[1999–00 Gib LR 300]

ELLUL and CHIPOLINA v. CLARKE

COURT OF APPEAL (Neill, P., Clough and Glidewell, JJ.A.):
September 30th, 1999

Guarantee and Indemnity—indemnity—liability to indemnify—common law liability may arise expressly under contract or statute, or impliedly when lawful act done by A at B's request causes injury to C—liability arises automatically if A under duty to comply with B's request—otherwise depends on circumstances, including parties' relationship

Guarantee and Indemnity—indemnity—liability to indemnify—trust fund and sui juris beneficiary may be liable to indemnify trustee for liability to third party

Trusts—liabilities of trustees—sale of trust property—trustees liable for breach of contract in sale of company owned by trust and not entitled to indemnity from beneficiary responsible for drafting sale documents—duty as trustees and company officers to ensure compliance with contract

The appellants issued third party proceedings against the respondent in the Supreme Court, claiming an indemnity in respect of their liability to H, the purchaser of their company.

The appellants were the trustees of a Gibraltar family trust of which the main asset was a company owning several properties in Spain. The trust was established on the initiative of the respondent, a barrister, who was the settlor's son and one of the discretionary beneficiaries. The appellants were the directors and shareholders of the company. The first appellant was its solicitor and the second was the company secretary.

Under an agreement drafted by the respondent, the appellants contracted to sell the company shares to H. Unable to use the land for the construction of a hotel as he had planned, H brought proceedings against the appellants alleging, *inter alia*, that in breach of the terms of the agreement they had failed (a) to deliver the title deeds to the Spanish properties upon completion and (b) to honour warranties that the company was the registered owner of the properties and that all matters material to H as a prospective purchaser had been disclosed. The appellants joined the respondent as a third-party defendant, claiming that they had taken no part in the negotiation of the agreement and they should be indemnified by him for any liability to H.

The Supreme Court (Pizzarello, A.J.) held that the appellants were liable

to H in damages (to be assessed) for breach of contract. It found that the appellants had been involved only to a very limited extent in the settlement of the trust and establishment of the company. The respondent had negotiated and drafted the sale agreement, including the clause relating to *registered* ownership of the properties, and presented it to the appellants, who read and signed it. They would not have signed it unless the respondent had asked them to do so, and they had made no oral representations to H. However, the court also concluded that they had been aware of their obligations as trustees. It dismissed their claim for an indemnity.

On appeal, the appellants submitted that the Supreme Court had erred in dismissing their claim since (a) at common law they were entitled to an indemnity on the basis that they had signed the agreement at the request of the respondent, their signature not being in itself a manifestly tortious act, and H had been injured as a result; (b) accordingly, having drafted the agreement, the respondent was liable under an implied warranty that it and its accompanying documentation were true and accurate; and (c) the court had failed properly to consider the relevant principles as applicable to the facts.

The respondent submitted in reply that (a) no implied liability could arise at common law, since a trustee's right to be indemnified by a beneficiary was governed by equity; (b) the appellants could not claim an indemnity against him in equity as a beneficiary, since he had only a limited interest in the trust estate and had not authorized or requested any act constituting a breach of trust; and (c) in any event, the judge had properly found that the appellants were not mere nominees but trustees and directors, with an obligation to acquaint themselves with the affairs of the trust and the company, and that they were therefore responsible for honouring the sale agreement.

Held, dismissing the appeal:

(1) At common law, the right to be indemnified for liability to a third party could arise expressly by virtue of a contract or statute, or impliedly. That right could be implied when an act done by one person at the request of another (which was not manifestly tortious in itself) caused injury to the third party. However, only if the person receiving the request had a duty to act upon it would the obligation to indemnify exist by operation of law. In other cases, whether the obligation actually arose would depend on the circumstances, including the relationship between the parties. An obligation could also arise in equity for a *sui juris* beneficiary to indemnify the trustee for liabilities to third parties incurred in respect of the trust (paras. 29–31).

