BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL No. 8 of 1 995

BETWEEN:

VILLAGE CAY MARINA LIMITED Appellant

and

JOHN ACLAND
LANDAC DEVELOPMENT LIMITED
RHYTO INVESTMENTS LIMITED
JOHN GREENWOOD

and

BARCLAYS BANK PLC Respondents

Before:The Rt. Hon. Sir Vincent Floissac Chief Justice of Appeal
The Hon. Mr. C.M. Dennis Byron Justice of Appeal
The Hon. Mr. Satrohan Singh Justice of Appeal

Appearances:
Dr. Fenton Ramsahoye Q.C. and Mr. G. St.C. Farara for the Appellant
Mr. J.S. Archibald Q.C., Mr. S. Bennett and Mr. A. Blackman for the Respondents
Mr. R. Webster and Mr. P. Dennis for the Third Party.

1996: January 16, 17 & 18;
May 13.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

At all material times, the appellant (Village Cay Marina Limited or VCM) was the registered proprietor of a long lease from the Crown of a parcel of land (Parcel 34/1) situate at Wickhams Cay 1 in Tortola and registered as a parcel of Block 2937B of the Road Town Registration Section. Parcel 34/1 (which is also known as Plots 53 A and 53 B) is adjacent to the appellant's marina and its proposed development is metaphorically the soil wherein the 12 seeds of

the disputes in this case were sown.

The first seed was sown on 9th November 1988 when the appellant issued and registered a debenture (the Debenture) in favour of the Third Party (Barclays). Under the Debenture, the appellant granted to Barclays a first fixed charge on its fixed assets and a floating charge on its other properties. The Debenture prescribed the events upon the happening of which the moneys secured by the Debenture immediately became payable and authorised Barclays, in those events, to appoint a Receiver and Manager with authority to perform certain acts as agent for the appellant.

The second seed was sown on 29th November 1988 when the first respondent (Acland) and Clifford Plaisance (who was then the major shareholder and a director of the appellant) executed an agreement which is herein conveniently referred to as the Parental Agreement. The evident object of the Parental Agreement was the development of the appellant's Parcel 34/1 by the construction of dwelling units thereon. The development was required to be effected by a company the shareholders of which would be Acland and Clifford Plaisance. The second respondent (Landac) was the company subsequently incorporated for that purpose on 8th March 1989.

Under the terms of the Parental Agreement, Acland was required to grant to the company (Landac) a loan in the sum of $150,000.00 "for the purpose of financing start-up costs, such sum to be repaid by the company primarily out of the proceeds of sale of units comprised in the development". The Parental Agreement also provided for the allotment of the shares in the capital of the company and for the appointment of the officers of the company. Acland would be allotted 51% of the shares and would be appointed sole director.

Clifford Plaisance would be allotted 49% of the shares and would be appointed secretary.

Clause 5 of the Parental Agreement provided (inter alia) as follows:

"Plaisance shall arrange for the above-mentioned Plots 53A and 53B to be made available to the company for purposes of **carrying out the** development. and shall further arrange for Village Cay Marina Limited, either for no consideration or for a nominal consideration only as the company may think fit, as lessee under a Crown Lease of the said Plots, to enter into an option agreement with the company providing for the sale to the company or to its nominees as described below, of subleases of the said Plots or subdivisions thereof, such contract to be completed within five years from the commencement of work in connection with the development……. The said option agreement shall provide for the Plots or subdivisions thereof to be transferred to the Company for no consideration or to its nominees for such monetary consideration as may be required by the company provided that Plaisance shall ensure that the company and not Village Cay Marina Limited shall receive the whole of any such monetary consideration……."

Clause 6 of the Parental Agreement provided as follows:

"This agreement is conditional upon an agreement being reached with Barclays Bank as mortgagee of Plots 53A and 53B whereby Barclays Banic shall agree not to enforce against Plots 53A and 53B any rights it may have arising out of the default of Village Cay Marina Limited and not to enforce against the land charged to Barclays Bank adjacent to Plots 53A and 53B any rights it may have arising out of the default of the company, such agreement to be in terms acceptable to Acland."

The third seed was sown on 1 7th January 1989 when the appellant's and Acland's solicitor (Richards Parsons) wrote a letter to the Manager of Barclays and therein suggested that Parce 1 34/1 be withdrawn from the purview of the Debenture upon payment to Barclays of the sum of $150,000.00. The penultimate paragraph of the letter reads:

"The Bank at present holds a debenture over VCM's property, but no land charge over Parcel 34/1, being the parcel on which the development is planned to take place. As we discussed yesterday, it is necessary for the protection of Landac that its obligations to the bank be "compartmentalized". It is suggested therefore that the Bank and VCM execute a document excluding Parcel 34/1 from the terms of the debenture, the consideration being the payment of the $150,000 to reduce VCM's debt to the Banic. VCM would then execute a land charge over the parcel solely to secure Landac's borrowing. The documentation would be authorised by resolutions of the shareholder and sole director of VCM."

The fourth seed was sown on 29th May 1989 when Landac issued a cheque (the controversial cheque) in favour of the appellant in the sum of $150,000.00. On that cheque was inscribed the ambiguous words "as per agreements". These words have generated a dispute as to the object of the controversial cheque.

Acland and Landac contend that the controversial cheque relates to an oral agreement (the Oral Option Agreement) entered into between the appellant (represented by Clifford Plaisance) and Landac on the same day (29th May 1989). Acland testified that under the Oral Option Agreement, the appellant granted to Landac or its nominees an option to **purchase** subleases of Parcel 34/1 or subdivisions thereof at the price of $1.00 each. According to Acland, the controversial cheque represented the agreed market value of Parcel 34/1 and was intended to be the consideration for the grant of that option.

