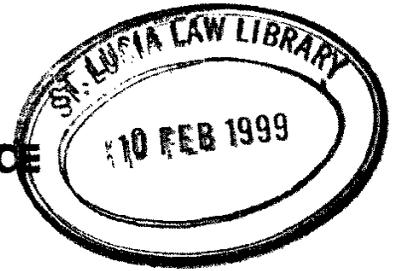


SAINT LUCIA

**IN THE THIGH COURT OF JUSTICE
(Civil)
A.D. 1998**



SUIT NO: 875/94

Between:

Nato's Educational and Sports Supplies Ltd

and

PLAINTIFF

Niles Nathaniel

DEFENDANT

Consolidated

SUIT NO: 280/98

Between:

Niles Nathaniel

and

PLAINTIFF

(1) Henry Nathaniel

(2) Albert Nathaniel

(3) Nato's Educational and Sports Supplies Ltd

DEFENDANTS

**1998: May 12 and 22,25,26,28,29
June 8,9,12,15 and 16**

Appearances:

Kenneth Foster ESQ., Q.C. and Anthony Bristol ESQ with him for Niles Nathaniel

Kenneth Monplaisir ESQ., Q.C and Patrick M.A. Straughn ESQ with him for the other parties.

JUDGMENT

PHILLIPS J. (Ag.) In Court

The following oral judgment was delivered.

This a claim by Nato's Education and Sports Supplies Ltd, against the former Managing Director, Niles Nathaniel and the claim is based upon paragraph 5 of the Statement of Claim which is as follows:

"During the period July 1978 up to 28th September 1994 the Defendant wrongfully and fraudulently took the funds of the Plaintiffs' company, opened separate personal bank accounts and placed the Plaintiff's funds in those bank accounts at the bank of Nova Scotia, namely account No. 700366 and account No. 202516 as well as at other banks and during that period purchased the following properties in his own name with the Plaintiffs' funds as per particulars hereunder." The particulars contain a list of ten properties.

Paragraph 6 is also important because it said, "it is only in and about January 1994 that it came to the knowledge of the said Directors, Henry Nathaniel and Albert Nathaniel, that the Defendant had been wrongfully and fraudulently misappropriating the funds of the company for his own use. In defence as amended, the defendant stated as respects to paragraphs 5, 6 and 7 as follows:

"The Defendant denies paragraphs 5, 6 and 7 in the Statement of Claim and states as follows:

- (a) that the paid up share capital of the Plaintiff company is \$15.00 consisting of one share each; held by each director
- (b) that in return for an overdraft facility of \$15,000.00 arranged by Henry Nathaniel he has been paid over \$150,000.00 and received property and benefits as shown in Schedule 1 hereunder

(c) The Director, Albert Nathaniel has received over \$50,000.00 and received property and benefits as shown in Schedule 2, hereunder."

And then the Defendant alleged acquiescence and laches the content of laches and acquiescence being the funds which they accepted and the properties of the company which they received. All those are set out and then claimed for salary and rental of properties allegedly occupied by the company.

Some years passed, and in 1998 the Defendant Niles filed an action against Henry Nathaniel, Albert Nathaniel and the Company Nato and in that he claimed that he was summoned to a meeting to consider the Audit and Financial Statement, the Director's Report, the Auditors Report and also to deal with the election of officers and the appointment of Auditors and that if this meeting were held he would be at a disadvantage because the Auditor's Statement is grossly inaccurate and its adoption will lead to the use of wrong data at the trial. He therefore asked for a proper accounting from the Defendant including years preceding 1994, general damages and costs. I ought to have mentioned that the company had asked that the Defendant Niles be ordered to account for his dealings with the company's assets during the whole of the time he was the Managing Director.

Now the causes were consolidated and came on for hearing on the 22nd May 1998. For the plaintiff company, Henry Nathaniel, Albert Nathaniel, Brenda Boland, Georgia Dominique and, Joseph Lubin gave evidence. Henry and Albert dealt with the circumstances surrounding the formation of the company and the early years, and I could do no better than to take the account from the evidence of Albert Nathaniel.