(2) The Supreme Court had properly concluded on the facts that no obligation arose for the respondent to indemnify the appellants either at common law or in equity, and had emphatically rejected that claim. Although the judge had not devoted much time to the issue of indemnity, his conclusion seemed to be based on the assessment that the appellants

should have been aware of their duties and taken a more active role, as trustees and as the only shareholders and directors of the company, in the preparation and negotiation of the sale agreement. Had they done so, they would have discovered for themselves that arrangements were not in place for complying with its terms. Having had the opportunity to hear the witnesses and other evidence, the lower court had been entitled to decide as it did on the basis of that reasoning (paras. 34–40; paras. 43–45).

(3) Accordingly, it was unnecessary to examine the relationship between the common law and equitable remedies or the precise scope of the equitable right (paras. 32–33).

Cases cited:
(1) *Broomhead (J.W.) (Vic.) Pty. Ltd*. v. *J.W. Broomhead Pty. Ltd.*, [1985] V.R. 891; (1985), 9 A.C.L.R. 593.
(2) *Dugdale* v. *Lovering* (1875), L.R. 10 C.P. 196; 44 L.J.C.P. 197.
(3) *Hardoon* v. *Belilios*, [1901] A.C. 118; (1900), 70 L.J.P.C. 9.
(4) *Naviera Mogor S.A.* v. *Société Metallurgique de Normandie, The Nogar Marin*, [1988] 1 Lloyd's Rep. 412; [1988] 1 FTLR 349, *dicta* of Mustill, L.J. applied.
(5) *Sheffield Corp.* v. *Barclay*, [1905] A.C. 392; (1905), 74 L.J.K.B. 747, applied.
(6) *Somerset, In re, Somerset* v. *Earl Poulett*, [1894] 1 Ch. 231; *sub nom. In re Somerset's Settlement Trusts, Somerset* v. *Poulet* (1893), 63 L.J. Ch. 41.
(7) *Yeung Kai Yung* v. *Hong Kong & Shanghai Banking Corp*., [1981] A.C. 787; [1980] 2 All E.R. 599.

D.W. Mayall and *G.C. Stagnetto* for the appellants;
W. Smith and *D.J.V. Dumas* for the respondent.

NEILL, P.:

Introduction

1 In these proceedings Mr. Anthony Hill claimed damages for breach of contract and for deceit against the defendants, Mr. Eric Ellul and Mrs. Lily Chipolina, in respect of the purchase by him from the defendants of the issued share capital of Arexine Holdings Ltd. ("Arexine"), a company registered in Gibraltar. Mr. Hill purchased the shares pursuant to an agreement in writing dated March 21st, 1986 ("the sale agreement").

2 Prior to the making of the sale agreement the shares in Arexine were held by the defendants as trustees of a discretionary settlement dated April 1985. The settlement, which was known as the "R.D. Clarke Gibraltar Settlement," was made between Mr. Rowland Clarke, a retired solicitor who formerly practised in the United Kingdom ("the settlor"), and the defendants. The discretionary beneficiaries under the settlement

were the three children of the settlor—including Mr. Giles Clarke ("Mr. Clarke"), the third party in these proceedings and the respondent in this appeal—and their issue. Mr. Clarke was named in the settlement as the protector, in which capacity he had certain powers, including the power to remove the trustees and to appoint new trustees.

3 At the date of the sale agreement Arexine was the owner of several properties in the municipality of Casares near Malaga in Spain. These properties included two fincas (small-holdings), which were adjoining properties and which can be sufficiently identified as the hotel land. Mr. Hill wished to purchase these two fincas with the object of building a hotel on them. It was intended that Arexine should dispose of the other property which it owned in Casares before the sale of the company to Mr. Hill was completed.

4 The completion date stipulated in the sale agreement was September 30th, 1986. Clause 5 of the sale agreement imposed certain obligations on the defendants as vendors. In particular, it was provided by cl. 5(a) that the vendors should, on completion, "deliver to the purchasers duly completed transfers of the shares to be sold in favour of the purchasers or their nominees together with the relevant certificates and other documents of title."

5 Clause 9 of the sale agreement contained certain warranties by the vendors. These warranties included a warranty in cl. 9(a) that Arexine was the "registered beneficial owner of the hotel land," subject to certain further provisions which are not relevant to this appeal. Clause 9(e) also contained a warranty that "all matters which are or may be material to an intending purchaser of the company have been disclosed to the purchasers."