The appellant contends that the controversial cheque relates to clause 6 of the Parental Agreement and the letter dated 17th January 1989 from Acland's solicitor to the Manager of Barclays. According to the appellant, the controversial cheque was intended to be the consideration for the withdrawal of Parcel 34/1 from the purview of the Debenture.

The fifth seed was sown on 10th July 1989 when the appellant specifically charged Parcel 34/1 to Barclays to secure the payment of "all monies and liabilities hereby agreed to be paid or discharged by the Chargor, including an initial facility in the sum of Seven hundred and sixty dollars ($760.000) with interest at the rate from time to time charged by the Bank (hereinafter called "the mortgage debt") repayable on demand." The appellant

adduced this specific charge as evidence of the withdrawal of Parcel 34/1 from the Debenture.

The sixth seed was sown on 16th May 1990 when **a writ of fieri** facias was issued against the properties of the appellant in satisfaction of a judgment in favour of Dougal Thornton in suit No.84 of 1989. This writ has aroused a debate as to whether its issue is a valid ground for the appointment of a Receiver and Manager of the properties charged under the Debenture.

The seventh seed was sown after the sudden death of Clifford Plaisance on 19th January 1990. It was sown on 29th June 1990 when the appellant (represented by Kim Plaisance) and Landac entered into a written agreement (the Written Ratification) "hereunder in consideration of the sum of $ 150,000.00 paid by Landac to the appellant and receipt whereof the appellant thereby acknowledged, the appellant granted to Landac an option to purchase sub-leases of portions of Parcel 34/1 at the price of $1.00 and consented to the registration of the agreement as a "caution against the title of Parcel 34/1". Acland and Landac contend that the Written Ratification is written ratification of the Oral Option Agreement and the option allegedly granted thereunder. The appellant disavows the authority of Kim Plaisance to have executed the Written Ratification on behalf of the appellant and contests the validity of the Written Ratification on this and other grounds.

The eighth seed was sown on 24th September 1990 when Barclays wrote to the appellant in these terms:

"We write to advise you that the overdraft outstanding on the company account as at the close of business on September 21, 1990 was $782,647.50 debit.

As you are aware, this overdraft has been allowed pending drawdown on a second loan of $750,000.00 previously agreed by us.The purpose of this letter therefore is to demand a minimum sum of $32,647.50 which has to be deposited within 24 hours to bring your account back into order. In addition, we would remind you of further interest due at the month end, and this should also be taken into account.

Failure to comply with this request will result in the Bank taking whatever action it deems necessary to protect its position."

This letter raises the question as to whether Barclays had thereby waived its contractual right to appoint a Receiver and Manager on the ground of Thornton's writ of execution.

The ninth seed was sown on 23rd August 1991 when Barclays (purporting to act "in pursuance of the power conferred on us by clause 9 of the Debenture") appointed the fourth respondent John Greenwood (the Receiver) to be "the Receiver and Manager of the property charged by the above Debenture". The appellant challenges the validity of that appointment on the ground that in so far as it purports to be based on the issue of the writ of execution in suit No.84 of 1989, that suit was irregular and was subsequently set aside on 30th September 1994.

The tenth seed was sown on 23rd September 1991 when the appellant (represented by the Receiver) granted to the third Respondent (Rhyto) nine underleases registered as instruments numbers 1429 to 1437 of 1991 with respect to Parcels numbers 34/1/10 to 34/1/18 inclusive. The appellant opposes the validity of these nine underleases on the grounds (inter alla) of the alleged invalidity of the Receiver's appointment, an alleged total failure of consideration therefor and alleged fraud and conspiracy.

The eleventh seed was sown on 27th August 1992 when the appellant, the Receiver, Barclays and the Estate of Clifford Herbert Plaisance each

executed a document entitled "Release" "hereunder the signatory purported to grant a release from liability. One of those documents is a release (the VCM-Receiver Release) **executed by the** appellant in favour of the Receiver. The appellant disputes the validity and effectiveness of the VCM-Receiver Release.

The twelfth and final seed was sown when by letter dated 24th September 1992 to the solicitors for the appellant and for the executors of the estate of the late Clifford Plaisance, Acland declined to register the transfer by Debra Plaisance to the appellant of the 49 shares originally held by Clifford Plaisance in the capital of Landac.

On 29th September 1992 or 5 days after the twelfth and final seed was sown, the appellant instituted suit No. 198 of 1992 against the 'respondents. In its Amended Statement of Claim in that suit, the appellant claimed (1) the avoidance of the Written Ratification and the 9 underleases to Rhyto (2) rectification of the Land Register by deletion of the entries therein relating to the 9 underleases (3) retransfer to the appellant of properties held by Acland and Landac (4) damages for fraud, conspiracy to defraud, misrepresentation, negligence and wrongful alienation and disposition of property (5) damages against the Receiver for breaches of fiduciary duties (6) an account of monies had and received by the respondents for the use of the appellant and (7) an order for the registration of the appellant as shareholder of 49 shares in the capital of Landac.

The action was tried by *Georges J.* By judgment dated 28th August 1995 and occupying 88 pages of foolscap, the learned judge dismissed the appellant's action and Landac's and Rhyto's counterclaims and awarded costs

against the appellant. The appellant is dissatisfied with the judgment and has appealed against it.

