**[2007–09 Gib LR 104]**

## MONTESINOS v. BR INVESTMENTS LIMITED, MANOLO AND COMPANY LIMITED, NEWMILL INVESTMENTS LIMITED and ASWANI

SUPREME COURT (Dudley, J.): June 11th, 2007

*Trade and Industry—trading licence—transfer of licence—if licence not transferable (e.g. bureau de change licence), transfer void and of no value—not "property" transferred in part-payment of debt*

*Limitation of Actions—extension of time—acknowledgement of liability—part-payment of debt only extends time in relation to debt recognized as owing, regardless of any other existing debts*

*Limitation of Actions—multiple defendants—waiver of limitation—if limitation waived by principal defendant, still available to other defendants, especially if different cause of action against them*

The claimant brought proceedings against the defendants for the recovery of outstanding debts.

The first defendant ("BR") ran a *bureau de change* which required an operating licence. Between 1995 and 1999, the claimant ("Delicado") financed the work of BR with an alleged total sum of 96m. Spanish pesetas (Pta.) (over £404,000) which had not been repaid. In November 1998, he was granted an equitable charge over BR's leasehold interest of its business premises in respect of two of the financing agreements between itself and Delicado worth £57,000. In mid-1999, BR faced financial difficulty and one of its creditors, the third defendant ("Manolo & Co."), through the action of one of its directors, the fourth defendant ("Aswani") who was also a creditor of BR, arranged for the other creditors to be reimbursed. Through this arrangement, the claimant was to be paid £1,000 per month until the debt was cleared on the condition that he would not seek immediately to enforce the full debt to enable Manolo & Co. to deal effectively with the other creditors. After eight months, however, the payments to Delicado ceased.

In June 2000, BR's *bureau de change* licence was suspended and it applied to the Office of the Financial & Development Secretary to have it reinstated. The licence was reissued but in the name of the third defendant ("Newmill"), of which Aswani was the sole director. This transfer was made in spite of the terms of s.20 of the Bureaux de Change Act which stated that licences were not transferable. The claimant was informed of

the new ownership of BR and was falsely told by Aswani that neither he nor Manolo & Co. had any involvement in Newmill. Delicado sought to recover the remaining monthly payments due to him.

The claimant submitted that (a) BR's original debt of Pta. 96m. was still outstanding; (b) although BR was responsible for repayment of the debt, it had assigned the debt to Manolo & Co. which was now responsible for its repayment; (c) there had been acknowledgement of the full debt (of Pta. 96m.) by the defendants through the monthly part-payments of £1,000 which extended the original six-year limitation period by eight months and meant the action for recovery of the debt was not time-barred; (d) since BR had not entered a defence to the claim for the recovery of the debt, there was no limitation defence available to the other defendants; (e) the transfer of the licence was unlawful under s.20 of the Bureaux de Change Act which had the effect of making the transfer void; (f) there was an intention on the part of the defendants to defraud him through the transfer of the licence to Newmill; and (g) there was a misrepresentation by Aswani to him as to the connections of both himself and Manolo & Co. to BR, in reliance upon which he did not pursue Manolo & Co. and suffered consequential loss.

In reply, the defendants submitted that (a) the debt owed by BR was only £57,000; (b) the debt was owed solely by BR as there had been no assignment of the debt to Manolo & Co. and BR remained the principal debtor and responsible for the repayment; (c) the monthly £1,000 payments only amounted to an acknowledgment of a debt of £57,000 and despite this, action for the recovery of the debt was time-barred due to the delay between the dates the payments were made and the bringing of proceedings; (d) limitation was a valid defence but did not need to be raised by BR since the actions against the defendants were different from that against BR; (e) the transfer was not unlawful as it was a legitimate transfer of property in consideration of BR's outstanding debt to Aswani; and (f) there was no intention to defraud Delicado through the transfer of the licence.

**Held,** the original debt of the full amount remained owing by BR:

(1) The debt originally owed by BR to the claimant was for the full amount claimed—Pta. 96m. There had been no assignment of the debt to Manolo & Co. or Aswani as there was no evidence. Since there was no assignment to Manolo & Co., Delicado did not suffer loss in relying on the misstatement as there was no advantage in pursuing Manolo & Co. and this did not affect the outcome of the case. Though there had been a misrepresentation by Aswani, this also had no significant legal consequences (para. 31; paras. 42–44).

(2) Limitation had not been raised by BR in respect of the loan agreements with the claimant and he was therefore entitled to judgment in respect of all the loan agreements despite the delays in bringing proceedings. The other defendants could use limitation as a defence as the actions against them did not deal directly with the loan agreements but were for

fraud and misrepresentation and the limitation defence had not been waived in respect of these actions. This made the issue of acknowledgment by part-payment unimportant but, in any case, the monthly payments related to the £57,000 debt and not the full amount claimed (paras. 31–35).

(3) No intention to defraud the claimant had been proved as the transfer of the licence took place as a result of negotiations between BR's solicitor and the Office of the Financial & Development Secretary and not through the purposeful actions of Aswani. The reissue of the licence to Newmill was, however, void as it was prohibited by s.20 of the Bureaux de Change Act. Although it was a valuable asset, since it could not be re-issued to Newmill under the Act, it was not "property" within the meaning of any of the relevant statutes and could not be considered to be part-payment of the debt (paras. 65–66; para. 70).

