IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO. CL 31/2001

BETWEEN STANDARD STAR INSURANCE LIMITED

SOUTHWESTERN FIRE AND CASUALTY LIMITED

DUDLEY S. BEST LIMITED

TITAN HOLDINGS LIMITED

Plaintiffs

-and-

MORRIS COTTINGHAM ASSOCIATES LIMITED

RASHID BODHANYA

TURKS & CAICOS PROVIDENT LIMITED

Defendants

Mr. Ariel Misick QC for the First Defendant Applicant
Mr. Carlos Simons QC for the Respondent Plaintiffs

JUDGMENT

1. This is an application to strike out the Plaintiffs' claims against the First Defendant, Morris Cottingham Associates Limited (MC) under Order 18 Rule 19 Civil Rules 2000 and under the Court's inherent jurisdiction. Under Rule 19(1) (a) it is alleged that the Statement of Claim discloses no reasonable cause of action. Further it is alleged under essentially 19 (b) and (d) that the claim is frivolous and an abuse of the court as there are no facts that give rise to a case that has any real prospect of succeeding against the First Defendant. In relation to the first it is agreed that the Court has regard only to the pleadings, and that in relation to the latter the Court has regard to all the information available to it, as it does when exercising its inherent jurisdiction. It is said on behalf of MC that a strike out would avoid a costly trial that would be a waste of time and money as the litigation cannot succeed, and on behalf of the Plaintiffs it is argued that it is only in the clearest case that a Court will deprive a party of the opportunity to pursue its claim by the trial process, including discovery, interrogatories and cross-examination, particularly where there are large sums at stake, as here.

2. Both counsel agreed that the correct test is that contained in the speech of Lord Hope in Three Rivers District Council v Bank of England (2001) 2 All ER 513. At

paragraph 95 he stated that where as a matter of law the claim could not succeed, even if the party was able to prove all the facts that it alleges, it should be struck out. Similarly where the Court was able to say with confidence that the factual basis for the claim was fanciful, being entirely without substance, and where it was clear that the statement of facts is contradicted by all the documents or other material on which it is based. He also said, as one would expect, that the simpler the case the easier it was for the Court to take a view on these matters. He later stated that the whole claim is only to be struck out if every part of it has no real prospect of success. Lord Hutton at paragraph 117 stressed that a claim was not to be struck out because it was weak, but only if it could not succeed even if all the facts alleged were proved under Rule 19 (1) (a), or if there was no prospect of proving the facts alleged under Rule 19 (1) (b) and (d).

3. Turning now to the present case, Mr. Misick, Queen's Counsel acting on behalf of MC, argued that careful consideration of the way that the matter had been pleaded in the Statement of Claim (Trial Bundle tab B) and the further and better particulars (tab D) revealed that it could not succeed even if the facts alleged were proved. These can be summarized as follows:

(a) MC and its predecessors had for some time provided corporate management services to the Plaintiffs, which were incorporated in the Turks and Caicos Islands as exempt companies, save for the Third Plaintiff which was incorporated in Bermuda and registered as a foreign company here.

(b) These services were provided pursuant to contracts between MC, or its predecessor partnership, and the Plaintiffs and included the provision of directors and a company secretary and a registered office.

(c) The Second Defendant, Mr. Bodhanya (B), a director and employee of MC, was nominated pursuant to those contracts by MC to be a director of and provided to manage the Plaintiff companies, and was accordingly elected a director of each company, and was named as one of the authorized signatories of the various Plaintiffs' bank accounts. Only one signatory was required on the cheques drawn on those accounts.

(d) For the services provided by him, B periodically made payments to MC from the Plaintiffs' bank accounts.

(e) Unfortunately it is alleged that he also made unauthorized loans of almost $3 million from those accounts to the Third Defendant, a company owned and/or controlled by him, and converted them to his own use.

4. In view of the nature of the application it is necessary to set out certain paragraphs of the Statement of Claim. Paragraph 6 states as follows:

"As such director and employee of Morris Cottingham (and, before that as a partner in Morris Cottingham & Co.) and in the course of its business Mr. Bodhanya was also ....a director of each of the Plaintiffs. He was provided in such capacity by Morris

Cottingham...pursuant to contracts for the corporate management with each of the Plaintiffs. Under those contracts:

6.1 Morris Cottingham...provided corporate management services to each Plaintiff, including the services of directors and a company secretary.