Basically, the disputes between the appellant and the respondents are with respect to the validity or otherwise of the option granted to Landac, the validity or otherwise of the nine subleases granted to Rhyto and the wrongfulness or otherwise of Acland's refusal to register the transfer to the appellant of the 49 shares in the capital of Landac.

The 8 significant issues discernible from the appellant's 38 grounds of appeal are (1) whether the Oral Option Agreement was proved (2) whether the controversial cheque was intended to be consideration for the option granted to Landac under the Oral Option Agreement or consideration for the withdrawal of Parcel 34/1 from the purview of the Debenture (3) whether Kim Plaisance was authorised to execute the Written Ratification on behalf of the appellant (4) whether the grant of the option to Landac is invalidated by the Non-Belongers Land Holding Regulation Act of the Virgin Islands (5) whether Parcel 34/1 was actually withdrawn from the Debenture (6) whether the appellant is estopped from challenging the validity of the Receiver's appointment (7) whether and to what extent the VCM-Receiver Release discharged and released the Receiver, Barclays, Acland, Landac and Rhyto from liability to the appellant and (8) whether Acland's refusal to register the transfer to the appellant of the 49 shares in Landac was wrongful.

(1) Proof of the Oral Option Agreement

The learned judge said: "There is no doubt in my mind whatsoever that the oral agreement of 29th May 1989 between Landac and VCM did in fact take place." That finding was based on the evidence of Acland who testified

that the Oral Option Agreement was initiated by Brian Sollitt (Barclays' Manager) and was reached on 29th May 1989 at a meeting which was held at Sollitt's office and at which Acland, Clifford Plaisance and Sollitt were present.

Acland's testimony was uncontradicted. The only persons who could have refuted that testimony were Clifford Plaisance (who was dead) and Sollitt (who had retired from Barclays and was living in South America).

Acland's testimony was supported by the controversial cheque if the proper inference to be drawn from the facts is that the controversial cheque related to the Oral Option Agreement and not to the suggested withdrawal of Parcel 34/1 from the Debenture. The testimony was also supported by the Written Ratification if Kim Plaisance was authorised to execute the latter. The testimony was further supported by the fact that two cheques for $150,000.00 each were issued by Landac to the appellant. The first cheque was issued on 1 8th April 1989. That cheque evidently represented the loan which Acland undertook to grant under the Parental Agreement. The acknowledgement in the Written Ratification of the receipt of the sum of $150,000.00 was admittedly a reference to the second or controversial cheque. If the controversial cheque does not relate to the suggested withdrawal of Parcel 34/1 from the Debenture, it could only have related to the alleged Oral Option Agreement.

This is therefore a case of a learned trial judge's finding based wholly or substantially on the credibility and substantiated evidence of a sole witness (Acland) whom the judge saw and heard in examination-inchief and under cross-examination and whose demeanour the judge had the advantage of observing in the unique atmosphere of the trial. The reasons given by the trial

judge for believing the witness (Acland) are 10 patently justifiable, satisfactory and tenable. Acland's testimony was not overridden, rebutted or falsified by any undisputed or indisputable fact or by the evidence critically examined as a whole. On the contrary, documentary evidence lends credibility to Acland's testimony.

In these circumstances, there is no justification for reversing the learned judge's finding that the Oral Option Agreement was in fact entered into. That finding of fact must therefore be sustained.

(2) **The object of the controversial cheque**

The object of the controversial cheque is signified by the words "as per agreements" inscribed on that cheque.

These words must have constituted a reference to agreements contemplated by Acland (who signed the cheque on behalf of Landac) and Clifford Plaisance (who received the cheque on behalf of the appellant). The agreements contemplated must have been those involving Acland and Clifford Plaisance themselves and/or Landac (the drawer of the cheque) and the appellant (the payee of the cheque). The only such agreements which were in existence at the time of the issue of the controversial cheque were the Parental Agreement between Acland and Clifford Plaisance and the proven Oral Option Agreement between the appellant and Landac. The common denominator of these two agreements was an option to purchase a sublease of Parcel 34/1. The Parental Agreement provided for the possibility of such purchase while the Oral Option Agreement in fact effectuated such purchase.

The suggestion that the words "as per agreements" relate to clause 6 of the Parental Agreement and to the letter dated 1 7th January 1989 from

Acland's solicitor to the Manager of Barclays is wholly untenable. The suggestion that the controversial cheque was intended to be consideration for the withdrawal of Parcel 34/1 from the purview of the Debenture as contemplated by the said clause 6 and the said letter is equally untenable. Barclays was not bound either by the said clause 6 or by the said letter. Neither clause 6 nor the said letter (which remained unanswered) constituted an agreement with Barclays to withdraw Parcel 34/1 from the Debenture. No such withdrawal could have been effected without an agreement to which Barclays was a party. No such agreement was proved. In those circumstances, the words "as per agreements" could not have related to any agreement with Barclays or to the withdrawal of Parcel 34/1 from the Debenture.

Consequently, the proper inference to be drawn from the circumstances of the controversial cheque is that the cheque was intended to be consideration for the option granted to Landac under the Oral Option Agreement and was not intended to be consideration for the withdrawal of Parcel 34/1 from the Debenture.