6 It is now no longer in dispute that among the documents of title which the defendants were required to deliver to Mr. Hill on completion were the deeds ("the escrituras") of the two fincas comprising the hotel land (including the deeds of sale to Arexine by the previous owners), and that these deeds were not delivered on completion. It is also common ground that neither on March 21st, 1986 nor on September 30th, 1986, indeed not until about 1988, was Arexine the "registered beneficial owner" of the hotel land or of either of the two fincas comprising the hotel land.

7 The purchase of Arexine by Mr. Hill and of the hotel land owned by Arexine proved to be a disaster for Mr. Hill. For reasons which may have to be investigated in more detail in subsequent proceedings, Mr. Hill was unable to develop the land for use for the construction of a hotel and he suffered serious financial loss.

8 By a writ issued in the Supreme Court of Gibraltar on April 15th, 1992, Mr. Hill claimed damages against the defendants for breach of

contract and for misrepresentation. Subsequently the claim was amended to include a charge based on fraud. In September 1992 the defendants issued a third party notice against Mr. Clarke and obtained leave to serve the third party notice out of the jurisdiction. There then followed a substantial number of interlocutory proceedings, including an application by the defendants to strike out Mr. Hill's claim for want of prosecution. Following the amendment of the statement of claim by Mr. Hill against the defendants to include a charge of fraud, a similar amendment was made in the third party proceedings to include an allegation to the same effect against Mr. Clarke.

9 The basis of the defendants' claim against Mr. Clarke was that they had acted on his directions and that the sale agreement had been drafted by Mr. Clarke and had been presented to them for signature in Gibraltar on March 21st, 1986. They had taken no part in the negotiations for the sale and, in the circumstances, Mr. Clarke should indemnify them against any liability to Mr. Hill. In their amended statement of claim served on October 31st, 1997, the defendants claimed a declaration that Mr. Clarke "did by oral and other representation made to the defendants and relied upon by the defendants induce the defendants to execute the contract dated March 21st, 1996."

10 The proceedings came on for hearing before Pizzarello, A.J. in June 1998. After a hearing lasting about 10 days, he reserved judgment. He delivered judgment on July 1998. It will be necessary to consider the judgment in a little detail later. At this stage it is sufficient to record that the judge:

(a) rejected the claim in fraud against the defendants;

(b) held that the defendants were in breach of contract in failing to comply with cl. 5(a) of the sale agreement and were in breach of the warranties set out in cl. 9(a) and (e) of the sale agreement;

(c) held that, though the writ was not issued until after the expiry of six years from the date of the sale agreement, the warranties set out in cl. 9(a) and (e) of the sale agreement were continuing warranties which were still in force at the date of completion;

(d) held that the question of damages for breach of contract should be assessed if not agreed; and

(e) dismissed the claim by the defendants against the third party.

11 The judge dealt briefly with the issue of damages against the defendants in his judgment as follows:

> "There are obviously no damages arising from the claim in tort. There is, I imagine, some damage arising out of breach of contract.

> It may be minimal, but I was asked to deal with this case first, on the question of the merits and, secondly, as to whether there was damage, and I have made my ruling. The question of the measure of damages will be left for another occasion if the parties do not come to an agreement between themselves as to this."

12 There is no appeal by the defendants against the decision of the learned judge in favour of Mr. Hill. They have appealed, however, with the leave of the judge, against the dismissal of their claim against Mr. Clarke. It is this appeal with which the court is presently concerned.

Some additional background facts

13 Before turning to examine the way in which the case against Mr. Clarke was developed before the judge, it is necessary to say something more about the background facts. In 1984 the settlor was considering moving from England to live permanently in Spain. He went to Spain where he met Mr. Ian Craven who was concerned with property development in the Malaga area. The settlor visited Casares and in due course bought a finca called El Higuito. Subsequently, he bought another finca and two village houses. For the purpose of the purchase of El Higuito, he employed a lawyer practising in Estepona called Sñr. Vallejo.