6.2 Morris Cottingham debited the respective Plaintiff's bank accounts with periodic charges for its fees.

6.2 Morris Cottingham agreed to provide its corporate management services honestly and with due care and in doing so to take due care and to protect and preserve each respective Plaintiff's assets."

5. The Plaintiffs allege against B breach of his fiduciary duties owed by him to them as a director of the Plaintiff companies, namely, (paragraph 7 of the statement of Claim):

"7.1 to act only in the company's best interests;

7.2 to use the company's assets only for its own purposes;

7.3 not to make secret profits."

6. Judgments in default of defence to those allegations were entered against B and the Third Defendant, and it was agreed between counsel for the Plaintiffs and MC that the action against MC would only proceed if it became clear that the Plaintiffs' monies were not going to be recovered under those default judgments. Sadly that has proved to be the case. This explains the delay of MC in making its strike out application.

7. Paragraph 8 of the Statement of Claim alleges;

"As director and employee of Morris Cottingham and as a director of each of the Plaintiffs Mr. Bodhanya was duly authorized to and did from time to time procure each to (sic) the Plaintiffs to make proper payments to third parties."

8. Having set out all the misappropriations in paragraphs 9 to 12, paragraph 13 alleges:

"All the said payments were effected by Mr. Bodhanya to his own benefit and not for the respective Plaintiff's purposes and were accordingly improper and were made dishonestly and in breach of his fiduciary duties as aforesaid..."

9. Paragraph 16 states:

"Further, in the premises of Mr. Bodhanya's actions Morris Cottingham:

16.1 is vicariously liable for Mr. Bodhanya's breach of fiduciary duty and conversion of the Plaintiff's assets. (further and better particulars alleged that B was a senior employee and a director of the First Defendant acting within the course and ambit of his employment. The First Defendant is therefore vicariously liable for B's actions).

16.2 breached the terms of its contracts with the Plaintiffs set out at paragraph 6.3 above in that (1) by Mr. Bodhanya it was dishonest, and (2) it failed sufficiently or at all to supervise Mr. Bodhanya.

16.3 knowingly (by Mr.Bodhanya) assisted in his dishonest misappropriation of company assets."

10. In relation to the first allegation at 16.2, Mr. Simons, Queen's Counsel acting on behalf of the Plaintiffs, accepted that such involved implying a term that MC would warrant the honesty of their employees and that such a term could not realistically be inferred (see Morris v C.W. Martin and Sons (1965) 2 All ER 725 at 740) on material facts that have to be pleaded under Order 18 Rule 7. Although he at first argued that the allegation at 16.3 should remain until discovery had taken place, he ultimately accepted that there were no facts upon which he could allege dishonesty on the part of anyone at MC other than B, as there would have to be to found an allegation of dishonest assistance, (see Underhill and Hayton, Law Relating to Trusts and Trustees page 956), and that therefore such allegation was unsustainable.

11. The Court is therefore left to determine whether the applicant has established that the Statement of Claim discloses no basis in law upon which a claim of vicarious liability can be made, and whether it can establish that there is no real prospect of alleging an implied term that MC would supervise B when he performed his management services.

12. In relation to these issues I have been greatly assisted by both Queen's Counsel, by their written skeleton arguments, their oral submissions which took a day, and their references to authority.

13. Mr. Misick submits that in determining the issues I have to apply the following principles of law:

(1) A director of a company owes a personal fiduciary duty to that company, which is separate and distinct from any duty he may owe to his nominator to the directorship. He said that this was a basic proposition of company law which had been applied in Paget-Brown (see below).

(2) For an employer to be liable for the wrongful acts of an employee, all of the acts which make the employee personally liable must have taken place within the ordinary course of his employment. He relied for this proposition upon Dubai Aluminium Co Ltd v Salaam and Others (2003) 1 All ER 97, and in particular the speech of Lord Nicholls at

paragraph 39. He said that the situation in the present case was different to that which pertained in Lister and Others v Helsley Hall Ltd (2001) 2 All ER 769. There was no attempt in Lister to make the employer liable for a fiduciary duty of the employee owed to another, but simply that the employee had failed properly to perform the function that had been delegated to him as part of his employment (see the speech of Lord Clyde at page 788, paragraph 50).