(3) Kim Plaisance's authority

The appellant impugns the validity of the Written Ratification on the ground that at the date of the execution of that document, Kim Plaisance was not a director of the appellant and did not have the appellant's actual authority to execute that document on behalf of the appellant. However, the learned judge found as follows:

"There can be no denying that Kim Plaisance concurred in charging VCM's property (Parcel 34/1) and executed the charge **created** by Instrument 1022/1989 dated 1 0th July 1989 to secure $760,000 from Barclays Bank as a loan to Landac. Kim Plaisance signed as director/secretary of VCM. Kim

Plaisance also executed subleases on behalf of VCM and signed other official public documents on behalf of VCM.

It would be true to say therefore that for all intents and purposes Kim Plaisance was a de facto director of VCM. On the company's 1989 annual return filed 30th October 1989, he is shown as one of two directors, the other being Clifford Plaisance."

This is therefore a clear case of ostensible authority or agency by estoppel.

The doctrine is explained in **Freeman V Buckhurst Park Properties** (1964) 1

AER 630. There *Diplock* L.J. said (at pp 645 & 646):

"The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, viz., bv permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do normally enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the "actual" authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance on such "apparent" authority that the agent had authority to contract on behalf of the company."

The doctrine is further explained in **Armagas Ltd v Mundogas S.A** (1986) 2

AER 385. There *Lord Keith* (delivering the judgment of the House) said (at pp

389 & 390):

"Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question."

Applying the law so stated to the facts found by the learned judge,

we should normally have concluded that Kim Plaisance had ostensible

authority to execute the Written Ratification on behalf of the appellant and that the appellant is estopped from denying that Kim **Plaisance had** actual authority so to execute that document. Further, by retaining and utilising the controversial cheque, the appellant must be deemed to have elected to ratify and adopt the Oral Option agreement.

However, the appellant contends in effect that there can be no estoppel in the face of a statute. The statute specified is the Non Belongers Land Holding Regulation Act (Cap 122) as amended by various Acts (including Act No.6 of 1994). The contention is expressed in ground 31 of the appellant's grounds of appeal. Ground 31 reads:

"Kim Plaisance executed the charge as a director. He was not a director but the deceased who also executed was a sole director entitled to do so. No estoppel of any kind arose. Further Kim Plaisance under the Non-Belongers Landholding Regulation Act would have required a licence to be a director and no estoppel could evade the Act."

The principle involved is summarised in Halsbury's Laws of England (Fourth Edition) Vol. 16 paragraph 1515 which reads:

"The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions. Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers. A petitioner in a divorce suit cannot obtain relief simply because the respondent is estopped from denying the charges, as the court has a statutory duty to inquire into the truth of a petition."

In **Kok Hoong v Leong Cheong Kweng Mines Ltd.** (1964) AC 993, Viscount Radcliffe (delivering the judgment of the Privy Council in an appeal from the Supreme Court of the Federation of Malaya) said (at p1 01 6):

"In their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of moneylending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public

generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise."

The fundamental question is whether the doctrine of agency by estoppel contravenes or circumvents the Non-Belongers Land Holding Regulation Act or violates some public or social policy underlying that Act. The answer to that question depends on the object and legal effect of the provisions of that Act. As its name implies, the Non-Belongers Land Holding Regulation Act is principally concerned with the holding of land and mortgages on land in the Virgin Islands. The Act prohibits such holding by unlicensed non belongers (including non-belonger companies). It defines a "non-belonger company" as including a company under non-belonger control. Section 6 of the Act deems a company to be under non-belonger control "if any of its directors is an unlicensed non-belonger."

However, the Non-Belongers Land Holding Regulation Act is not an invalidating Act. It does not invalidate a non-belonger's title to land or mortgages or his title to shares in a company or his offices in a company. As explained by the Privy Council in **Young v Bess** (1995) 46 WIR 165, such an Act merely renders such titles or offices voidable at the discretion of the Crown. The Act does not prescribe or indicate any immutable public or social policy which the Court is required to enforce. There can be no public or social policy involved in the concept of Statutory voidability per se.

In those circumstances, it cannot be said with justification that the doctrine of agency by estoppel contravenes or circumvents the NonBelongers Land Holding Regulation Act or transgresses some public or social policy underlying that Act. I would therefore conclude that Kim Plaisance had ostensible authority to execute the Written Ratification on behalf of the

appellant and that the appellant is estopped from denying that Kim Plaisance had actual authority so to execute that document. The Written Ratification (which was a mere repetition in writing of the Oral Option Agreement) purported to ratify and in fact ratified the Oral Option Agreement and the option to Landac granted thereunder even though the Oral Option Agreement was not expressly mentioned in the .\Vritten Ratification.

(4) **The validity of Landac's option**

Counsel for the appellant submitted that Landac's option was invalidated by the Non-Belongers Land Holding Regulation Act. In his Skeleton Arguments in support of grounds 12 and 26 of the appellant's grounds of appeal, counsel stated that "Landac was an unlicensed alien company which could not hold land or any interest in land and VCM could not legally make any contract or arrangement with Landac which created a trust as defined by section 15 of the Non-Belongers Land holding Regulation Act."

That submission is answered by the decision of the Privy Council in **Young v Bess** (1995) 46 WIR 165. There the Privy Council was required to interpret the Aliens (Land Holding Regulation) Act of Saint Vincent and the Grenadines which for all practical purposes is identical with the NonBelongers Land Holding Regulation Act. Delivering the judgment of the Board, Lord Jauncey said (at p 170):

"Construing section 3 in the context of sections 5 and 16, it is apparent that the legislature did not intend forfeiture to be automatic but rather that prohibition on land holding by an unlicensed alien could be enforced by a discretionary power of forfeiture vested in the Crown. The position in relation to section 4 is similar. It follows that the words "shall be forfeited" in sections 3 and 4(2) must be construed as "shall be liable to be forfeited" and "the time when the forfeiture took place" in section 5(1) is the time when the liability for forfeiture arose. Their lordships accordingly consider that *Lehrer v Gordon* (1964) 7 WIR 247 and *McMillan v Peters* (1988) (unreported) were correctly

decided and that *Chase Manhattan Bank NO v Kaffka (1984*) 33 WIR 132 and *Ramsaran v Attorney-General of St. Christopher and Nevis (1* 986) 38 WIR 160 should be overruled.