**Legislation construed:**

Bureaux de Change Act 1980, s.20: The relevant terms of this section are set out at para. 7.

s.26(7)(a)(ii): The relevant terms of this paragraph are set out at para. 58.

Interpretation and General Clauses Act 1962, s.2:

> "'property' includes money, goods, things in action, land and every description of property, whether real or personal; also obligations, . . . arising out of or incidental to property as above defined."

Limitation Act 1960, s.29(4): The relevant terms of this sub-section are set out at para. 34.

*K. Azopardi* for the claimant;
The first defendant did not appear and was not represented;
*C. Salter* for the second, third and fourth defendants.

1 **DUDLEY, J.:** This is a multifaceted case as regards both the factual and legal issues. I shall deal in detail with the facts in the context of the issues requiring determination; it is useful, however, to set out the basic factual background.

2 The first defendant ("BR") held a *bureau de change* licence during the period 1995 to about September 2000. Up until June 14th, 2000, the directors and shareholders of BR were Mr. Raju Soneji and his wife Mrs. Bhagwati Soneji.

3 The claimant, Mr. Jose Delicado Montesinos ("Delicado"), is a Spanish national who, at all material times, was a businessman involved in real property and construction. According to Delicado although there was, on his evidence, some uncertainty as to the precise dates, between 1995 and 1999 he invested in/loaned to BR a total sum of Pta. 96m., albeit this was documented as £57,000 and Pta. 82m. The total sum is particularized as

amounting to £404,063.33. According to Delicado, he received interest payments on the investment but was never repaid any capital save for some eight payments of £1,000 each.

4 On or about June 1999, BR found itself in financial difficulties and, during that summer, there were various meetings of BR's creditors. Through the intervention of the second defendant ("Manolo & Co.") and one of its directors, the fourth defendant ("Aswani"), most of BR's creditors were paid 50p in the £1. Delicado, however, was paid at the rate of £1,000 per month for some eight months, after which payments ceased.

5 In June 2000, Mr. Soneji was arrested on a warrant following a request for extradition to the United Kingdom in connection with money laundering offences and on June 7th, 2000, the Licensing Committee for Bureaux de Change suspended BR's licence.

6 Thereafter Mr. Pilley, Mr. Soneji's lawyer, entered into discussions with the Office of the Financial and Development Secretary (the "OFDS") and sought to have the licence reinstated. During that period, certain share transfers were undertaken whereby in effect, Aswani (through the third defendant) had become the indirect beneficial owner of the shares in, and the sole director of, BR.

7 By September 21st, 2000, the *bureau de change* licence was re-issued in favour of the third defendant ("Newmill") rather than BR, notwithstanding that s.20 of the Bureaux de Change Act provides: "No licence shall be transferable."

8 Newmill is a company, the sole director and shareholder of which, is Aswani. The issues which arise in this case are essentially:

(i) Are there debts owed to Delicado by BR?

(ii) Is the action on any such debt time barred?

(iii) Was there an assignment of any such debts to Manolo & Co.?

(iv) Was there a misrepresentation by Manolo & Co./Aswani to Delicado with regard to their nexus with the bureau and if so, did Delicado rely upon this and if so, what legal consequences, if any, flow from this?

(v) Was there a transfer of assets from BR to Newmill and if so, was such a transfer fraudulent and therefore voidable at the instance of Delicado?

**The debt**

9 The thrust of Delicado's evidence was this: In the early 1990s he opened an account at Banco Atlantico in Gibraltar in the name of Deltrisa S.L., a company wholly owned by him. During the period of 1994 to 1995, interest rates started to decline and one of the bank managers, Mr.

Caballero, with whom he had a good relationship, suggested that he invest through BR. He says that the first agreement was drafted by Mr. Soneji's then lawyer, Mr. Ellul. Thereafter, all other agreements entered into were in the same form but with the amounts changed. Although in his witness statement he refers to a series of eight agreements, which are exhibited, and which date from September 19th, 1995 to June 23rd, 1999, when cross-examined, he said that the first two agreements were not the first in time.

10 The reason for those two agreements which record loans totalling £57,000 being backdated and the currency of the investment changed into pounds sterling was because Mr. Soneji had said that he needed this for accounting purposes, but that as far as he was concerned, what was in fact owing were the amounts endorsed in manuscript at the top of each document, namely, Pta. 6.5m. and Pta. 7.5m. respectively. According to him, these two investments may have taken place in 1996 or 1997 but not in 1995. According to Delicado, the existing agreements do not reflect all the agreements which existed between the parties; that the practice was to replace old agreements with new agreements once further sums were invested and old agreements were torn up and replaced.

11 On the face of the agreements, the interest payable on the sterling contracts was of 12% whilst that payable on the pesetas contracts was of 20%—in either case, significantly more than the 9% which Delicado says was paid by Banco Atlantico at the time.

12 Delicado also produced a bundle of handwritten documents described as "investment charts" which cover the period October 1998 to June 1999 and which reflect the payment of interest on various principal amounts. It is noteworthy, however, that the total principal amount which these documents evidence is of Pta. 69m., that is Pta. 27m. short of the Pta. 96m. which are claimed.