14. Mr. Misick submits that the allegation made against B, as clearly set out in paragraphs 7 and 13 of the Statement of Claim, is based on his breach of fiduciary duties owed personally by him to the Plaintiffs in his capacity as a director of the Plaintiffs, and accordingly MC could not be held vicariously liable for his actions on the Cayman Court of Appeal authority of Paget-Brown and Company Limited v Omni Securities Limited (1999) CILR 184, which he says is indistinguishable from the present case and which he urged this Court to follow.

24. In his skeleton argument Mr. Simons, asserted that Paget-Brown should not be followed as it relied on Kuwait Asia Bank EC v National Mutual Life Nominees Ltd. (1990) 3 All ER 404, which dealt with a wholly different and distinguishable situation to that in Paget-Brown, and therefore should not have been applied to the facts in Paget-Brown, nor relied on as authority for a finding that there was no vicarious liability in that case.

25. Kuwait, the appellant bank, held 40 % of shares in a New Zealand company (AICS), and as such was entitled to nominate two of the five directors of AICS. The respondent company, National Mutual, was appointed trustee to protect the investors, and under the trust deed AICS covenanted to furnish National Mutual with monthly and quarterly certificates signed by two of its directors of its financial position. They were not the directors appointed by Kuwait. When AICS went into liquidation and its depositors were unable to recover their deposits in full, they brought a representative action against National Mutual for breach of trust in failing to perform its duties under the trust with due diligence. National Mutual, having settled that action, brought contribution proceedings against the directors of AICS for breach of a duty of care, owed to them as trustees for the depositors, to exercise due diligence to ensure that the certificates were correct, when in fact they contained fraudulent and negligent misrepresentations regarding the financial position of AICS. Against Kuwait, as employer of two of the directors, it alleged vicarious liability for acts or omissions committed by them during the course of their employment, and that the relationship between Kuwait and the two directors was that of principal and agent and therefore the bank was responsible for all of the acts or omissions in their office as directors, which were within the scope of their authority as agents of Kuwait.

26. The Privy Council held that if the two directors had committed a breach of trust to AICS or to National Mutual, they had done so as individuals and as directors of AICS, and not as employees of Kuwait, notwithstanding that Kuwait had allowed them to perform their duties to AICS in Kuwait's time and at Kuwait's expense. In the performance of their duties as directors and under the trust deed the directors were bound

to ignore the interests and wishes of their employer. Kuwait's employment of the two directors did not make it responsible for their negligence under the trust deed, in respect of which they acted as agents of AICS. An employer who, as a shareholder of a company nominated an employee to be a director, did not owe a duty to the company unless the employer interfered with the affairs of the company.

27. Mr. Simons argued that this was not a case where the nominated directors were providing services to the company which their appointor had contracted to provide, and was therefore distinguishable from the present case where the director was performing badly the task which his employer, the defendant service provider, was engaged to provide in return for remuneration. In such circumstances there was no reason to protect the employer from liability for the manner in which its employee had chosen to perform the obligations that the employer had contracted to provide, merely because it had nominated that employee as a director.

28. The factual matrix in which the Cayman Islands Court of Appeal sought to apply the principles set out in Kuwait was as follows. Paget-Brown, a Cayman company offering services to overseas companies, entered into a contract with Omni to provide a registered office, to act as company secretary and to provide a person to act as a company director. Omni alleged that Paget-Brown was vicariously liable for the director's negligence or breach of fiduciary duty, and that Paget-Brown had negligently failed properly to monitor him as their employee in the performance of his duties. The Court held that Paget-Brown could not be vicariously liable for the director's negligence or breach of fiduciary duty, since he had not acted in his capacity as Paget-Brown's employee, but as an agent of Omni itself, and as such was answerable to it and its shareholders who had appointed him. When acting in that capacity he was obliged to ignore the interests of his employer. Further, by nominating him as a director, Paget-Brown did not thereby owe Omni a duty of care to ensure that he performed his functions diligently and competently, unless they were guilty of fraud or bad faith, or sought to interfere with or instruct him in relation to the performance of his duties as director.

