Friis and Another v Casetech Trading Pte Ltd and Others
[2000] SGCA 35

Case Number : CA 203/1999, 204/1999

Decision Date : 14 July 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Harish Kumar and Joanna Tan (Engelin Teh & Partners) for the appellants in CA 203/1999 and the respondents in CA 204/1999; Philip Lam (Foo, Liew & Philip Lam) for the appellants in CA 204/1999 and respondents in CA 203/1999

Parties : Friis; Another — Casetech Trading Pte Ltd

Contract – Contractual terms – Whether plaintiff has right to account of share of profits

Contract – Discharge – Breach of contract – Remedies for breach of contract – Whether damages sufficient – Whether plaintiffs entitled to an account of profits – Whether restitutionary damages appropriate

Contract – Remedies – claims for interest – General rule and exception – Plaintiffs' unwarranted and unexplained delay – Interest – Whether interest should run from date of writ or accrual of loss

Contract – Discharge – Whether defendant a party to oral agreement

Limitation of Actions – When time begins to run – Breach of contract – Whether claim time-barred – s 6(1) Limitation Act (Cap 163, 1996 Rev Ed)

Trusts – Constructive trusts – Commercial financing arrangement – Provision of bank guarantee to procure overdraft facilities – Whether funds from overdraft facilities held on trust for guarantor – Whether fiduciary relationship exists between parties

(delivering the judgment of the court): ***The parties***

Povl Friis (`Friis`) is a Danish businessman residing in Kuala Lumpur. He was the first plaintiff in the action below. The second plaintiff, Combined Overseas Transport Sdn Bhd (`Combined`), is a company owned and controlled by him. The defendants in the action were Casetech Trading Pte Ltd (`Casetech`), Stephen Wiffen (`Wiffen`), his wife, Stevany Wiffen (`Mrs Wiffen`) and Lars Arne Kent Linden (`Linden`). The Wiffens reside in Singapore and are directors of Casetech, which is in the business of dealing in cranes and construction related equipment. Linden is a Swedish businessman, who used to reside in Kuala Lumpur and was a former director of Casetech.

The facts

The relevant facts giving rise to the dispute have been sufficiently set out in the judgment below, which we respectfully adopt. Briefly they were as follows. Friis first met Linden sometime in 1989 at the Danish club in Kuala Lumpur, and thereafter socially from time to time. Arising from their conversations on these occasions, Friis learnt that Linden was in the business of supplying construction related equipment and had businesses in Malaysia and Singapore. On one such occasion, Linden mentioned that he had a business partner in Singapore and he had some cash flow difficulties as a result of a project having gone wrong. Friis intimated that he might be able to offer some financial assistance. However, nothing developed from that conversation, until Linden wrote to Friis on 6 July 1990 outlining a proposal to Friis and inviting him to take up a 33% share in Casetech, in return for which Friis would provide financial assistance by arranging for the opening of letters of

credit up to a maximum limit of $1m to finance Casetech`s operations, and also provide security for a bank overdraft to Casetech up to a limit of $100,000. In that letter, Linden said that he was one of two partners of Casetech and would welcome Friis as an equal partner. Linden proposed that he, his partner and Friis should meet on 11 or 12 July 1990 for further discussions.

Soon after this, Friis met Linden and Wiffen at the Lake Club in Kuala Lumpur. He learnt from them that Casetech bought cranes and construction related equipment for re-sale by way of `back-to-back` trade, and that it would only purchase equipment from a seller when there was already a purchaser at hand. They told him that this trade had been financed by way of letters of credit arranged by a company called Cawthorne Trading Pte Ltd. Casetech`s business was managed mainly by Wiffen in Singapore. Linden and Wiffen owned Casetech and had an equal share of its profits after giving Cawthorne their share. After a discussion on Friis` proposed involvement, the parties came to the following broad agreement (`the 1990 oral agreement`):

(1) Friis would help Casetech finance its trade on a case-by-case basis by procuring and obtaining letters of credit to be opened by the branch of Citibank at Kuala Lumpur;

(2) In return, Friis would be entitled to one third of the profits of the trade;

(3) The transactions financed by Friis would be back-to-back trades only, and not the purchase of stocks or anything that would put the funds at risk;

(4) Friis would be regularly provided with a full account of all sales and purchases of equipment made by Casetech that were financed by him; and

(5) Friis would be reimbursed all expenses incurred by him in financing the trades.