13 According to Delicado, the provenance of the Pta. 96m. which he invested in/loaned to BR was varied. Pta. 36m. were, he said, loaned to him by Mr. Gonzalez and Ms. Sermiento and he produced an agreement dated December 15th, 1997 between Deltri Gestion S.L. (on whose behalf he signed) and the said Mr. Gonzalez and Ms. Sermiento. He also produced a bundle of 16 receipts dated from January 15th, 1998 to April 15th, 1999 in respect of payments of Pta. 360,000 each by way of profits on the investment of Pta. 36m. Similar documentation was also produced in respect of a Pta. 4m. loan which Delicado says was provided by a Ms. Ucles.

14 Also produced by Delicado—a document from Banco Atlantico dated April 19th, 1995 confirming a fixed deposit in the name of Deltrisa S.L. in the sum of Pta. 20m., said by Delicado that at one stage, the

account in Banco Atlantico was closed and the moneys there invested in/loaned to BR.

15 The Mr. Gonzalez/Ms. Sermiento loan, the Ms. Ucles loan and the deposit in the Banco Atlantico total Pta. 60m., which leaves an undocumented balance of Pta. 36m. Delicado also produced copy of a record sheet of a chequebook with handwritten entries which make reference to a cheque number 2428 dated June 4th, 1996 and a sum of Pta. 5m. (albeit entered under the column headed "credit"); which he said, related to a cheque of Pta. 5m. he gave to BR. It is not clear whether or not these Pta. 5m. formed part of the Pta. 20m. deposit.

16 As regards the provenance of the unaccounted Pta. 36m., Delicado says that that money was the proceeds of his work in Spain as a developer and that he would bring the moneys over with his uncle in cash, walking through the frontier each carrying Pta. 1m. at a time. Other issues also need to be considered in determining whether Delicado loaned/invested moneys in BR and if so, the amount.

17 On November 22nd, 1998, BR granted Delicado an equitable charge over its leasehold interest in its business premises. Although it was an express term of the charge that it be registered by BR at the Companies Registry and the Land Registry, no such registration ever took place. Whilst the said charge provided little security (particularly as, at the time, there was a pre-existing equitable charge), for present purposes of relevance to the matter in issue, the said charge was stated to be for the total sum of £57,000 and related exclusively to the agreements dated September 9th, 1995 and January 8th, 1996. Delicado's explanation as to why the charge did not relate to the full indebtedness is that Mr. Soneji gave him this security without his having requested it, and that the charge did not make reference to the other agreements because Mr. Soneji considered the lease was worth about £57,000.

18 When BR found itself in financial difficulties in 1999, various meetings of its creditors were convened, of which, as I understood the evidence, Delicado attended some but not all. Exhibited to Delicado's witness statement (albeit its provenance has not been explained), is a very poor copy of a draft agreement dated July 1999, which may well have been drafted by BR's then-lawyer Mr. Ellul, which provides for the financing of BR by Manolo & Co. In the recital to the draft agreement there is a reference to a schedule of creditors. Although there is no schedule attached to the draft agreement a document was, however, produced at trial entitled "Schedule" which contains a typewritten list of BR's creditors and the amounts said to be due to them and endorsed in manuscript payments purportedly made. There are eight creditors listed in the Schedule, although it is only in respect of four that there has been some evidence arising at the hearing as to the sums due to them. The sums

by which, it has been said at trial, BR was indebted to Manolo & Co., Martin Jewellers and the Gibraltar Gold Coin Co., tally with the sums on the Schedule. In contrast, the sum set out in the Schedule as owing to Delicado is only £57,000.

19 Mr. Ferro, at the time a director of the Gibraltar Gold Coin Co., testified that Delicado attended one of a number of creditors' meetings but that Delicado was not present at the final meeting in which Aswani assumed responsibility to pay 50% of the debts due. Mr. Ferro had not seen the "Schedule" before. It was also his evidence that although he was aware that the amount due to Delicado was significant, he was uncertain what the exact amount was. I certainly found Mr. Ferro a credible and reliable witness.

20 Also before me is a witness statement of Mr. Juan Martin Zayas. It is unfortunate that, although I am told by Mr. Azopardi he attended court, he was unable to testify as another witness was doing so at the time and business commitments prevented him from attending on another day. In the circumstances and whilst his evidence could be considered crucial, absent cross-examination, I must exercise a significant degree of circumspection as to the weight I attach to his witness statement. The thrust of Mr. Zayas's witness statement is that, following a creditors' meeting, he met Delicado for the first time and that following the meeting, they went for coffee and that Delicado stated that the debt due to him was of the order of Pta. 100m.; that these moneys had been invested with BR and were aimed at the sale and purchase of gold coins and foreign exchange.

21 Mr. Soneji's evidence certainly supported the existence of a debt in favour of Delicado, which according to Mr. Soneji, was of Pta. 80–85m. Mr. Soneji also confirmed that the eight agreements relied upon by Delicado as evidencing the debt were signed by him. In line with Delicado's evidence, Mr. Soneji also confirmed that whilst he had paid interest on the moneys, he had never repaid any capital and that he had used Delicado's moneys as working capital.