14 In addition, the settlor entered into negotiations in relation to two further fincas (which later became the hotel land). These two fincas belonged respectively to a Mr. Mena and a Mr. Rios. Following discussions with Mr. Clarke, however, who was a barrister specializing in revenue matters, the settlor decided that the Mena and Rios fincas should be held through a family trust to be set up in Gibraltar in conjunction with a company which would become the owner of the properties. It was in these circumstances that Mr. Craven introduced the settlor to the first defendant, Mr. Ellul, who was in practice both as a barrister and a solicitor in Gibraltar.

15 In April 1985 the R.D. Clarke Gibraltar Settlement, to which I have referred previously, was executed. The deed was prepared in draft by Mr. Clarke, and Mr. Ellul inserted clauses relating to the perpetuity period and the question of jurisdiction. The deed was engrossed by Mr. Ellul's firm. From the outset the trustees of the settlement were Mr. Ellul and Mrs. Lily Chipolina, his legal secretary. The trust fund at the date of execution was the sum of £1,000, and the two fincas which comprised the hotel land were added later as assets of the settlement.

16 Arexine was incorporated on April 17th, 1985. The formalities in connection with the registration of the company were dealt with by Mr. Ellul. The nominal capital of Arexine was £1,000 divided into 1,000 shares of £1 each. Of these, 500 shares were issued to Mr. Ellul and 500 shares to Mrs. Chipolina. Mr. Ellul and Mrs. Chipolina were appointed as

the directors of the company, Mr. Ellul was appointed solicitor to the company and Mrs. Chipolina the company secretary. On April 25th, 1985 a sterling current account was opened in the name of Arexine by Mr. Ellul at the Gibraltar and Iberian Bank in Main St., Gibraltar. It is right to say, however, that this account was not an active account and that from April 26th, 1985 until the account was closed in March 1987 the credit balance remained unchanged at £1,256.

17 On April 25th, 1985 Arexine issued a power of attorney in favour of Mr. Craven which enabled him to act in commercial transactions for the company. It seems that in pursuance of this power of attorney, Mr. Craven opened a bank account in the name of the company at the Banco Atlantico in Estepona. On May 31st, 1985 Mr. Ellul sent a fee note relating to the incorporation and registration of Arexine addressed to the trustees of the settlement. These fees were paid by the settlor by a cheque drawn in favour of Mr. Ellul.

18 Following the incorporation of Arexine, the settlor directed that the two fincas, *i.e*. the Mena and the Rios fincas, should be conveyed to Arexine. The settlor had paid the deposit on these two properties in October 1984 and made arrangements for the balance of the purchase price to be provided by loans made by an English settlement ("the Spa Trust") which the settlor had made in 1971.

19 I must now introduce Mr. Hill into this summary of the main events. In July 1985 Mr. Hill resigned from his position in a Lebanese construction company by which he had been employed in Greece, and returned to the United Kingdom. In December he and his wife visited the Costa del Sol region and decided that they would like to establish a small hotel. In due course they were put in touch with Mr. Ian Craven and a little later they visited the two fincas which comprised the hotel land. It was clear that at that time the land did not have an adequate supply of water but it was contemplated that drilling for water would take place.

20 Discussions relating to the sale of the hotel land to Mr. Hill took place at the beginning of 1986. The original plan was that Mr. Hill should buy the hotel land, but after some discussion it was decided that it would be more advantageous for Mr. Hill to buy Arexine, which owned the hotel land, rather than the land alone. As Arexine owned some other property it was contemplated that this other property should be sold.

21 The sale agreement was drafted by Mr. Clarke. It seems that this drafting was carried out in England. On March 18th, 1986—also in England—Mr. Hill signed two copies of the agreement and paid the first instalment of the price. A receipt for this instalment was signed by Mr. Clarke "on behalf of the vendors, Eric Ellul and Lily Chipolina." The agreed price for the shares was Pta. 15m.

22 There was a conflict of evidence at the trial as to the circumstances in which Mr. Ellul and Mrs. Chipolina signed the sale agreement. The judge found, however, that Mr. Clarke took the two copies of the sale agreement to Mr. Ellul's office in Gibraltar and Mr. Ellul and Mrs. Chipolina signed the agreement there. Both Mr. Ellul and Mrs. Chipolina read the agreement, but it seems clear that neither of them made any comment about it. Mr. Ellul inserted the date March 21st, 1986 in his handwriting. The reason why the completion date was postponed until September 30th, 1986 was to enable Mr. Hill to sell his houses in England and for Mr. Clarke to transfer the other property out of the ownership of Arexine.