He said that "in 1972 Niles called Henry and myself to a meeting. We met,

and he informed us that M & C where he worked at the time was closing down the book section of the company, and he thought that it would be a good idea for us to form a company to go into the book business. We agreed with him and discussed the financing of that company. Henry has already testified on the way in which the company was financed and I confirm what he said as being correct." At this point I refer to what Henry said on this question.

"Niles conceived the idea of starting the company. Niles was very experienced in business at M&C and Albert being at School was in a unique position to advise Niles and me about the text books problems in St. Lucia at that time, and how the three of us would help to improve the condition. I was President of the National Youth Counsel so I had to leave to attend the conference in London. Niles gave me two addresses to meet two of the largest publishers in London. I met them and we established business contacts. They were willing to ship the books to St. Lucia to the Company on credit on condition that we can establish a letter of credit through our bankers in St. Lucia. When I returned I discussed matters with my brothers and went to the bank of Nova Scotia to establish letter of credit. In 1972 the Manager of the Bank told me that M & C and Valmont are already in text books, and asked me what do I know about text books. The bank refused. I then went to the Chief Minister John Compton after consulting with my brothers. I explained the position to him. The Chief Minister rang the bank manager and spoke to him in my presence. On the Chief Minister's advice I returned to the Bank Manager and that was how we got the letter of credit established."

To return is Albert's account "The next step was to give a name to the company and I suggested the name by which it is known. At that time I was Principal of a primary school. It was agreed that Henry's name should be

used as the person running the business and this was done to safeguard the job of Niles and me. That is why Henry became the Managing Director. In fact Niles was to run the business. The business started around June 1972 and books were ordered around this time. So during the July holidays, I virtually ran the business since Niles did not want it known publicly that he was associated with other business. The business was an instant success." Then he gave reasons why the business was such a success namely, that Henry had large connection with the banana people and he was prominent in the educational field and had access to the list of text books that will required from time to time; that the very year in which the business started the Ministry of Education had standardized the text book and that made it easier to order and to provide for the requirement of the educational system. Then he said that in July 1972 he actually supervised and managed the whole operation of Nato. The success was such that before the end of July the stock was running out, so much so that Niles had to rushed to Trinidad to purchase fresh supplies of text books. In 1973 the other leading book store namely the Voice Book Shop also closed its books section. Nato was virtually the only book shop in Castries and this brought tremendous pressure on him as the room was small. They had to close the door to allow customers to be served and open it again for others to enter. It was like an auction sale. Again supplies dwindled and he went to Trinidad to purchase a substantial quantity of books for the company.

This went on until about March or April 1974 when Niles joined the company full time. In 1973 Niles told him that inspite of his caution in relation to the business he was getting pressure from his bosses at M&C. In 1974 Henry said Niles told them that his company was transferring him as supervisor of dry goods to the cold storage department. They then decided that Niles should come into the company full-time since the company could have afforded to remunerate him consistent with what he was getting at M&C.

He did not know what Niles was getting at M&C. They told Niles he was not to suffer any loss on account of his leaving Minvielle and Chastanet. Everything went well; they opened a bank account. Henry put up his house because he was the only one of the three brothers who owned any immovable property at the time and the letter of credit was established and business commenced and books were ordered.

Niles came on board in 1974 full-time and up to 1978 there were three signatories on the account with any two being able to operate it. In 1977 Henry Nathaniel got a scholarship, a two year scholarship and had to go abroad. In 1978 Albert got a scholarship and had to go aboard. In 1978 it happened that Henry had returned home on holiday and they all three agreed that for the proper conduct of the business the signatories on the accounts had to be changed and they changed it so that Niles alone would sign.

When they returned from abroad they left matters unchanged and sometime in 1993 Henry received some information from Georgia Dominique. As a result of this he contacted the Clerk who made the bank deposits and induced him to show him the book after he had made the deposit in the bank. By this means Henry discovered that some of the daily sales were being deposited to an account other than the company's account. He therefore informed Albert of what he had discovered and Albert went to Niles and arranged a meeting.

In the meantime the two brothers Henry and Albert consulted lawyers as to how best they could proceed and I accept Albert's reason that he did not want to destroy the good relations that existed between the three of them over all these years. He wanted to be cautious.