22 Mr. Soneji was a witness who, whilst forthcoming on certain issues, was evasive on others and, when testifying, I advised him of his right not to answer questions if by doing so he could incriminate himself. The explanation which he gave with regard to the financial collapse of his business in June 1999 requires an absolute suspension of disbelief for it to be accepted. Vague as it was, the explanation he gave was that in 1999, the value of the Spanish peseta was very low and was constantly fluctuating and he made a loss. More significantly, he also went on to say that at that time he had some eight long-standing customers who bought Spanish pesetas and gold coins, but after taking them, failed to pay for them. He said that these customers were not Gibraltar residents—that one was Moroccan, that two or three were Spaniards and the rest were

Englishmen—that he had no idea where they lived, save that the Englishmen, he thought, came from the Costa del Sol, and that he had no telephone contact numbers for them, that he suffered a loss of about Pta. 65m., that he does not know whether these customers knew each other, and he does not know why they let him down.

23 There was also a demonstrable inability on Mr. Soneji's part to explain the precise nature of some of the business undertaken at the bureau. He testified that he had never transferred money out of Gibraltar from the bureau, which he was clearly at odds with various transfer documents produced, which he was unable to explain despite the substantial moneys involved. A proper inference to be drawn would be that the business conducted by Mr. Soneji was not wholly transparent.

24 Given the foregoing, it is apparent that I do not consider Mr. Soneji as a witness who could properly be described as either credible or reliable. Moreover, and for reasons which I deal with in a different context, it is clear that Mr. Soneji feels that he has been swindled out of the bureau by Aswani and therefore his motivation in testifying in a manner which runs counter to Aswani's interest also needs to be taken into account. In the circumstances, I attach very little weight to Mr. Soneji's evidence when determining the existence of the debt and the sum due to Delicado.

25 The manner in which Delicado sought to pursue the recovery of the moneys in 1999 also raises issues. By letter dated November 8th, 1999, Messrs. Isola & Isola wrote to BR enclosing five letters, each signed by Delicado, demanding payment in respect of five of the loan agreements but failing to make reference to the remaining three. The explanation given by Delicado is that demand for the full amount was not made because, on the advice of Mr. Hernandez of Isola & Isola, he only pursued payment for part of the amount due, on the assumption that it was more likely that a lesser amount would be paid.

26 Significantly, by letter dated November 12th, 1999 from Mr. Ellul to Isola & Isola (to which I shall have cause to return in a different context later), Mr. Ellul questioned the indebtedness claimed and stated:

> "When Manolo & Co. Ltd. was informed at a meeting of all creditors, including your client, as to the indebtedness of our client to each of them, your client declared that he was owed £57,000 and not the amount stated in the letters. Indeed, Mr. Hernandez of your own firm was present at the meeting when the list of amounts due to each creditor was drawn up."

No substantive correspondence followed and unfortunately, Mr. Hernandez has not been called to testify.

27 It is not in dispute that, about this time, Delicado received monthly payments of £1,000, which was physically paid to him by Aswani. When

these payments ceased, Delicado did not pursue matters through solicitors. He says that the reason for this was that he could not afford legal representation and that his efforts were focused in rebuilding his life and trying to make money through his business in Spain.

28 In or about April 2003, Delicado instructed Mr. Bernard Vaughan with regard to the recovery of the moneys at that stage and thereafter. The claim has, in essence, been for the sums pleaded in this action.

29 It is in the context of this quagmire of conflicting and unsatisfactory evidence that I must determine, on balance, whether moneys are due to Delicado and, if so, the sum.

30 Fundamental to my finding as regards the debt, is the testimony of Delicado. Whilst there may be an element of circumspection in the particulars of claim and his witness statement, when giving oral evidence I found that his testimony certainly had a ring of truth. I perceived Delicado to be a credible witness, and I reach this conclusion without ignoring a raft of matters which can properly be said to challenge that perception. Delicado was willing to have loan contracts backdated because it suited Mr. Soneji's accounting; and he gave a somewhat limited explanation as to the provenance of substantial moneys, and through Messrs. Isola & Isola, he initially claimed part, but not the full amount. Moreover, I have not had the benefit of the evidence of Mr. Hernandez, who could well have confirmed that the demand for part only was merely tactical, and it is also unfortunate that I have not had the benefit of having Mr. Zayas cross-examined.

31 Notwithstanding the issues I have raised which challenge Delicado's testimony, I have little doubt that BR owed Delicado moneys. What causes the difficulty is determining the amount. On balance, and reminding myself that the onus of proof is on Delicado, by the slightest of margins, I find that it is more likely than not that BR is indebted to Delicado for the principal sums claimed.

**Limitation**

32 In essence two issues arise. Is it open to the second to fourth defendants to rely upon limitation as a defence when it is not relied upon by the debtor? And, do the undisputed eight or so payments of £1,000 each amount to an acknowledgment by part-payment?

33 It is apparent that a party is not obliged to rely on limitation as a defence, if he chooses not to. In this case, BR filed an acknowledgment of service, but did not file a defence. The action for the simple debt, which I have found proved, is exclusively against BR, and limitation not having been raised, Delicado is entitled to judgment as against it, in respect of all of the agreements, including those which could have been found to be

time-barred. The causes of action against the other defendants, for misrepresentation and fraud, whilst dependent upon the existence of the debt are not strictly for the loans, but in respect of an alleged assignment of the loans.

34 Although given my determination, it is not strictly necessary for me to consider the effect of the part-payments, I shall, albeit briefly, deal with that issue. Section 29(4) of the Limitation Act 1960 provides:

> "Where any right of action has accrued to recover any debt . . . and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment . . ."