29. It is clear that the President of the Court in Paget-Brown relied heavily on the speech of Lord Lowry in Kuwait, and at page 193 of his judgment he said:

> "We can see no reason for distinguishing the Kuwait case from the present one. Mr. Coleman was nominated by the appellant He was appointed a director by the shareholders of the respondent, and could have been removed by the shareholders. He was answerable to the respondent and its shareholders. There was no control by the appellant over Mr. Coleman's performance. The respondent has not pleaded bad faith or fraud on the part of the appellant. The pleadings do not disclose that any instructions or directions were given to Mr. Coleman by the appellant in the performance of his duties or that any interference with his activities occurred. The appellant would owe no duty of care to the respondent unless it interfered with the affairs of the respondent. The acts or omissions of Mr. Coleman are acts or omissions in his individual capacity as a director of the

respondent. They are not acts or omissions by him as an employee of the appellant.
It is our view that the appellant, in the circumstances of the present case, owed no duty of care to the respondent. The appellant therefore cannot be held to be vicariously liable to the respondent. The fact that the appellant is a management company offering services does not, in our opinion, affect the legal principle as enunciated in the Kuwait case. There is no personal duty of care owed by the appellant to the respondent to monitor the conduct of Mr. Coleman as director of the respondent."

30. Mr. Misick argued that the case of Paget-Brown was on all fours with the present case. Although MC had nominated B as the director because he was an employee of MC, it was the shareholders of the Plaintiffs who appointed him the director of their companies, and once so appointed his fiduciary duties were owed to them as their agent. He referred, for illustrative purposes, to tab 3 page 40, which are the minutes of the first meeting of the Board of Directors of Titan Holdings Ltd. These record that the subscriber to the Memorandum and Articles of Association appointed B as a director of the Company, and the Board resolved that he should be permitted to execute cheques on its bank account, and his name duly appeared on the bank mandate, where he is described as director (page 45). He was therefore a signatory of the accounts in his capacity as a director of the companies. Even if one was to assume that MC got paid for the time that he spent in writing cheques on the accounts, this does not alter the fact that the allegation is that when he did so dishonestly he was breaching his fiduciary duties as a director.

31. He also referred to the documents emanating from Mr. Gregory to show that instructions were essentially given by him as counsel for/agent of the beneficial owner, Mr. Paul Smith, directly to B, and that there was no evidence and no facts had been pleaded to suggest that MC instructed or interfered with or supervised B in any way when acting in his capacity as a director of the Plaintiffs.

32. Mr. Misick contended that, as the Plaintiffs' pleading alleges that the dishonest actions of B constituted breaches of his fiduciary duties as a director of the Plaintiffs, it was not open to them to argue that the dishonest actions were also carried out in the course of his employment. In relation to those duties a man cannot have two masters. In any event the Plaintiffs have not pleaded, in the alternative, that B misappropriated the Plaintiffs' funds as an employee of MC, rather than as a director of the Plaintiffs.

33. He argued that there was no legal or factual basis on which to allege that MC had agreed to protect and preserve the companies' assets. This would elevate MC to the position of a trustee, and no such claim had been made against it. In any event MC had never had any of the assets under its possession, custody or control.

34. Mr. Simons countered that the acts which resulted in monies being stolen from the Plaintiffs' accounts were B's acts in signing the cheques, in other words his actions as an authorized signatory of the companies' accounts. In so doing he was acting in the course of his employment with MC pursuant to the contracts to provide corporate management

services. MC decided who should be nominated as signatories of the accounts, and it was by so doing that B and other employees of MC became authorized signatories of the companies. He therefore sought to distinguish the present case from that of Paget-Brown on the basis that B carried out tasks of management of the companies as an employee of MC pursuant to its contractual relationship with the Plaintiffs for which MC was paid time rates over and above the nominal annual fee of $1000 for his nomination as a director. Although it was accepted that MC carried out other professional services for the companies in respect of which no complaint is made, such as arranging insurance, which were quite separate from the corporate services, the payment of which would be included in time costs invoices such as that at tab 3 page 108, it was to be assumed for the purposes of this application that part of this charge may have related to B's management services. It was impossible to say how much. There was no evidence that B was ever paid anything by the Plaintiffs for carrying out their day to day management. All of the time costs invoices were on MC's headed paper.

35. He pointed out that in Paget-Brown where the President had specifically remarked at page 188 (25);

> "The fee paid by the respondent was a nominal fee. Surely if the appellant was to monitor and be vicariously liable for the acts or omissions of Mr. Coleman, one would have expected a much larger fee?"