The meeting was held and Albert wrote up the minutes. This was on the 12th March 1994. These minutes were signed by Niles Nathaniel as the Managing Director and he accepts they are correct, and at that meeting Niles set out to give an account of his stewardship to fellow Directors. He set out all the properties that he had and confessed that 50% of the cost was borne by the company. He set out also what monies and accommodations were given to Henry and also to Albert. It was discovered that Albert got very little out of this company, and so they decided that \$40,000 should be given to Albert to purchase a property at Grass Street, supposedly to equalise things a little better than as it stood. The managing Director declared that in relation to the Mary Ann Street property, he had received substantial assistance from an undisclosed source by way of building materials in building the property on Mary Ann Street. The meeting ended with the Directors agreeing to pay Niles \$5000 monthly, Henry Nathaniel \$900 monthly and, as usual, Albert was left out.

At that meeting, it was agreed that henceforth they should have greater communication among themselves as to what is taking place in the business. Now what is interesting about the proceedings at that meeting is that what was given to the other Directors were quantified, but Niles never quantified what he took. There was a second meeting on the 28th August where Albert complained the fact that Niles did not play fairly with them; that they had placed complete trust and confidence in him; and that he had betrayed that trust and confidence. Again there was an attempt to quantify what everyone got and came up with some figures for the four properties. Niles was reminded that he had spent considerable sums of money educating his children which Henry estimated at somewhere in the region of \$700,000.

They agreed that an audited statement from the last five years should be

made available to adequately assess the growth potential and financial standing; on access to the bank statements by all Directors daily; and monitoring of sales and bank deposit by Director Henry Nathaniel. There was a further proposal. Now Henry challenged Niles directly on a number of specific deposits made to his private account. When he was questioned on the status of this account he said that this was his money and that he had paid company's bills from this very account. The account referred to was the saving account at the Bank of Nova Scotia account No. 202516. He told them that he did this in order to reduce the company's liability to income tax and that he was advised to do so by a Canadian Consultant. In evidence he confirmed that he opened the savings account as a vehicle to hide the company's earnings. Albert told him that this was quite illegal. Niles opposed a resolution to change the signatories to the company's account to provide for any two of the three directors to operate the account. Niles proposed that shares should be issued in the following proportions, namely, 80% to him and 10% each to Henry and Albert. Henry and Albert did not agree.

It seems at this meeting it was decided that any decision as to issue of shares, would have to await the stock taking in December. There was a third meeting on Wednesday the 28th September 1994 and Niles had taken up the position previously that he was Nato which caused quite a heated debate at one of the previous meetings. At this meeting on 28th September 1994 Niles backed down some what, and said that when he stated that without him there was no company, he meant that it was he who designed the company's accounting system, ordering and pricing of goods. Albert Nathaniel proposed that the appointment of Niles as Managing Director be revoked immediately observing that Niles had reneged on the decision to allow Henry to have access to the bank account.

Then Henry made the observation that the sales book which contained the company's transactions from 1974 to 1989 was discarded for a new one without any need for doing so, and he complained that this was an attempt to prevent him having access to the sales book. Niles was asked directly by Henry about this book and he replied that the book was safe in his office. Henry also complained that a new bank deposit book was used again without any apparent need and therefore the only way to get the company to function properly was to remove Niles as Managing Director. This resolution passed by majority Niles voting against. Then Henry Nathaniel under other business alleged that the total amount which Niles had taken out of the company's account was \$34,4677.88, and he demanded again that this amount be returned to the company's account. He also asked about the foreign currency that the company had earned, and Niles said he used those to pay foreign drafts.

Albert, always trying to conciliate, reminded them of the strong family ties and stated that this was the thing which brought them so far and he didn't like the turn matters had taken. He appealed to Niles to be reasonable in order to avoid extreme measures. Niles, of course, gave his own version and complained that he had only become Managing Director for one year. It is the case that in 1993 Niles had asked his brothers to appoint him formally Managing Director which they did, quite readily on the 31st August 1993. He now complained that he had only been Managing Director for one year; that he could not give his best under the pressure of the prevailing circumstances, and that he had formed his own company and would tell him all about it in writing. He also threatened to expel the company from the warehouse to which Henry and Albert protested vigorously on the grounds that he had such authority. Consistent with the direction of the board, Henry took over, the Management of the Company and immediately appointed Coopers and Lybrand as Auditors to audit the accounts of the

company from 1970. Niles agreed to the appointment of the auditors and they commenced the work. This is what transpired from the evidence of Mrs. Boland.