Linden also proposed at the meeting that Friis should take up one-third of the shares in Casetech as well as a directorship in that company, but no agreement was reached in this respect at the time. Later, Wiffen sent him a Form 45, which is a form of consent to act as a director, for him to sign, but Friis said that he eventually decided against this proposal.

Pursuant to the 1990 oral agreement, the parties from August 1990 undertook a series of transactions financed by Friis in the following manner. Linden would request Friis to procure a letter of credit to be established and Friis would instruct his bank, Citibank at Kuala Lumpur, to open the letter of credit. On a few occasions, Friis obtained bank drafts to pay for the equipment. These transactions were profitable and Wiffen submitted monthly reports to him.

After a while, the parties found that applying for letters of credit and bank drafts was cumbersome, and in early 1991 a variation was made to the financing arrangement. Friis had an account with Den Danske Bank, Singapore (`DDB`) and he obtained from them a bank guarantee for $950,000 to secure the facilities granted to Casetech by Deutsche Bank, Singapore (`DB`). The DB facilities included an overdraft account and facilities for letters of credit. Casetech used the DB facilities to finance its crane trading operations. In June 1992, Casetech obtained similar facilities from the Singapore branch of The Hong Kong and Shanghai Banking Corporation Ltd (`HSBC`) in place of DB. This was also secured by a DDB`s guarantee for $1m procured by Friis. These foregoing facilities will be collectively referred to as `the overdraft facilities`. These arrangements made in 1991 and 1992 were, in effect, a variation of the 1990 oral agreement. Instead of procuring a letter of credit to be opened on a case by case basis, Friis procured a banker`s guarantee to secure the overdraft facilities to finance the back-to-back trades of construction related equipment. There was no other change to the terms of the 1990 oral agreement.

The arrangement appeared to work smoothly until sometime in late October or early November 1992, when Linden called Friis and informed him that something was amiss in Casetech`s accounts. However, Linden assured him that he would sort it out. Later, on 30 December 1992, DDB informed Friis that HSBC had called on the guarantee and in consequence DDB had deducted a sum of $1m from his account with them to effect the payment.

Wiffen and Linden then arranged a meeting with Friis in Kuala Lumpur on 31 December 1992 to discuss the matter. This was held at the office of the auditors Ernst & Young. They discussed how Friis was to be repaid the $1m. Wiffen and Linden agreed that Casetech would sell whatever equipment they had and direct the proceeds of sale towards repayment to Friis (`the December 1992 agreement`). With this in mind, a list detailing Casetech`s assets was drawn up, which primarily consisted of the equipment available for sale and their estimated selling prices. It was found that the total of the estimated sale proceeds of the equipment was close to what was needed to repay Friis. Wiffen and Linden then apportioned the responsibility between themselves for the sale of the individual equipment. All the designated items of equipment were to be sold by 31 March 1993. It was also agreed that rental proceeds from those items of the equipment then rented out would also be applied towards the repayment to Friis. All proceeds received from sales and all rentals would be paid into a new account in which Friis would be the sole signatory.

Unfortunately, only a total sum of $97,390.30 was paid into that account in March and April 1993 and thus received by Friis. In fact, before any money was received, he was asked by Wiffen in January 1993 to pay out a sum of $27,103.22, being the freight due on one item of the equipment in order to secure its release. Friis paid this sum and thus only received a net sum of $70,287.08 pursuant to the December 1992 agreement, leaving a balance of $929,712.92 unpaid.