This construction means that the title remains in the alien until the Crown has obtained judgment under sections 5(1) and 16 when it vests in Her Majesty as from the time above referred to. There is no vacuum. The result is that the alien's title is voidable until the Crown obtains judgment and a bona fide purchaser from him would be protected……."

I would therefore repeat what I stated earlier. The Non-Belongers Land Holding Regulation Act is not an invalidating Act. It does not invalidate a non-belonger's title to land or any interest therein. It merely renders such title voidable at the discretion of the Crown. Accordingly, Landac's option remains valid until the Crown invalidates it by exercising the statutory and discretionary power of forfeiture in relation thereto.

(5) Withdrawal of Parcel 34/1 from the Debenture

Counsel for the appellant has drawn attention to the fact that on 10th July 1989, the appellant specifically charged Parcel 34/1 to Barclays to secure payment of liabilities "including an initial facility in the sum of .....$760,000." The appellant relies on that specific charge as proof of the actual withdrawal of Parcel 34/1 from the Debenture. But that specific charge is not inconsistent with the terms of the Debenture.

Clause 5 of the Debenture reads:

"THE SECURITY hereby given to the Debenture Holder shall be without prejudice and in addition to any other security by way of mortgage equitable charge or otherwise howsoever which the Debenture Holder may now or at any time hereafter hold on the property of the Company or any part thereof for or in respect of all or any part of the indebtedness of the Company to the Debenture Holder or any interest thereon."

The learned judge found that "There is no evidence whatsoever that the bank at any time excluded Parcel 34/1 from the Debenture. It was clearly reluctant and unwilling and in fact did not do so." The learned Judged added:

"In my view, it is quite easy to understand why the bank was unwilling to diminish the value of its security by excluding Parcel 34/1 from the Debenture. In that regard I accept the evidence of Richard Parsons that the bank never excluded Parcel 34/1 from the Debenture. "

The net result is that the appellant failed to prove that Parcel 34/1 was in fact withdrawn from the purview of the Debenture. As acknowledged in the letter dated 1 7th January 1989 from the appellant's and Acland's solicitor to Barclays, it was necessary to show that Barclays had executed a document effecting such withdrawal. No such document was produced.

(6) **Estoppel in relation to the Receiver's appointment**

The Receiver, Barclays and Rhyto contend that the appellant is estopped from challenging the validity of the Receiver's appointment. These respondents rely on estoppel by acquiescence.

According to the authorities, the typical prerequisites to the success of the plea or defence of estoppel by acquiescence (silence or other passive conduct) are (1) a representor's representation by acquiescence that the representor has no legal right or has abandoned or waived his legal right against a represented (2) the representee's belief or assumption that he has legal rights or the representee's expectation of some right, benefit or protection (3) the representor's knowledge of the representee's belief, assumption or expectation (4) the fact that the acquiescence created or encouraged the representee's belief, assumption or expectation (5) the fact that on the faith of or in reliance on the mistaken belief, assumption or expectation, the represented expended money or performed some other act to his detriment and (6) the conclusion that it would be unconscionable to allow the representor to defeat or disappoint the representee's belief, assumption or expectation.

However, in Taylor Fashions v Liverpool Victoria Trustees Co (1 981)

1 AER 897 at 915 and 916, Oliver J said:

"Furthermore, the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

This dictum was confirmed by the Privy Council in **Lim v Ang** (1992) 1 WLR 1

13 (an appeal from the Court of Appeal of Brunei Darussalam). There, Lord

Browne-Wilkinson (delivering the judgment of the Board) said (at p117):

"The decision in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd. (No ted* [1982] Q.B. 133 showed that, in order to found a proprietary estoppel, it is not essential that the representor should have been guilty of unconscionable conduct in permitting the represented to assume that he could act as he did: it is enough if, in all the circumstances, it is unconscionable for the representor to go back on the assumption which he permitted the represented to make. "

Accordingly, the conduct of the appellant or its duly authorized agents must be examined to determine whether the conduct amounts to acquiescence which makes it unconscionable for the appellant to contest the validity of the Receiver's appointment. Here, the conduct relied on includes four letters written by the appellant's solicitors (Farara and George-Creque) to the Receiver and a release granted by the appellant to the Receiver. Since I propose to discuss the Release separately, I concentrate on the four letters for the time being.

The first letter was written on 24th August 1991 (the day after the

appointment of the Receiver). The letter is in these terms:

"We act for Village Cay Marina Limited.

We refer to a letter dated 23rd August 1991 from Barclays Bank pic appointing you Receiver and Manager of the said company under the terms of a Debenture dated 9th November 1988 (Instrument No.247 of 1988).

We are instructed to remind you of your personal legal duty of care to the Company to take all reasonable steps to obtain the true market value of the very substantial and valuable assets of the Company and, conversely, not to sell or otherwise dispose of those assets below their true market value……."