36. He also said that the Judgment in Paget-Brown did not make clear the extent of the corporate services provided, nor how Mr. Coleman had breached his fiduciary duties as a director. There is a reference to transactions but the nature of these is not described. Accordingly this Court should be slow to strike out on the basis that Paget-Brown was on all fours with the present case where the service provider was paid additional sums for their employee's acts of management, which made it arguable that there was a contractual duty to supervise him, and vicarious liability for his actions.

37. He quoted Lord MacNaghten's classic statement of vicarious liability in Lloyd v Grace, Smith & Co (1911-1913) All ER 51 at page 60 to the effect that a principal is liable to third persons for the fraud and negligence of his agent in the course of his employment, even though the principal did not know of such misconduct. He referred to Lord Steyn's approval in Lister at paragraph 15 of Salmond on Torts assertion that the act of the employee is deemed to be done in the course of his employment if it is a wrongful and unauthorized mode of doing some act authorized by the master. A master is even liable for acts which he has not authorized, provided they are so connected with acts that he has authorized that they may rightly be regarded as modes, although improper modes, of doing them. That, he argued, when one had regard to the particular circumstances of this case, was precisely this situation.

38. He argued that the facts of the present case indicated that B, in his capacity as a senior employee of MC, was in charge of the Plaintiffs' Turks and Caicos offices and provided day to day corporate management of the Plaintiffs, which included effecting

payments on their behalf, and all of this he did pursuant to MC's contracts with the Plaintiffs, and as MC's employee. One of the tasks that he had to carry out was to make payments out of the Plaintiffs' bank accounts. To be able to do this he was made a signatory of and had access to the accounts by virtue of him being an employee of MC, and not as a Director of the Plaintiffs. A director does not have to be a signatory. The banks relied on his authority as a signatory of the accounts, not on the fact that he was a director. It was the fact that he was a signatory that facilitated his misappropriations, not the fact that he was a director. The fact that B was a director did not enable him to misapply the Plaintiffs' funds. When he did so dishonestly, that was an unauthorized way of carrying out an act which he was employed by MC to carry out. This assumption should be made in the absence of disclosure of B's contract of employment, which has been refused at this stage.

39. He submitted that even if Paget-Brown may have been correct on its particular facts, it was not authority for the proposition that, once an employee is appointed a director of a company, there can be no vicarious liability for his actions, nor was it the Court's intention to oust vicarious liability in every case in which an employee is appointed a director. He argued that the result of holding that, because their employee had been appointed a director of the Plaintiffs, any liability of his employer when he stole from them was thereby negated, would be a surprising one, particularly as the employer would be liable for a junior employee who had not been appointed a director, but who had done precisely the same thing.

40. Mr. Simons referred to a letter dated 7 February 2005 (tab 3 page 141) written by Mr. Misick when setting out his views of the Plaintiffs' claims. At page 144, paragraph 5.1 he accepted that MC owed the Plaintiffs a contractual duty to use reasonable care in the provision of the services they provided to the Plaintiffs. Mr. Simons submitted that this admission gave rise to an implied term that MC would supervise B when providing the services. However in the next sentence Mr. Misick states in terms that the scope of the duty extended to taking reasonable steps to ensure MC employed honest reliable and competent staff to provide the services to the Plaintiffs. A breach of this is not alleged. In the circumstances I do not consider that this letter amounted to an admission of a duty to supervise him as alleged, and Mr. Misick confirmed to me that there was no intention no make such an admission in this letter.

41. Mr. Simons argued that when misappropriating the funds B was acting in dual capacities, firstly as a director and so was in breach of his fiduciary duties to the Plaintiffs, and as B was being was being pursued as a Defendant in his personal capacity this breach was pleaded and particularized. Secondly he was also acting in his capacity as an employee of MC, thereby giving rise to vicarious liability for those same misappropriations. There was nothing wrong in the Plaintiffs advancing and succeeding in both allegations, as long as the Court ensured that there was no double recovery. The fact that these have not been pleaded in the alternative does not alter the dynamics of that contention.