35 *Chitty on Contracts*, 28th ed., para. 29–100, at 1436 (2001) (dealing with the equivalent provision in England and Wales), makes it clear that a payment does not acquire the character of being "in respect of" a distinct debt by the act of the creditor, but only by that of the debtor or his agent. The letter of Mr. Ellul of November 12th, 1999 denies the existence of the debt, other than for the £57,000, therefore the eight or so payments of £1,000 could only be said to be in respect of the two loans amounting to £57,000 and not of any of the other loans.

**The assignment of the debt**

36 It is not in dispute that when BR found itself in financial difficulties that Aswani, through Manolo & Co., who was owed £50,000 by BR, intervened. Aswani, certainly a shrewd businessman, saw an opportunity not only to recoup the money he was owed, but also to make profit. To that end, it is apparent that he was instrumental in brokering the deal whereby the minor creditors were paid 50p in the £1, and his encouraging Mr. Soneji to cash in certain insurance policies so as to pay (according to Aswani), the minor creditors.

37 By an agreement in writing in the nature of a facility letter dated August 11th, 1999 between Manolo & Co. and BR, Manolo & Co., so as to allow BR to continue to operate the bureau, provided BR with a daily revolving credit of £100,000 in consideration of 50% of BR's daily gross profits. Although not recorded in the facility letter, according to Aswani (and this is supported by a very poor copy of a draft agreement dated July 1999) Mr. Soneji received a salary of £2,000 whilst BR's share of the profits was used towards the payment of creditors other than Manolo & Co.

38 At about this time, Delicado entered into an arrangement whereby he received £1,000 per month, which payments were, according to him, to continue until reviewed, with the ultimate aim of satisfying the debt due.

According to Delicado's witness statement this arose consequent upon an oral agreement whereby Manolo & Co. assumed responsibility for BR's debt in consideration for Delicado not seeking to enforce the debt.

39 According to Delicado, the payments were effected by Manolo & Co. When cross-examined, he said that the £1,000 offer had been made by Aswani in the presence of Mr. Soneji—that he was aware that Aswani/Manolo & Co. was to finance BR, but Delicado could not say where his £1,000 payments came from, only that they were physically paid over by Aswani in the Manolo & Co. premises at Casemates. Unfortunately, the receipts handed over by Delicado were, according to Aswani, boxed up with Manolo & Co. papers when he ceased trading from the shop at Casemates. Aswani denied Manolo & Co. was responsible for the payments, he testified that they were made by BR, albeit he accepted physically making the payments because Delicado did not want to do business directly with Mr. Soneji.

40 The only contemporaneous document which can be said to shed some light on this issue is a letter from Mr. Eric Ellul, of Messrs. Eric C. Ellul & Co., to Isola & Isola of November 12th, 1999, and a subsequent fax of November 23rd, 1999, when he confirmed that he was acting both for BR and Manolo & Co. It is useful to set out the letter in full:

> "We are instructed to acknowledge the receipt of your letter dated November 8th, 1999, enclosing five separate letters from your client, Mr. Jose Delicado Montesinos, claiming the payment of certain moneys from our client.
>
> One of our client's creditors, Manolo & Co. Ltd., has entered into an agreement with our client to re-finance our client's business in order to assist it in repaying all existing creditors. In this connection, Manolo & Co. Ltd. entered into a verbal agreement with your client some time in July or August of this year, under the terms of which, Manolo & Co. Ltd. agreed to pay your client £1,000 per month for the first three months following thereafter. This sum was duly paid and collected by your client. It was further verbally agreed that in February of next year, by which time all the other creditors will probably have been fully paid off, the matter would be reviewed and a decision taken as to the best way to repay him the balance of the moneys due to him.
>
> In such circumstances, our client is surprised that your client should have disregarded such agreement and is now seeking immediate payment.
>
> Our client is unable to pay your client's debts within the period required by him in his letters. Your client must bear in mind that Manolo & Co. Ltd. has paid off a number of the other creditors

relying entirely upon your client's agreement as previously mentioned. However, had it not been for your client entering into such agreement with Manolo & Co. Ltd., the latter company would neither have paid off the other creditors nor re-financed our client in order to enable it to carry on trading. If your client is now intending to resile from the verbal agreement, Manolo & Co. Ltd. will need to pursue its legal remedies against your client for the recovery of all moneys laid out by virtue of such verbal agreement as aforesaid.

When Manolo & Co. Ltd. were informed at a meeting of all creditors, including your client, as to the indebtedness of our client to each of them, your client declared that he was owed £57,000 and not the amount stated in his letters. Indeed, Mr. Hernandez of your own firm was present at such meeting when the list of amounts due to each creditor was drawn up.

We have advised our client that the only proceedings your client can issue against our client is to have the company wound up. In those circumstances, our client's company will be prevented from generating income out of which your client can be paid off. In addition, if such proceedings are issued by your clients, Manolo & Co. Ltd. will need to issue proceedings against your client for the recovery of all moneys laid out by them relying upon your client's verbal agreement with them as aforesaid.

In all of the circumstances, we are instructed to propose that nothing is done by either side until the whole matter is reconsidered in February of next year as originally agreed, by which time our client's financial position will be clearer and it will be possible to enter into a formal agreement with your client setting out a programme of repayment of the amount due to him."

