCB on the capital sums into which he held the Plaintiffs could trace" (Notice of Appeal para.16). The Respondents say "Not only is interest awarded on the traceable monies, ordinarily a court would award compound interest", citing *El Ajou v.Dollar Land Holdings plc and another (No.2)* [1995] 2 All ER 213 where interest was included in the amount of the order, apparently without objection, after Robert Walker J. had considered in some details "the general principles that underlie tracing in equity" (p.221e). Nor was it objected to before the Judge in the present case.

92. The Appellants raise a question of principle. "The purpose of interest is essentially compensatory and there is no good reason or logical basis for giving such an award the same status as traceable monies and thereby artificially inflating the amounts ring-fenced as traceable" (Skeleton Argument para.88).

93. However, we note that in his *El Ajou* judgment, Robert Walker J. went on to consider what rate of interest should be awarded, and he did so on a principled basis –

> "The rate of interest should mirror, so far as possible, the income which the plaintiff might have earned had the principal sum been paid to him in March 1988" (page 224g).

Thus the purpose of the equitable relief is to put the plaintiff in the same position financially as if the equitably duty had been performed. Thus there is a "good reason and logical basis" for including interest, and this, together with the considerable authority of Robert Walker J.'s judgment, leads us to conclude that the Appellant's contention must be rejected.

(b) Damages

94. The Judge recorded that there was no dispute as to the numbers claimed and he awarded total damages of US$19,252,003.09 to Mr. Walsh and $953,792.83 to Mr. Taal, subject to a reduction for interest claimed in respect of the period after the date of the Bermuda winding up (para.166). The Plaintiffs were also required to give credit for sums received in respect of their tracing remedies.

95. The Appellants contend that the damages should be further reduced by the amounts of payments which had already been made to the Respondents, as listed in paragraph 15 of the Notice of Appeal. However, it appears from the Respondents' Skeleton Argument that these payments were taken into account in the calculated figures, which were not challenged at the trial. We have not looked into these calculations, and we have no record that the Respondent's contention was disputed at the hearing of the appeal. If this is wrong, the Appellants have liberty to apply (in writing) for the calculations to be reviewed.

(c) Costs

96. On 15 April 2008 (the judgment was handed down on 31 March 2008), the Judge awarded the Plaintiffs their costs of the proceedings, on the standard basis, to be taxed if not agreed). The Appellants submit that he was wrong to do so, because their claims were "fundamentally flawed" until the Points of Claim were amended on the first day of the trial. The amendment followed the Defendant's late assertion of the *locus standi* issue. Its significance, for present purposes, is that until that date the Investors claimed on the basis that they had retained beneficial ownership of the Shares (ref. judgment paras.13 and 142).

97. The award of costs was a matter for the Judge's discretion, and this Court is not entitled to vary it unless he misdirected himself or made a clearly wrong decision. It is an outlandish suggestion that he should have ordered the Plaintiffs to pay the Defendant's costs of the proceedings down to the date of the amendment (Appellant's Skeleton Argument para. 89). In the result, and after a lengthy and detailed examination of all the evidence, documentary as well as oral, the Investors succeeded in their claims. The addition of Boomer as Third Plaintiff enlarged the scope and complexity of the proceedings, and in the event it was unnecessary. That was as the result of the *locus standi* objection which the Defendant took so late in the day, after appearing to concede the Investors' title to sue. We uphold the Judge's order, with which we entirely agree.

The Respondent's Counter Notice

98. The Respondents raised four issues –

(1) The Dishonesty of Coombes.

We have considered this above.

(2) Knowing receipt.

The Judge held that this was not pleaded (para.138) and refused to entertain it. It was not separately argued, and it seems that it is unnecessary for us to consider it further.

(3) Tracing Remedy: Alternative approach to lowest intermediate balance

It was contended that the Judge ought to have held that the entire amount in the name of HBI at BCB was charged with the amounts that could be traced by the Respondents, and that those amounts totalled $14,142,073.15. We have no record that this was argued before us, and again it seems unnecessary for us to consider it further.

[If we are wrong in thinking that items (2) and (3)] above were not pursued, the Respondents have liberty to apply, in writing, to this Court.

(4) Costs – Priority

(i) At a further hearing on 15 May 2008, the Judge was asked to rule that the costs awarded against the company in liquidation should have priority in the liquidation over pre-liquidation creditors. But it appeared that the assets within the jurisdiction of the Bermuda Court are insufficient to respond to the Costs order, and the costs will have to be paid out of SVG assets (Ruling dated 21 May 2008, para.1).

(ii) There was an issue as to whether the Bermuda Court has jurisdiction to make an order as to priorities in the SVG liquidation, but the Judge ruled that, even if such jurisdiction exists, no such order should be made in the present case. He rightly observed that the order would have no force, in any

event, unless it was recognised and enforced by the SVG Court, and that "on balance it would be excessive for this Court to make any order with respect to priorities in a foreign liquidation save at the request of the foreign court"(para.4). He could see no basis for concluding that the SVG Court, by permitting the Plaintiffs to pursue their claims in Bermuda, had impliedly authorised the Bermuda Court to make the order sought.

(iii) He did, however, anticipate a request for a ruling by the SVG Court, and indicated that, if requested, he "would order that the post-liquidation litigation costs awarded in favour of the Plaintiffs should be paid on a priority basis ranking equally with all other liquidation expenses, in accordance with what appears to be the usual rule" (para.6). He added a footnote to the effect that he could see no specific basis for awarding that the costs should have priority over all other liquidation expenses, though "seemingly" such an order might be made.

(iv) The Respondents by their Counter Notice contended that the Judge not only had jurisdiction to make the order, but he ought to have done so. Moreover, the costs should have priority over the costs and expenses of the liquidators, as well as the claims of general creditors (para.5.2).

(v) They rely upon authorities including the judgment of Lawrence Collins LJ in *Dolphin Quays Developments Ltd. v. Mills* [2008] EWCA Civ.385 and they invite the Court "to include a provision for costs in these terms in order to avoid

further unnecessary litigation and further depletion in the assets of HBI" (Skeleton Argument para.210).

(vi) The Appellants accept that the Judge had a broad discretion with regard to costs, and that "had he been dealing with questions of priority in the Bermuda jurisdiction, he would have had to take into account the authorities cited" by the Respondents. However, the Judge was correct to hold that he should not make an order as to priorities, except at the request of the foreign Court (Written Submissions para.21).

(vii) We hold that the Judge struck a correct balance in holding that he should not make an order regarding the priority of assets in the SVG liquidation. It was also sensible and realistic for him to indicate what the position might be, if a ruling were requested by the SVG Court. But we go no further than to say that, given the authorities relied upon by the Respondents, and the Appellants' muted response to them, quoted above, it seems likely that the Bermuda Court would award the costs priority over the costs and expenses of the liquidators. Our hope is that no further costs will be incurred in arguing this priority issue in any court.

Conclusion

99. For the reasons given above, the Appeal is dismissed. The issues raised by the Respondents' Counter Notice are resolved in their favour as regards the 'Dishonesty of Coombes'. These conclusions, so far as we are aware, do not require any alteration to the terms of the Judgment ordered by Kawaley J.

100. The Appellants attacked the judgment on practically every front. The attack has failed. Both parties have liberty to apply with regard to their costs of the appeal. Our provisional view, subject to any such application, is that the Appeal should be dismissed, with costs.

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Evans, JA

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Zacca, President

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Nazareth, JA