23 I have already referred to the fact that the purchase by Mr. Hill of the hotel land proved to be a disaster. It would not be appropriate, however, as further proceedings may follow, for me to investigate the reasons why Mr. Hill was unable to build the hotel on the land. Nevertheless, it is quite clear that before completion Mr. Hill was not provided with the deeds of the land, the escrituras, and that the title of Arexine to the land had not been registered.

The case for the defendants before the judge

24 I come now to the case for the defendants against Mr. Clarke before the judge. In considering this aspect of the matter, we have the advantage of having before us the skeleton argument prepared by the defendants and also the closing submissions dated June 24th, 1998, prepared on behalf of Mr. Clarke. Leaving aside the arguments which were directed to the allegation of fraudulent misrepresentation, it is clear that the defendants' claim for an indemnity was based, as in the main it has been based before us, on the principle recognized in *Sheffield Corp.* v. *Barclay* (5) ([1905] A.C. at 397). The principle, to which the Earl of Halsbury, L.C. gave his approval in the *Sheffield Corp*. case, was formulated by counsel in *Dugdale* v. *Lovering* (2) as follows (L.R. 10 C.P. at 197):

> "It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."

25 In his skeleton argument, counsel for the defendants also made reference to three other cases in which this general principle was applied, including the decision of the Privy Council in *Yeung Kai Yung* v. *Hong Kong & Shanghai Banking Corp.* (7). Basing himself on this general principle, counsel submitted that Mr. Clarke's liability to indemnify arose from an implied warranty, at the time of the presentation of the documents, that they were accurate. It was argued that in view of Mr. Clarke's involvement in the operation of the settlement and of Arexine,

and his involvement in the sale of the hotel land, the defendants were "perfectly justified" in relying on the sale agreement, which was drafted and submitted by Mr. Clarke, as being true and accurate.

26 Counsel for Mr. Clarke challenged the claim for an indemnity, though the precise scope of his argument is not apparent from the documents before us. It is clear, however, that he stressed that the defendants were trustees and directors, with the responsibilities attaching to these positions, and were not mere nominees. He referred the judge to the decision of the Privy Council in *Hardoon* v. *Belilios* (3), which established the proposition that where a beneficiary is *sui juris* his trustee is entitled to be indemnified by the beneficiary against liabilities incurred by the trustee in relation to the trust. This liability is not dependent on any request being made by the beneficiary that the liability should be incurred or the relevant step taken.

The judge's decision

27 It is apparent from the transcript of the evidence and from Pizzarello, A.J.'s judgment that much of the hearing before him was devoted to the claim against the defendants by Mr. Hill and to the allegations of fraudulent misrepresentation. It is, no doubt, for this reason that the judge dealt carefully and at length with the law relating to deceit. It was also necessary for him to consider the defences of limitation which had been raised. However, when he came to examine the claim in the third party proceedings he dealt with the matter very shortly and without reference to the authorities to which he had been referred. He rejected the defendant's claim against Mr. Clarke in these words:

> "On the view I have taken on the evidence, it seems to me, notwithstanding Giles's active and positive role, impossible to hold that the third party should indemnify the defendants. Giles owed no duty to the defendants either in contract or in tort and no obligation arises in equity on the facts as I see them."

28 It seems to me to be clear in this passage in the judge's judgment that he came to the conclusion that on the particular facts of this case, the claim by the defendants against Mr. Clarke did not fall within the legal principles on which an indemnity can be based to which he had been referred. Accordingly, it is necessary for this court to consider for itself the relevant principles of law and the relevant facts, to ascertain whether the material before the judge entitled him to come to this conclusion.

The law

29 At common law a right to an indemnity may arise by virtue of an express contract or a statute, or it may be based on an implied obligation. In the present case we are concerned with an implied indemnity and with the principle approved by the House of Lords in *Sheffield Corp.* v.