"I know the plaintiff company I am a partner at Coopers and Lybrand. Chase, Keat and Boland purchased the practice from Cooper and Lybrand. I was the partner responsible for auditing the accounts to the company. We were approached in September 1994 to do the accounts. Henry Nathaniel approached us and I was requested to do the audit. When the brothers fell out Niles had agreed for my firm to do the audit. I requested books of accounts and records from Niles Nathaniel and he was in control of the record. I had numerous meetings with Niles and at his request I went to his home at Entrepot to collect the records I got some but not all that I required. Henry accompanied me to Niles's home. There were boxes at Niles's home and I received some information. As a result I made several attempts to find the missing records. Niles said he would make further search for the daily sales book, e.g on one occasion when I had visited the store, I had seen the daily sales book but this was not forthcoming. This is one of the books for which Niles said he would make further search.

I also contacted the previous accountant, Stewart and Associate who were unable to provide any detailed information about the opening figures. I could not find details of opening inventory or list of payables and receivables. I see a letter dated October 5th 1994 and produce it with attachment. Now of the items mentioned in this letter I received one bank statement for January 1st to August 1994. We got some for September. I got this from the bank, but without the returned cheques the accounting data was therefore incomplete. List of fixed assets, a van, electrical equipment, a cash register, no land was mentioned. I received a disbursement book from January to August, September was missing. At

first the intention was to audit from 1990 but due to the absence of the accounting record we eventually decided to commence in January 1994. Stewart & Associate had prepared accounts for 1991, 1992 and 1993. Henry provided me with them but they were not audited.

I see letter dated 4th April 1995. I produce this letter. Based upon the information given me to that date, in my opinion evaluation using normal accounting technique could not be arrived at so to use an asset base appeared the best way to proceed. I have produced accounts for 1994, 1995 and 1996. Because of missing records I had to qualify the report on the 1994 accounts. The records for the years 1995 and 1996 were complete.

The affairs of the company were generally healthy the reason why we suggested the asset base valuation is because of doubt arose as respect to profitability of the company, during the years we audited as compared to former years. I am satisfied that the company's records are complete for 1995 and 1996."

Evidence of the existence of this sales book is contained in the minutes to which I have already referred. The witness Joseph Lubin testified to it's existence and said that "I know of this daily sales book that Nato had. Nato had a daily sales book at the end of the day the cashier enters the grand total in the daily sales book. I know that Georgia Dominique was one of the Cashiers entering daily sales. The last time I worked at the cash register I heard Henry ask Niles "where is the cash book" and Niles replied "the cash book is in good hands." The cash book is the same as the daily sales book. This was in 1994."

I should say that the sales book is one of the essential documents required for the proper audit of the company's accounts. The absence of the sales

books and other essential records which were last in Niles' possession aborted the attempt to audit from 1990 and led to the Auditors expressing reservations on the accuracy of the 1994 accounts.

Henry's accounts are stated by the Auditors to be in order as far as the accounting is concerned. I not turn to suit No. 208 of 1998. This called for an accounting from the inception of the company to the last financial year. I think myself that in view of the evidence that Niles was incharge of this company completely, and unfettered from 1978 to 1994, it becomes rather difficult to appreciate why Niles asked Henry, Albert and the company to account for the period during which he was the General Manager. Niles had an opportunity to account and have it audited so that everybody would know that he had accounted properly. He never provided the auditors with the information that was required in order to do so. Instead, the records which ought to have been in the registered office of the company at its head quarters he took it to his home and it seems that all the vital information are now missing if not destroyed. In these circumstances that in 1998 Niles should be asking Henry, Albert and the company to account to him, seems to me to be a monstrous suggestion. Even when they called him to a meeting he never went to the meeting but instead rushed to court and he got an order to stop the company from holding meetings, which were for the express purpose of considering the accounts and Henry's stewardship as Managing Director. He turned down the opportunity offered; stopped the meeting; and still asking the Court to order the directors to produce accounts. I have no hesitation in dismissing this action with costs.