This letter presumes or impliedly acknowledges the validity of the Receiver's appointment and presumes or impliedly acknowledges the contractual power of the Receiver to sell the assets of the appellant. It is on the basis of these presumptions and acknowledgments that the letter admonishes the Receiver "not to sell or otherwise dispose of those assets below their market value".

The second letter was written on 31 st October 1 991. It was written in reference to the Annual List of Members of the appellant. In that letter, it is stated "I would suggest that it be signed by yourself as receiver on behalf of the company." The letter presumed that the Receiver had the authority to act as Receiver and Manager. The solicitor thereby encouraged the Receiver's assumption or belief that the Receiver's appointment as Receiver and Manager was valid.

The third letter was written on 1 2th November 1991. In that letter it is stated "I would request that you let me know the current state of affairs regarding the receivership and possible sale of assets". That letter was further acknowledgment of the Receiver's authority (in his capacity as Receiver and Manager) to sell the assets of the appellant and further encouragement of the Receiver (in his capacity as Receiver and Manager) to sell those assets.

The fourth letter was written on 3rd February 1992 in these terms:

"I have been informed of the termination by the Barclays Bank of the receivership of Village Cay Marina Limited.

I am therefore instructed to request that you return to me all corporate

documents provided by these Chambers at your request and that you let me have a letter to the Registrar of Companies indicating the reinstatement of the registered office at these Chambers. "

The first three letters (ratified by the fourth letter) singly and collectively constitute a representation by acquiescence on the part of the appellant that the Receiver's appointment was valid and that the Receiver was authorised to exercise the contractual powers of sale and disposition of the properties of the appellant. The Receiver evidently believed or assumed that his appointment was valid and that he was entitled to exercise those contractual powers.

The appellant knew of and by its acquiescence encouraged that belief or assumption. On the faith of and in reliance on that belief or assumption, the Receiver sold or disposed of 21 some of the properties of the appellant and thereby acted to his detrimentby exposing himself to the risk of liability should that belief or assumption be mistaken.

In those circumstances, it would be unconscionable to permit the appellant to defeat or disappoint the Receiver's belief or assumption.

For these reasons, I would affirm the learned judge's conclusion that the appellant is estopped by its acquiescence from opposing the validity of the Receiver's appointment and the validity of acts performed by the Receiver acting within the scope of the contractual powers and authority of a duly appointed Receiver and Manager of the properties of the appellant. The estoppel makes it unnecessary to decide whether the Receiver's appointment can be justified either on the ground of the issue of the writ of execution in suit 84 of 1989 or on the ground of Barclays' demand for payment or on any other ground.

(7) **The VCM-Receiver Release**

The VCM-Receiver Release is in these terms:

" For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned, for itself, and its successors and assigns, hereby releases John Greenwood of KPMG Peat Marwick and its **officers, directors,** employees, attorneys, agents and representatives, (collectively, "Releasees"), from any and all actions, causes of action, suits, debts, sums of money, accounts, bonds, bills, liabilities, matters, relationships, agreements, commitments, undertakings, obligations, promises, judgments, claims, damages, executions and demands whatsoever, in law, admiralty or equity, which against any such Releasee the undersigned, and its successors and assigns, ever had, now has or hereafter may have for, upon or by reason of any matter, cause or thing whatsoever on or prior to the date hereof.

At any time and from time to time, the undersigned, without further consideration, shall execute and deliver in favor of the Releasees such additional documents and instruments as any such Releasee may reasonably request to evidence or effect the purpose and intent of this Release.
This Release may not be changed orally."

The appellant impugns the validity and effectiveness of the VCM Receiver Release on the ground that there was no consideration therefor.

On the one hand, Anthony Esposito (the appellant's managing director) testified that the VCM-Receiver Release was intended to be conditional on the Receiver's execution of a mutual release and the Receiver's delivery to the appellant of certain requested documents and that those conditions were not fulfilled. On the other hand, Christopher McKenzie (Barclays' solicitor) testified that the conditions were in fact observed. The learned judge then found as follows:

"Having seen and heard Christopher McKenzie I entertain no doubt whatsoever that he is a witness of truth and I accept his testimony without cavil. I therefore hold that VCM released Greenwood from all liability as Receiver in accordance with the release signed by VCM and dated 27th August 1992. I reject Esposito's denial that he never in fact received VCM's own release of even date by the Receiver."

Accordingly, the VCM-Receiver Release and the consideration therefor were proved to the satisfaction of the learned judge whose finding I accept. The legal legal effect of the VCM-Receiver Release so proved is to discharge and release the Receiver from all legal liabilities which the Receiver had incurred towards the appellant at the date of the execution of the VCM-

Receiver Release and to extinguish all rights of action which the appellant had against the Receiver at that date. The discharge, release and extinguishment apply to all liabilities and rights of action with respect to (1) the alleged fraudulent and illegal execution of the nine underleases in favour of Rhyto (2) the alleged breaches by the Receiver of his alleged duties to the appellant and (3) the alleged conspiracy between the Receiver on the one hand and Barclays, Acland, Landac and Rhyto on the other hand.

The next question is whether the discharge, release and extinguishment benefit the Receiver's alleged co-conspirators and joint tortfeasors (Barclays, Acland, Landac and Rhyto). For guidance on the answer to that question, I invoke the decision of the English Court of Appeal in Duck v Mayeu (1892) 2 Q.B. 511. There, A.L. Smith L.J said (at p513):

> "It is, we think, clear law, that a release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor, or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. The case of *Cocke v. Jennor is* distinct upon the point, and there are many subsequent cases to the same effect.
>
> It has also been held that a covenant not to sue one of two joint debtors does not operate as a release to the other joint debtor, *Hutton v Eyre,* the reason being that the joint action is still alive. We have found no case in which it has been held that a covenant not to sue releases a joint tortfeasor; and in our judgment the principle upon which it has been held that such a covenant does not release a joint debtor applies to the case of a joint tortfeasor."