42. In his reply Mr. Misick reiterated that the only wrong pleaded against MC's employee was that he breached his fiduciary duties owed to the Plaintiffs. That is a duty that only arises by way of him being a director, and therefore Paget-Brown applies. To pursue MC for vicarious liability the Plaintiffs would have to disavow the basis upon which they alleged that B was personally liable, and it would be an abuse of process to permit them to do so.

43. He said that the documentary evidence was clear. It was not MC who appointed B a director. It was not MC but the directors who made him a signatory of the accounts. Those appointments were made by resolutions passed in the companies' board meetings. The fact that the banks may not have been interested as to who the signatories were is irrelevant to the issues between MC and the companies. The fact that it was because B was an employee of MC that he was nominated by it as a director, which ultimately led to him having the opportunity to have access to the Plaintiffs' assets, was not enough to found vicarious liability, as Lord Millet made clear in paragraph 75 in Lister.

44. It was because, once appointed a director, he owed personal duties as a director that the person nominating him had no obligation to supervise him, and this was the principle laid down in Paget-Brown, in respect of which its particular facts were irrelevant. It made clear that vicarious liability for a director once appointed would only arise if the employer gave him instructions as to how to perform his duties as a director, or interfered with how he performed them, or if the person nominating him did so in bad faith or committed a fraud. There was no suggestion of any of these nor were they alleged in the pleadings.

45. If there was no duty to supervise B as a director, it would be inconsistent to imply a term to supervise him in the contracts between MC and the Plaintiffs.

46. I accept Mr. Simons' submission that it is a very serious step to find against a party on paper without permitting him to advance his case at trial and that I have to approach this application cautiously and should not put the Plaintiffs out of court unless I am quite satisfied that the case, if tried as pleaded, could not succeed. Further I would be unwilling to do so on a pleading point that could be easily rectified by an amendment.

47. It seems to me that this application hinges upon the capacity or capacities in which B was acting when he misappropriated the companies' monies. If he was acting as a director of the companies, then he must have been in breach of his fiduciary duties owed to the plaintiffs as a director. This is precisely what has been alleged against him in paragraphs 7 and 13 of the Statement of Claim, in respect of which a default judgment has been entered, and I can therefore conclude for the purposes of this application an acceptance by the plaintiffs' that he was so acting.

48. That then leaves the question as to whether it can be alleged that when so acting his employer is vicariously liable for his acts and, even if such cannot be alleged, whether those acts can also be acts performed in the course of his employment founding an alternative basis for vicarious liability, and an implied term to supervise.

49. I consider that Paget-Brown is clear authority that, when B was acting as a director, there was no vicarious liability on MC for his actions, nor any duty to monitor his actions. I do not accept that The Cayman Islands Court of Appeal was not entitled to apply the principles adumbrated in Kuwait to the facts in Paget-Brown, nor that there is any difference of significance between the case of Paget-Brown and this one. I accept that there is no evidence to contradict the documentary evidence which establishes that B was appointed as a director by the shareholders of the companies, and the directors of the companies appointed him as a signatory of the accounts. Although MC had nominated him as a director and MC may have received payment for B carrying out his tasks, I do not consider that that gives rise to an implied term that MC would supervise him when he did so. Further there is no suggestion nor are any facts pleaded to assert that any supervision was carried out.

50. Further, although it is alleged in paragraph 8 that B was acting as both a director and an employee when making these payments, and in paragraph 16.1 and the further particulars of it that by breaching his fiduciary duties he was acting in the course of his employment with MC, I accept Mr. Misick's submission that the personal duties owed by B were the fiduciary duties of a director as alleged, and cannot at the same time be the duties of an employee. They are either one or the other. To hold otherwise would be to fly in the face of Paget-Brown. Therefore, even if an amendment was made to allege this in the alternative, I do not consider that it would have any prospect of succeeding.

51. I have considerable sympathy for the Plaintiffs who have been defrauded of large sums of money by a person nominated by MC to be their director, but I regret that I consider that I have no alternative on the law and on the facts and allegations as pleaded but to strike out the Plaintiffs' claims against the First Defendant.

52. Mr. Simons, having received a draft of this Judgment, does not seek to argue that costs should not follow the event and I order the Plaintiffs to pay the First Defendant's costs of this application and of defending the claim generally. He does, however, seek leave to appeal, which I am willing to grant.

CHRISTOPHER GARDNER QC
Chief Justice
15 November 2005