I should in this connection also mention the several attempts made by interlocutory proceedings when two orders were obtained from two different judges to get Niles to deliver the accounts. He never did. Niles

was threatened with the contempt proceedings and there is on file a motion for contempt. I noticed that nothing seems to have been done about that application, but at least he had that threat and still that did not induce him to obey the orders.

Now coming back to the main suit 875/94. At the hearing when the case for the defendant was opened learned counsel for the Niles said

"that the case really concerns and deals with a company formed, manned, ran and controlled by one man, namely Niles Nathaniel. The existence of the memo and articles was merely a legal technicality which was required for the formation of the company in law. Niles will say that he has no recollection that Henry had taken a mortgage on his land, that is, on Henry's own property to raise the sum of \$15,000. What he does know is that his bankers required him to submit his house at Maynard Hill his car and his savings to secure whatever overdraft was allowed the company. In short Niles knows nothing about the \$15,000 that Henry claimed that he had raised on mortgage for the company. This must have been a personal transaction for Henry and not for the company."

Niles went in the witness box and supported this opening statement. He stoutly maintained that the company was his alone. The two brothers are only there on the memo and articles for convenience. They had no interest in the company. Now Niles himself in his defence said that Henry had provided the security for the overdraft of \$15,000. I think that he had also admitted at the meetings that this was how the company started. There is also an affidavit of Niles in which Niles swore that Henry had provided security for the \$15,000.00 overdraft facilities.

The banker Gene Neptune came here and she said in Testimony that Niles

himself told her that Henry had put up his house. She said Niles told her that the first building at the corner used to be Henry Nathaniel's. With Henry putting up the building and he Niles putting the financing, the company started, and she thought that it was such a beautiful thing that Niles had brought all his brothers together and they had worked together to build this business.

In his counterclaim he counterclaimed for an aliquot or a proportionate sum from the company in paragraph 16 for putting up his building as security for \$50,000 and \$150,000 respectively. There is no evidence that he raised \$50,000 but there is evidence that he provided security for \$150,000 and he wanted \$2,000,000.00 from the company for having negotiated this facility because according to him, he had paid Henry over \$150,000 for finding \$15,000 credit at the bank. So in the face of all that Niles was still able to stand in the witness box and say that he knows nothing about Henry raising \$15,000 for the company and that the hypothec evidence for \$15,000 might have been for his own private business and had nothing to do with the company. As respects owning the company there is no such allegation made in his defence. Infact the defence proceeded on the basis that, three of them were the directors and the only share holders of this company.

Let me go back to this defence now. He said the paid up share capital of plaintiffs company is \$15.00 consisting of one share held by each director. In respect of paragraphs 3 and 4 of the Statement of Claim the defendant said he had been managing the company from the inception of the opening of the business in 1972 and was alone authorised to sign cheques. In 1978 when both the other Directors left St. Lucia for a period of time they did not authorise his signing alone. Admits that he signed cheques in 1978 and afterwards but states that he signed cheques because of credit facilities arranged by him with the bank.

Although Henry and Albert Nathaniel returned to St. Lucia the authority for the defendant to sign cheques alone remained until the Defendant was removed as Managing Director by resolution passed on 28th September 1994. Niles strenuously maintained in evidence that Henry and Albert had nothing to do with these accounts; that they had no say in it; that he signed cheques on his own authority; and that they did not have to authorise anything. It was not until the documentary resolution at the bank was shown to him that he capitulated and admitted and agreed that it was on the authority of all three of them that he was able to sign alone. That document is in evidence as exhibit 3 and is dated 19th August 1978. It says that this resolution was passed by the Directors on the 13th October 1978.

So here again Niles refused to be fair and honest with the court all in a vain endeavour to prove that he is the only owner of this business. I have no hesitation in finding (and the record speaks for itself) that this company is owned by the three of them in equal shares.