In the present case, we are not confronted with a covenant not to sue a joint tortfeasor or a joint debtor. The VCM-Receiver Release is a positive and unequivocal release and discharge of the Receiver from all legal liability to the appellant. The VCM-Receiver Release therefore has the legal effect of releasing and discharging the Receiver's alleged co-conspirators and joint tortfeasors (Barclays, Acland, Landac and Rhyto) from all legal liabilities in respect of the alleged fraud and conspiracy and has the legal effect of

extinguishing all rights of action which the appellant may have had against the alleged co-conspirators in respect of the alleged fraud and conspiracy. The releases and discharges of the respondents thus render it unnecessary to determine whether the respondents in fact committed any tort against the appellant before the execution of the VCM-Receiver Release.

(8) **The refusal to register the transfer of shares**

By Instrument of Transfer executed on 27th August 1992, the Executors of the Estate of the late Clifford H. Plaisance "in consideration of the sum of $212,000" transferred to the appellant 49 shares in the capital of Landac. By letter dated 7th September 1992, the law firm of Farara and George-Creque (writing on behalf of the said Executors) asked Acland (the sole director of Landac) to register the transfer of the shares. Acland replied in these terms:

> "I acknowledge receipt of your letter of 7th September, which has only just reached me.
>
> I appreciate the interest of your clients, Village Cay Marina Limited, in
>
> this company, but at this stage of its development I do not regard it as beneficial to the company to involve third parties in its ownership.
>
> Please therefore take this letter as formal notice to the intending transferors, for whom you also act, pursuant to regulation 16 of the Articles of Association of the company that I decline, as director, to register the transfer to Village Cay Marina Limited, a copy of which was enclosed with your letter."

In examination-in-chief, Acland gave different reasons for refusing to register the transfer of the 49 shares to the appellant. He testified that he would never have agreed to the appellant's becoming a shareholder of Landac. He gave his reasons for his opposition in these words:

"I thought the company was highly leveraged. I thought the company had a lot of bank borrowing And Village Cay was held by a holding company which could transfer shares and ownership without Landac's knowledge."

The questions to be decided are whether Acland's refusal to register

the transfer was authorised by the Articles of Association of Landac and whether the refusal was wrongful. The relevant provisions of the Articles of Association are regulations 3(a), 16 and 23. These regulations read as follows:

3(a) "except as may be hereinafter provided the directors may, without assigning any reason, decline to register any transfer of shares but notwithstanding the foregoing the members may by ordinary resolution direct that a transfer of shares be registered;"

16. Subject to any direction made by the members in accordance with item (a) of Regulation 3 hereof, shares in the Company may be transferred, with prior or subsequent approval by the directors of the registration of the transfer, in such manner or form and subject to such evidence as the directors shall accept. In the event that approval for any transfer is not given within a reasonable time, either party to the transfer may serve on every director a formal request for such approval, and if within 30 days of receipt by the director last served with such an application for approval of a proposed transfer, whether submitted in the form of an instrument of transfer or in some other form or manner, notice shall not have been given to the intending transferor that the directors have declined to register such transfer, it shall be deemed to have been approved and shall therefore be registered. The transferor shall be deemed to remain the holder of the share or shares until the name of the transferee is entered in the register of Members in respect thereof. If, however, within 30 days of receipt by the Company of an application as aforesaid, notice shall have been given to the intending transferor that the directors have declined to register the proposed transfer, such application shall lapse and be deemed to be of no further effect."

23. Any person who has become entitled to a share or shares in consequence of the death or bankruptcy of any member may, instead of being registered himself, request in writing that some person to be named by him be registered as a transferee of such share or shares and such request shall likewise be treated as if it were a transfer."

These regulations confer upon Landac's directors a power or discretion to register or refuse to register a transfer of shares. This power or discretion is a fiduciary one. For this reason, a Court will condemn and overrule a refusal of directors of a company to register a transfer of shares in the company if the refusal is wrongful. In determining the wrongfulness or otherwise of the refusal or the wrongfulness or otherwise of the exercise by directors of any of their other powers or discretions, the basic test is whether the directors acted in

good faith in the interests - of the company or simply acted arbitrarily and capriciously. The basic test may be applied objectively or subjectively.

Applying the objective test, a Court will overrule a decision of directors where the directors acted ultra vires either by imposing unauthorized conditions on shareholders seeking to exercise their rights or by acting beyond the scope or purpose and intent of regulations which confer the power or discretion which the directors purported to exercise.

In **In re Gresham Life Assurance Society Ex parse Penney** (1872) 8 Ch App. 446, Sir James L.J. said (at pp 449 & 450):

"If the directors had been minded, and the Court was satisfied that they were minded, whether they expressed it or not, positively to prevent a shareholder from parting with his shares, unless upon complying with some condition which they chose to impose, the Court would probably, in exercise of its duty as between the *cestui que trust* and the trustees, interfere to redress the mischief, either by compelling the transfer or giving damages, or in some mode or other to redress the mischief which the shareholder would have had a just right to complain of."