Barclay (5). This principle has been applied in a number of cases since 1905 and has been explained quite recently by Mustill, L.J. in the Court of Appeal in *Naviera Mogor S.A.* v. *Société Metallurgique de Normandie, The Nogar Marin* (4). Mustill, L.J. said ([1988] 1 Lloyd's Rep. at 417):

> "1. The general principle is that—
>
> . . . when an act is done by one person at the request of another which act is not manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.
>
> 2. This is, however, a general principle, not a conclusion of law, which is always to be drawn. As Mr. Justice Grove was careful to point out in *Dugdale v. Lovering*, whether there is an obligation to indemnify must greatly depend on the circumstances of each individual case. Notes of caution to a similar effect may be found elsewhere in the authorities.
>
> 3. A special situation exists where the person receiving the request or demand has a duty to act upon it. Here, as we understand it, the right of the indemnity does arise by operation of law, except in the case where there is a 'default' on the part of that person."

Mustill, L.J. then proceeded (*ibid.*) to consider a fourth proposition, which it is not necessary for me to investigate for the purposes of this appeal, relating to the relationship between the "default" in "duty to act" cases and the "manifestly tortious" acts which provide an exception to the general principle.

30 This formulation by Mustill, L.J. may require further development in the future, but it is sufficient to note in the context of the present case the important qualification that except in cases where the person receiving the request has a duty to act, the question whether the obligation to indemnify arises depends on the circumstances of each individual case. It seems to me to be clear that the circumstances will include the relationship between the parties.

31 An obligation to indemnify may also arise in equity in cases where a trustee is able to seek reimbursement not only from the trust estate but also from a beneficiary who is *sui generis*: see *Hardoon* v. *Belilios* (3). Furthermore, such an indemnity can be enforced against a number of beneficiaries who are between them entitled to the trust fund: see *J.W. Broomhead (Vic.) Pty. Ltd.* v. *J.W. Broomhead Pty. Ltd.* (1).

32 In the present case a question arose as to the relationship between the common law principle and the rights in equity against a trustee. It was submitted by counsel on behalf of Mr. Clarke that the common law

principle had no application where the relationship between the parties was that of trustee and beneficiary. In addition, two further questions arose as to the scope of the right to an indemnity recognized in *Hardoon* v. *Belilios* (3). Thus, it was argued that—

(a) the right to relief could not be exercised against a beneficiary who had merely a limited, as opposed to an absolute, interest in the trust estate; and

(b) the right to an indemnity could only be exercised where the beneficiary had requested or authorized a breach of trust which had caused the loss.

In respect of the first point, counsel pointed to the fact that Mr. Clarke was only one of several beneficiaries under a discretionary trust. In respect of the second, counsel referred us to *In re Somerset*, *Somerset* v. *Earl Poulett* (6). In the present case the request to sign the sale agreement did not constitute a request to commit a breach of trust.

33 I have come to the conclusion, however, that it is not necessary to resolve these questions for the purpose of the present appeal. It seems clear that the judge dealt with the case on the basis that whatever legal or equitable rights might be available to the defendants in other circumstances, they were not entitled to an indemnity on the facts of the present case.

The judge's view of the facts

34 I must return, therefore, to the judgment to examine the findings of fact which the judge made or must be deemed to have made. In this context it is important to remember that the judge heard the evidence, including the evidence of Mr. Ellul and Mrs. Chipolina, over several days and was therefore in a position to make an evaluation of the witnesses which an appellate court is not in a position to do.

35 The judge made a number of findings which supported the defendants' contention that they were involved to only a very limited extent in the affairs of the settlement and of Arexine and in the sale of the hotel land, and that all the arrangements for the sale were made by Mr. Clarke with the assistance of Mr. Craven. These findings included the following:

1. It was Mr. Clarke who agreed the terms of the sale with Mr. Hill and who drafted the contract.

2. It was Mr. Clarke who "thought up" the expression "registered beneficial owner."

3. Mr. Ellul and Mrs. Chipolina were "left to one side in the Hill transaction" until they were asked to sign. The judge preferred the

evidence of Mr. Ellul to the effect that Mr. Clarke had brought the two copies of the sale agreement to his office in Gibraltar to sign.