41 In essence Mr. Ellul's evidence was that although he was formally instructed by BR, given that Manolo & Co. was assisting his client, he was willing to set out, in the letter to Isola & Isola, certain points which Aswani wanted to make. Aswani, for his part, denied ever having instructed Mr. Ellul to act for him and asserted that he never instructed him to write on the terms of the letter dated November 12th. I certainly prefer the evidence of Mr. Ellul, particularly as it would be highly unusual for such a detailed position to be recorded in a letter absent instructions. It is not however a material issue. The reference to "[o]ur client is unable to pay your client's debts . . ." was, according to Mr. Ellul, a reference to BR and not to Manolo & Co. and there is nothing otherwise on the face of this letter which would support Delicado's contention as regards the alleged assignment of the debt.

42 In any event, given a debt of some £400,000, an assignment makes no commercial sense. Moreover, when Delicado was cross-examined, he

accepted that he was owed the principle amount by BR and not by Manolo & Co.—that this must have been Delicado's understanding throughout is also apparent from the pre-action letters drafted by Isola & Isola and addressed to BR; and later, by Mr. Bernard Vaughan's letters to Mr. Ellul and BR. In the circumstances, there is no evidence upon which to find that the debt was assigned to Manolo & Co.

**Misrepresentation**

43 Although there is some confusion about dates, some time in mid-2000, the monthly payments ceased. According to Delicado, Aswani told him that a company had bought BR's business, that neither he nor Manolo & Co. had any involvement with BR, and that therefore, no further payments would be effected. Aswani, when cross-examined, accepted that a conversation along those lines took place, albeit he could not recall the exact words and he said that it took place in November rather than in mid-June. Such a statement by Aswani (given his directorships and interest in BR, Newmill and Manolo & Co.) was, in my view, certainly a misrepresentation.

44 It was, however, a false representation from which, to my mind, no legal consequences flow. Delicado's pleaded case is that, in reliance upon the misrepresentation, he did not pursue Manolo & Co. Having found that there was no assignment of the debt to Manolo & Co., there is no basis upon which it can be said that Delicado suffered a loss which flowed from the misrepresentation.

**Fraudulent conveyance of BR's *bureau de change* licence**

45 In June 2000, Mr. Soneji was arrested on a warrant following a request for extradition to the United Kingdom in connection with money laundering offences. Following an application by H.M. Customs for the cancellation of the *bureau de change* licence on June 7th, 2000, the Licensing Committee for Bureaux de Change suspended BR's licence.

46 Mr. Ray Pilley, Mr. Soneji's solicitor at the time, attempted to have the suspension of BR's licence lifted and entered into discussions with the OFDS. According to Mr. Pilley, the primary concern of the OFDS was to ensure that the bureau was run by a reputable person. As part of trying to satisfy the OFDS, on June 14th, certain share transfers were undertaken whereby, out of the 1,000 authorized and issued shares, 500 shares beneficially owned by Mr. and Mrs. Soneji were transferred to Aswani and 500 shares also beneficially owned by Mr. and Mrs. Soneji were transferred to Mrs. Soneji. Mr. Soneji then resigned as director, and whilst Mrs. Soneji remained a director, two new directors were appointed, namely Aswani and a Mr. David Smith.

47 According to Mr. Pilley, as part of the process of trying to persuade

the OFDS to lift the suspension of the licence, a change of name from BR to Newmill Investments Ltd. was contemplated. However, as appears from a letter of August 10th, 2000, the position evolved; and it was suggested to the OFDS that a company of that name could be incorporated of which Aswani would be the sole director and shareholder.

48 According to Mr. Soneji, one evening Aswani called his wife and told her that she was to transfer her 500 shares in BR to Newmill and although his wife did not wish to do so, she had to because Aswani said that if she did not do so, he would withdraw the money he had put up as bail for Mr. Soneji. Curiously, Aswani did not wholly demur from this when put to him; rather the thrust of his evidence was that he could not recollect threatening with the withdrawal of the bail money, but that maybe he said it in a different way—that he could not remember anything like that, but that if he did it, it was for a reason. Notwithstanding the great reservations to which I have alluded previously, with regard to Mr. Soneji's testimony, when he dealt with issues concerning the transfer of the shares in BR and the manner in which these were obtained by Aswani, I perceived in Mr. Soneji a real sense of injustice.

49 It was not in dispute that Mrs. Soneji received no actual payment for her shares in BR. According to Mr. Soneji, they were told by Aswani and Mr. Pilley that the shares would be returned to her when the case against him was over. This understanding is certainly substantiated by the terms of a letter from Mr. Pilley to the OFDS of August 10th, 2000, where he states that he has "prepared a short agreement providing an option for Mrs. Soneji to re-acquire her shares in the event the matters presently outstanding in respect of her husband were cleared up."

50 Aswani's evidence, when cross-examined on these issues, was wholly disingenuous. He said that the aim was to get the licence and that to that end, he was used as a pawn. He also said that he did not remember instructing Mr. Pilley to prepare a share option agreement, and that he never agreed for Mrs. Soneji to be able to buy back her shares. Moreover, he asked the rhetorical question—why should he pay Mrs. Soneji for her shares, when it was his business which he was going to open?