Now the Statement of Claim says that there is an account No. 700366 and one 202516 at the Bank of Nova Scotia. There is no evidence of any account No. 700366 and there is no evidence as to any deposit in any other bank so we are left with the accounts at the Nova Scotia. At the bank of Nova Scotia it is proved that there are three accounts which are material to these proceedings-one is a sales account No. 202516 the other one is a building account which Niles said he established in order to facilitate the building and that building account is in the name of the company and its number is 67814. This building account was started in February 1992. The second account is the savings account No. 202516. The third one is an account No. 65919. Niles said this last account is his. It was pointed out to him that on the cheque itself he was signing for Nato Ltd. and his answer was that he

put in Nato Ltd. on the cheque merely for the purpose of identification, in order that if the cheques bounced they will know to whom to send the cheque. I find this answer frivolous. That account is the company's account. This is how a company's account is run. As to the savings account, by Niles own admission he took the company's money and put it there in order to evade tax on the recommendation of some expert from Canada whom he said told him to do that. I am not making findings in that direction as it is not necessary but I find it very strange that an expert from Canada or any other place will come and tell somebody that they must evade tax and defraud the revenue.

So from Niles own mouth and from an abundant of evidence it is clear that the savings account belongs to the company. I must say here that I accept Henry and Albert as witnesses of truth, and that Niles has not been truthful in the testimony he gave in court. So where ever there is any conflict between the evidence of Niles on the one side and Henry and Albert of the other, I prefer the evidence of Henry and Albert.

Now we come down to the question of what is to be done with these findings. The company is asking that all these properties be ordered to be conveyed to the company. Now it is to be observed that the arrangement with Niles was that he should not loose by coming over to the company so that it was contemplated that he should have a salary. What actually transpired was that in the words of Learned Counsel for Niles "this company was operated as a free for all." Niles took what he wanted and gave something to the other two brothers. In order to keep them quiet. They took no interest as they had confidence in Niles. Niles was a business man and they were content on the basis of counsel's suggestion that he was the patriarch of the family. The younger brothers accepted that and they left it up to him. Whatever he did so far as they were concerned was well done

providing that he played fair but he did not play fair. He gave them something from time to time and he made sure that what ever they got was recorded in the ledgers and so on. What he took for himself there is no record what so ever so how are we going to trace anything. The records are gone either hidden or destroyed. The auditor could not make any head way. The court does not make orders in vain. I don't see what purpose it could serve to order accounts to be taken. That to me is a waist of time and a useless exercise. So something practical has to be done.

Apart from the warehouse and Mary Street properties, there is no evidence that Niles used any money from these three accounts to purchase the other properties. So far as tracing is concerned it has not been shown that this could be achieved. It seems to me that the others got something so Niles is entitled to have something as well from the company and it's operation.

I reject the idea that he is entitled to salary. I think he took what ever he wanted for himself and his family. He paid for the children's education. He helped out the brothers to sums of money and goods so everybody got a little something. I cannot say that with respect to those other properties that if he had played straight and took a salary and allowances that he could not purchase these properties on his own. So I refuse to make any order in connection with these properties.

When it comes to Mary Ann Street and the warehouse as I said, I accept the evidence of Albert and of Henry that Niles told them when these properties were going to be purchased that he was purchasing for the company. It is abandonly clear that the bulk of the building expense at Mary Ann Street came from the company's accounts. Before I say any thing further there is a question of US\$60,000 allegedly given by Neila to Niles for the acquisition of the Mary Ann Street property. It will take someone with a stronger

constitution than myself to accept this story of US\$60,000 cash given to her by her husband to provide for her education in the future. The husband conducted business with his father in Miami and also in Jamaica. I cannot see any reason why he would take up US\$60,000 cash in the year 1991 and give it to his wife when she was not yet ready to go to law school and infact did not go to law school until 1994 that is to say three years later when he had a business in Miami. He had access to US money. Any business man would invest in his company and turnover the \$60,000 to make a profit so the he could do better for his wife and children when she is ready to go to school.

Then an extraordinary event took place. She takes this US\$60,000 and without any bodyguard or any thing like that; flies from Jamaica to St. Lucia with the cash; and what does she do with it? She gives it to her father who never asked her to contribute or lend him any money to hold as a loan until she is ready to go to school.