4. The defendants would not have signed the sale agreement except at the request of Mr. Clarke.

5. Mr. Ellul himself never made any oral representations or gave any oral warranties to Mr. Hill.

36 On the other hand, the judge came to the firm conclusion that Mr. Ellul's perception of his position and responsibilities was wrong. In his judgment he examined the setting up of the settlement and the establishment of Arexine and decided that Mr. Ellul either knew of his obligations as a trustee or must be deemed to have known of them. It is true that neither Mr. Clarke nor Mr. Craven appears to have expected the defendants to take any steps in relation to the sale agreement after it was signed but, as I understand the judgment, the judge concluded that the defendants should nevertheless have taken a more active role.

37 It is to be remembered that the defendants incorporated Arexine and were the only shareholders and officers in the company. They held board meetings or purported to do so. Mr. Ellul played a part in the formation of the settlement and the judge clearly attached particular importance to the role of the defendants as trustees. He considered that, as trustees, they should have played a more active role and should have found out for themselves what was happening.

38 It was probably inevitable, after such a lapse of time, that the evidence would be defective in a number of respects. Some of the contemporary documents were missing and the judge did not have the benefit of any evidence from the settlor or from Mr. Craven or from the Spanish lawyer who acted in the sale of the hotel land. He therefore had to make up his mind on the material before him and on the inferences which he could draw.

39 It may be that a different view could have been taken of the facts, but the judge heard the evidence. He did not regard the defendants' role as trustees as a mere sinecure, and it seems to me that his firm rejection of the claim to indemnity was based on what he regarded as a dereliction of their duties by the defendants. The trust was not a mere sham. The defendants, as trustees and directors, were not mere nominees. In my view, it is not without significance that when the judge gave his decision in his judgment, he stated emphatically that it was "impossible" to hold that Mr. Clarke should indemnify the defendants.

Conclusion

40 I have not found this to be an easy case but in the end I have come to the conclusion that the judge had sufficient material before him to entitle

him to reject the defendants' claim in the third party proceedings. I would dismiss the appeal.

41 **GLIDEWELL, J.A.:** I have had the advantage of reading in draft the judgment of Neill, P. Like him, I have had considerable difficulty in deciding the proper outcome of this appeal. However, I have also concluded that the appeal should be dismissed. I explain my reasons for this conclusion briefly.

42 My main difficulty stems from the fact that the passage in Pizzarello, A.J.'s judgment in which he decided that Mr. Ellul and Mrs. Chipolina were not entitled to be indemnified by Mr. Giles Clarke is so short that it is not clear to me what the learned judge's reasons for that decision were. On many of the issues of fact between these parties, he made findings in favour of Mr. Ellul and Mrs. Chipolina. The major findings adverse to them were that the trust was not a sham and that Ellul knew or at least should have known of his obligations as trustee. Since the main argument for Mr. Ellul at the hearing was that the trust was indeed a sham, the learned judge may have decided that this was conclusive against him and his secretary, thus making it impossible to hold that Mr. Giles Clarke should indemnify them. If this was the judge's reasoning, I respectfully think that he fell into error.

43 However, the findings that the trust was not a sham and that Ellul knew or should have known of his obligations as trustee were obviously important and weighty factors to put in the scales if the learned judge was carrying out the balancing exercise required by the application of the *Sheffield Corp.* v. *Barclay* (5) principle, as explained in *The Nogar Marin* (4). Despite the findings of fact set out in para. 35 of Neill, P.'s judgment, the judge was entitled to conclude that Mr. Ellul's apparent failure to fulfil, or indeed to pay any attention to, his duties as trustee outweighed the factors in his favour. If this was the judge's process of reasoning, though unexpressed, it was one he was entitled to adopt.

44 For this reason, which does little more than express in other words what the learned President has already said, I too would dismiss this appeal.

45 **CLOUGH, J.A.:** I have also experienced difficulty in determining this appeal in the light of the judge's findings of fact and the paucity of reasons for his decision on the indemnity issue between the appellants and Mr. Clarke. Having had the advantage of reading in draft the judgment of Neill, P., I agree that this appeal should be dismissed for the reasons he has given.

Appeal dismissed.