51 Newmill, incorporated on September 13th, 2000, was, at all material times, a company whose issued share capital was held by Aswani, who was also its sole director. By letter dated September 15th, 2000 (a Friday), Mr. Pilley, *inter alia*, informed the OFDS that Newmill had had signs made which it intended to fit on the Monday with a view to opening on the Tuesday. Whilst the inference which may be drawn is that at the time of Newmill's incorporation, there was a substantial degree of certainty that the OFDS would be issuing a licence in its favour, it does not assist as to whether or not the new corporate vehicle was a requirement of the OFDS.

52 Whatever the motivation, as recorded in minutes of a meeting of the directors of BR, on September 15th, 2000, Mrs. Soneji resigned as director and transferred her 500 shares to Newmill and Aswani also transferred his 500 shares to Newmill. The consideration for the transfer of Mrs. Soneji's shares to Newmill is to be found in an undated agreement between her and Newmill which, curiously, was not drafted by Mr. Pilley, albeit witnessed by him, which provides for Newmill employing her on a full time basis at the bureau at a salary of £1,000 per month.

53 Aswani's evidence was that he did not think that the OFDS had forced Mrs. Soneji to transfer her interest in BR, but that rather the reason behind it as conveyed to him by Mr. Pilley, was that it had something to do with the landlords. He could offer no explanation as to why, if the licence was to be issued in favour of Newmill, the shares in BR were also transferred to Newmill.

54 According to Mr. Pilley, the aim was to salvage the situation; that initially it became apparent that the licence would not be reinstated if Mr. Soneji remained involved and at a later stage, it also became apparent that Mrs. Soneji would not be allowed to be involved. In my view, of the utmost significance, Mr. Pilley also testified that Aswani had no preference between a change of name and a new company and that the representations made to the OFDS evolved, in response both to correspondence and conversations with them—that it was as a consequence of their trying to satisfy the Committee, that the suggestion of incorporating Newmill came about.

55 The tenor of correspondence passing between Mr. Pilley and the OFDS, to my mind, corroborates his evidence. In a letter to the OFDS dated July 21st, 2000 he states:

> "It occurred to me after the hearing that to change the name of the company would be a very simple matter and may meet any concerns the Committee has about references to BR Investments Ltd. in criminal proceedings in England and extradition proceedings here in Gibraltar.
>
> . . .
>
> Finally, to the extent the Committee may have been concerned that the continued involvement of Mrs. Soneji . . . could create in the minds of the public an impression that the restructuring is merely cosmetic. I would be prepared to suggest to Mrs. Soneji that she resign as a director and shareholder and her shares be transferred to Mr. Aswani subject to an option to re-purchase . . ."

Subsequently in another letter to the OFDS of August 31st, 2000, he stated:

> "I write further to my letter of yesterday, since which time I have seen articles in both the *Gibraltar Chronicle* and *Panorama* (copies of which are enclosed for ease of reference). Given the reference to BR Investments, the Committee may take the view that the suggestion in . . . my letter dated August 10th may be the most satisfactory."

56 The earlier suggestion was the incorporation and grant of the licence to Newmill. On September 21st, 2000, Mr. Pilley once again wrote to the OFDS and on this occasion stated:

> "She [Mrs. Soneji] fully understands and accepts that there should be no overt link between the bureau, her husband and herself. Further, the decision of Mrs. Soneji to transfer her shares to Newmill Investments Ltd. and the relinquishing of her beneficial ownership is an action she has taken quite separately to the requirements of the Committee—in other words she does not regard the decision of the Committee to allow the bureau to continue trading to have in any way influenced or coerced her into transferring her shares."

57 The inference which I draw from this letter is that although the OFDS did not want Mrs. Soneji linked to the bureau, equally, they did not want to be seen to be pressurizing her into disposing of her interest in it. By letter also dated September 21st, 2000, the Financial and Development Secretary wrote to Mr. Pilley on the following terms:

> "I am content for Newmill Investments Ltd. to reopen the bureau, formerly BR Investments Ltd., on the basis set out in correspondence over the past few weeks. Mr. Gomez will sort out the re-issue of the licence in the changed name . . ."

58 The licence which was issued was, in fact, the existing licence with a line through BR, substituted by Newmill, and endorsed to reflect that the licence which had been issued on October 15th, 1999 had been amended on September 22nd, 2000. Section 20 of the Bureaux de Change Act provides that: "[n]o Licence shall be transferable." In a letter to the OFDS dated September 10th, 2000 Mr. Pilley referred the Committee to s.26(7)(a)(ii) of the Bureaux de Change Act which provides:

> "On hearing an application for the cancellation of a licence—
>
> (a) where the Committee is satisfied that any ground or grounds on which cancellation is sought have been established, it may—
>
> . . .
>
> (ii) vary or add to the conditions of the licence . . ."

59 In the context of a letter in which he deals with the possibility of either changing the name of BR to Newmill or incorporating a company of

that name, Mr. Pilley proffered the view that the provision granted the Committee a "wide and unfettered discretion capable of embracing the proposal . . ."