In **Vatcher v Paull** (1915) AC 372, Lord Parker (delivering the judgment of the Privv Council in an appeal from the Roval Court of the island of Jersey) said (at p378):

"The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."

Applying the subjective test to a case where the directors have disclosed the reasons for their decision, a court will reverse the decision if the reasons clearly indicate that the directors were unduly influenced by factors and considerations relevant to their own personal interests only or if the reasons clearly indicate an intention to promote personal or directorial interests at the

expense of corporate interests.

In **In Re Bede Steam Shipping Company Limited** (1917) 1 Ch 123,

Lord Cozens-Hardy M.R. said (at p134):

"The illustration given by Chitty J. in *In re Bell Brothers* seems to me very much in point: "If the reasons assigned are legitimate, the Court will not overrule the directors' decision merely because the Court itself would not have come to the same conclusion. But if they are not legitimate, as, for instance, if the directors state that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them among his nominees, the Court would hold that the power had not been duly exercised.""

In **In Re Smith and Fawcett Limited** (1942) 1 Ch 304, **Lord Greene**

M.R. said (at p306):

"The principles to be applied in cases where the articles of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider - not what a court may consider - is in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles on their true construction permit them to take into consideration, and in construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases."

It is in the light of these authorities and the principles established thereby that the wrongfulness or otherwise of Acland's refusal to register the transfer of the 49 shares to the appellant must be determined.

Acland's reasons for the refusal must be examined to ascertain whether he acted in good faith in the interests of the company or acted ultra vires, arbitrarily or capriciously in his own personal interests.

The reason stated by Acland in his letter dated 7th September 1992 is that the appellant was a third party who should not be involved in the ownership of shares in Landac. The truth is that the appellant was already so involved. The Parental Agreement contemplated that the consideration for the allotment of

Landac's shares to Clifford Plaisance would be the utilization by Landac of the appellant's property. The shares allotted to Clifford Plaisance were in fact allotted in consideration of that utilization. The result is that Clifford Plaisance and his personal representatives and heirs arguably held those shares on constructive trust for the appellant. The transfer of those shares to the appellant could conceivably have been justified on the ground that it was in satisfaction of the appellant's equity in those shares.

In Acland's testimony, the reason given for the refusal to register the transfer of the shares was the appellant's vulnerability. According to Acland, the appellant was "a highly leveraged borrower" and was a subsidiary controlled by a holding company.

This vulnerability existed at the time of the incorporation of Landac. Yet, Acland was content to incorporate Landac solely or principally for the purpose of developing the appellant's property. Landac (under Acland's sole directorship and management) was content to lend money to the appellant, to acquire an option to purchase subleases of the appellant's Parcel 34/1, to spend money on the development of Parcel 34/1 and generally to promote and maintain a close business relationship with the appellant. It is incomprehensible that the appellant's vulnerability could be regarded as a disqualification from holding a minority of the shares in the capital of Landac but not a disqualification from intimate business relationship with the appellant.

In my judgment, the reasons given by Acland for refusing to register the transfer are incredible and implausible. The true reason should therefore be

ascertained by inference from proven facts.

At the date of the death of Clifford Plaisance, Landac had only two shareholders (Acland and Clifford Plaisance). Although Acland held 51% and Clifford Plaisance held 49% of the issued shares in the capital of Landac, Acland ensured (evidently in his own personal interest) that he was and remained the sole director of Landac and that he continued to enjoy sole and exclusive management and control of Landac. This arrangement was acceptable to Clifford Plaisance but there was no guarantee that it would be satisfactory to the appellant. Acland therefore had an overriding personal interest in excluding the appellant from holding shares in the capital of Landac. Acland must have perceived the appellant's entry into Landac as a threat to Acland's sovereignty.

The grounds on which Acland declined to register the transfer were in effect conditions imposed on shareholders intending to transfer their shares in the capital of Landac. These conditions were not authorised by Landac's Articles of Association. In imposing those conditions, Acland acted ultra vires and beyond the scope or purpose and intent of the Articles which conferred on Landac's directors the power or discretion to refuse registration of a transfer of shares. These conditions were not perceptibly in the corporate interests of Landac. They were palpably in Acland's personal interests intended to be promoted at the expense of corporate interests.

In refusing to register the transfer to the appellant of the 49 shares in the capital of Landac, Acland did not act in good faith in Landac's interest but acted arbitrarily and capriciously in Acland's own personal interests. For this

reason, the refusal must be held to be wrongful and must be reversed.

Conclusion

I would allow the appeal in so far as it relates to the decision of the learned judge on the propriety of Acland's refusal to register the transfer to the appellant of the 49 shares in the capital of Landac. I would reverse Acland's refusal and would order Acland forthwith to register the appellant as the holder of the 49 shares.

I would affirm the decision of the learned judge in all other respects save on the question of costs. In particular, I would confirm the validity of the option granted to Landac to purchase subleases of Parcel 34/1 and the validity of the nine subleases granted to Rhyto.

The indications are that these exorbitant proceedings were prompted by Acland's arbitrary refusal to register the transfer of the 49 shares to the appellant. For this reason, I would order Acland and Landac to bear their own costs and the costs of the appellant here and in the Court below. However, since there was no justification for involving the Receiver, Barclays and Rhyto in these proceedings, I would order the appellant to bear the costs of these respondents here and in the Court below. All costs ordered to be paid shall be taxed if not agreed.

SIR VINCENT FLOISSAC
Chief Justice

I concur.

I concur.

C.M. DENNIS BYRON
Justice of Appeal

SATROHAN SINGH
Justice of Appeal