In the meantime she said that in 1990 after she got her first degree she got married and because the father opposed the marriage he cuts her off; stops supporting her. Speaking of that event Niles said after her marriage he could not tell whether she was still a student or whether she was working or what. Is that the sort of thing which one expects from a father who had received US\$60,000 loan from his daughter? He cuts off his daughter who shows such affection for him and is not concerned to know whether his daughter is going to school or if she is working or anything. When the time came for her to go to school in 1994 he doesn't contribute to her education although he would have known that the US\$60,000 was a fund for her education at law school. She had to go and borrow money from the US government to pay for school fees and the father is sitting in Castries with US\$60,000.00 of his daughter's money and not contributing anything. This

scenario it is unreasonable to accept and I reject it out of hand as being unbelievable.

That property at Mary Ann Street belongs to the company and I so declare. It is obvious that from the growth of the company a warehouse was necessary. Niles recognised this and told his brothers he was acquiring land for this purpose. I also declare that the warehouse belongs to the company. Inconnection with these two properties I order the Registrar of Lands to transfer these properties from Niles to name of the company, and if any expense is involved, Niles must pay it.

Now there still remains the question of the supermarket. The supermarket is by advertisement and name plate Nato's Supermarket. Nato is the company, and what is more, in his counterclaim Niles is claiming rental for the presence of the supermarket in the downstairs of his premises. He can't be claiming rental for a supermarket that is his, so it has to be the company's supermarket and I so declare.

Now he said this supermarket was making a profit of \$240,000 yearly for sometime but since the establishment of the Malls in Julians and JQ Charles the trade diminished and the business is now being operated at a loss.

Niles is now operating that grocery or supermarket and he should not because he had been removed as Managing Director. Henry should have been operating it as of the 28th September 1994, I am ordering an account of the conduct of the business and that any profit made in the operation of the business should go to the company, and losses should be made good by Niles. There still remains some residual monies in the accounts. It seems to me that it is reasonably proved that Niles used the bulk of the monies in the savings account, to pay for books and stationeries. It is now impossible to really take accounts of these things as the materials are not available.

Looking at the book itself the last entry is the 12th September 1994 when there was a debit memo of \$300,000 leaving a balance of \$77,448. He was removed the 28th September and the next notation is 7th October so that between the 12th of September and 7th October there was no withdrawal. On the 28th September Niles should have handed over to Henry the book which had in it \$77,448. We do not know what happened to that money. Niles must pay to the company \$77,448. I think all the other bank books are accounted for.

With respect to documents that was put in evidence showing that Niles had hypotheticated the warehouse building to the Bank of Nova Scotia to raise the sum of \$150,000 which was signed on behalf of the company by Henry and Albert, I accept Albert's explanation that his joining was nearly for the purpose of raising funds for the company and was not intending to be an admission or concession that building belongs to Niles. I will tell you why I accept that. I accept it because up to that time Albert and Henry continued to repose utmost confidence and trust in Niles until something happened to cause them to withdraw that confidence. It subsisted until 1993 when they started receiving information that Niles was funnelling monies to his own account. Up to that time whatever Niles did was well done. Besides, he was using the building for company purposes. They neglected their duties to the company as Directors and failed to make sure that things were going right. Then that brings me to the questions of acquiescence laches and estoppel. In my judgment none of these principles applies here. The company is the aggrieved party. I will give an illustration Suppose Niles, Albert and Henry all three agreed that they will share up the company's assets in a certain way among themselves, and then creditors of the company put in either a receiver or have a liquidator appointed. Could either of these Directors contend that the company is debarred from recovering the company's assets. Could they say "look here you the

company cannot complain since the Directors acquiesced; that the company ought to have acted sooner and is estopped from complaining?" These directors owe a fiduciary duty not to each other but to the company, and when ever the company is in position to move to protect its assets and it moves it must be heard and effect must be given for what ever its rights are. So I do not accept that any acquiescence laches or any estoppel has any bearing on this problem. I am grateful to the defendant's Counsel for reminding me about that. I have dealt with the property. I have dealt with the supermarket. I have dealt with the savings book. I dismiss the counterclaim as being without any foundation.

I order all costs of the proceedings and costs reserved in Chambers to be paid by Niles.


COSMAS PHILLIPS, Q.C.
PUISNE JUDGE (AG.)