60 In parallel to the suspension of the *bureau de change* licence on July 19th, 2000, the landlord to the premises from which the business was conducted, purported to exercise a right to peaceable re-entry consequent upon rent arrears. On July 21st, 2000, the landlord's solicitors wrote to Mr. Pilley stating that the forfeiture had arisen on the basis that the managing agent had stated that BR had confirmed that no further rent would be paid. They also stated that they were instructed to hand back the keys to Mr. Soneji, and enclosed the keys with the letter. It was apparent from the subsequent correspondence between the landlord's solicitors and Mr. Pilley that BR remained in occupation of the premises. Particularly telling, I think, is a letter from Denton Wilde Sapte to Mr. Pilley of January 16th, 2001 in which the following passages are to be found:

> "You are also aware that BR Investments Ltd. entered into a fixed term lease for the premises for five years commencing on June 1st, 1993. The fixed term expired on May 31st, 1998. BR Investments holds over on a monthly periodic tenancy under the Landlord and Tenant Act 1983.
>
> . . .
>
> We have now been instructed by our client to write to you to propose terms for the surrender of the existing lease and for the grant of a new lease to BR Investments Ltd. . . ."

61 The terms of the correspondence do not, in my view, tally with the evidence contained in Mr. Pilley's witness statement that "at no stage did the landlord enter into a new agreement with BR after it had determined the lease by peaceable re-entry." It is unfortunate that this aspect of Mr. Pilley's evidence was not explored in cross-examination.

62 It is against this evidential and statutory matrix that I must determine whether the acquisition by Newmill, of the *bureau de change*, amounts to a fraudulent conveyance. Mr. Azopardi relies on the Fraudulent Conveyances Act 1571, which is "An Acte Agaynst Fraudulent Deedes Gyftes Alienations, &c." The purpose of this statute is to render voidable conveyances made with the intent to defraud creditors.

63 The issues requiring determination are, I think, these: (i) whether the re-issue of the licence amounts to a disposition of "property"; and (ii) as it is apparent that there was no consideration passing between Newmill and BR, whether Newmill/Aswani has therefore disproved an intent to defraud creditors.

64 Counsel have not taken me in any detail to the Statute of Elizabeth.

Rather, and although the Law of Property Act 1925 does not apply in Gibraltar, it is implicit in the authorities cited that Mr. Azopardi relies on that. I am urged to rely upon the definition of "property" found in that statute when considering the applicability of the Statute of Elizabeth. Section 205(1) of the English Law of Property Act 1925, defines "property" as including "any thing in action, and any interest in real or personal property." That definition is, in essence, not dissimilar from that to be found in s.2 of the Interpretation and General Clauses Act 1962.

65 There can, I think, be little doubt that the licence is a valuable asset in that it is the basis of what is, on the evidence before me, a profitable business. However, irrespective of the statute one turns to for the purposes of defining "property," in applying the Statute of Elizabeth, what needs to be considered is whether the *bureau de change* licence is property from which a creditor could obtain satisfaction of his debt (see 18 *Halsbury's Laws of England*, 4th ed., para. 371, at 174 (1977)).

66 I do not ignore the fact that Aswani, with beneficial interests in Manolo & Co. (a creditor of BR) and in BR, obtained BR's only substantial asset through the medium of Newmill. However, given the provisions of the Bureaux de Change Act (albeit cognizant that the OFDS are not a party and have not had the opportunity to make submissions), I am of the view that the *bureau de change* licence was, in essence, improperly transferred to Newmill contrary to the express provisions of the Act. In my view, the licence was not capable of being re-issued to Newmill and upon such an understanding, it is not properly "property" from which a creditor could obtain satisfaction. Were I to hold that (notwithstanding my aforesaid determination) the fact that the licence was transferred allows for a creditor to rely upon the Statute of Elizabeth, this would have the effect of sanctioning what, in my view, was an *ultra vires* act. It may be that the position would be otherwise if the claim were by a liquidator of BR asserting a constructive trusteeship in respect of the profits of Newmill.

67 Notwithstanding that it is not strictly necessary, given the foregoing determination, it is right that I consider the issue of intent.

68 I am certainly of the view that Aswani's assumption of control of BR came about as a consequence of what could generously be described as sharp commercial practice. I am also of the view that he misrepresented the position to Delicado in the manner I have dealt with before. However, the issue is not the change of beneficial ownership of BR or his seeking to avoid creditors of BR by misrepresenting the ownership of the bureau.

69 The fundamental act in respect of which Aswani must disprove intent, is simply that of the re-issue of the licence in favour of Newmill. It is fair to say that I am unable to draw anything from Aswani's own evidence which supports his case. To my mind, his live evidence was

generally unhelpful and, on occasion, he seemed intent to avoid or obfuscate matters. The only substantive evidence upon which Aswani/ Newmill can rely to disprove the intent to defraud is that of Mr. Pilley. Certainly, I found him a credible witness, albeit apparent that as regards the issue of BR's leasehold interest, his evidence did not accord with the contemporaneous correspondence, and therefore it would appear that his reliability has been compromised by the passage of time.

70 However, his is the only direct evidence as regards the re-issue of the licence to Newmill and his testimony is, on the whole, supported by the tenor of his letters to the OFDS. On the evidence before me, on balance, I do not see Aswani's hand in the re-issue of the licence to Newmill. I accept Mr. Pilley's evidence that it came about consequent upon his trying to salvage the position and his persuading of the OFDS. The outcome may have had the effect of securing Aswani's position as against creditors of BR, but it was not of his making.

71 I shall hear counsel on the orders which are to issue and on costs.

*Order accordingly.*