Friis did not take any action until some years later. He considered that the antagonism that had developed between Linden and Wiffen, over the events leading to and after the December 1992 agreement, would prevent any possibility of recovery. However, in early 1998, Linden came forward with information that the DDB`s guarantee was called on as a result of a misuse of the overdraft facilities. That prompted him to take action against all the parties concerned.

Friis brought the present action on 7 July 1998 and he joined his company, Combined, as the second plaintiff. We shall hereafter refer to Friis and Combined, where appropriate, as the plaintiffs. In the action the plaintiffs claimed against Casetech, Wiffen, Mrs Wiffen and Linden, inter alia, the balance sum of $929,712.92 as damages for breach of contract on the ground that they were contractually bound to use the overdraft facilities only for the back-to-back trade as agreed, but that they had instead used the facilities for other types of trades resulting in the loss. Alternatively, the plaintiffs claimed that the defendants, save for Mrs Wiffen, held the overdraft facilities on trust and had acted in breach of trust in the use of the facilities. Mrs Wiffen was sought to be made liable as an accessory to the breach of trust, on the ground that she knowingly assisted the three defendants in the breach. Accordingly, the plaintiffs sought an account from the defendants of the use of the overdraft facilities and all profits made from their use. Only Casetech, Wiffen and Mrs Wiffen resisted the claim; Linden, however, did not enter an appearance and defend the claim, although the writ was served on him. Eventually, judgment in default was entered against him.

The decision below

Dealing first with the claim against Mrs Wiffen, the trial judge found that there was no evidence that she was involved in any contract with the plaintiffs. Friis did not allege that she had participated in

any of the discussions he had with Wiffen and Linden. Mrs Wiffen`s evidence was that she was not involved in any of the dealings between Wiffen and Friis, and that she was merely an employee of Casetech during part of the relevant period. Accordingly, the learned judge dismissed the claim of $929,712.92 against her.

Turning to the claim against Casetech the learned judge found that Wiffen`s evidence was only a bare denial and none of the defendants had contended that the sum of $929,712.92 was not due to the plaintiffs. On the evidence, he found that there were clear breaches of the 1990 oral agreement (as varied in 1991 and 1992) in the use of the overdraft facilities, and that Friis had only received $70,287.08. Accordingly, the learned judge held that the plaintiffs were entitled to the sum of $929,712.92 as damages for breach contract and entered judgment against Casetech for that amount.

On the question whether Wiffen was personally liable to Friis for that sum, the trial judge found that both Wiffen and Linden were parties to the 1990 oral agreement and therefore were personally liable to the plaintiffs for damages for breach of the 1990 oral agreement. Thus, he also entered judgment against Wiffen for that amount.

The learned judge next turned to the plaintiffs` claim for an account on the ground that Casetech, Wiffen and Linden were constructive trustees of the funds from the overdraft facilities provided by DB and subsequently by HSBC which were guaranteed by the bank guarantee procured by Friis. Here again he dismissed the claim against Mrs Wiffen, as accessory to the breach of trust alleged to have been committed by the three of them, on the ground that she was only an employee and later a director of Casetech at the material time, and there was nothing which supported such a claim. The learned judge found that plaintiffs had not proved that she was a constructive trustee or that she was an accessory to any breach of trust.

The learned judge found that the arrangement made between, on the one hand, Wiffen and Linden and, on the other, Friis was `akin to a partnership arrangement` and he imposed a constructive trust on the funds in the DB account and subsequently, the HSBC account. He held that both Linden and Wiffen were trustees of the funds and were accountable to Friis for the use of those funds. The defendants were thus liable to account for the profits made from the improper use of the facilities. However, the plaintiffs filed the writ on 7 July 1998, and therefore any claim for account for the period of more than six years from that date, ie before 7 July 1992, was time-barred by virtue of s 6(2) of the Limitation Act (Cap 163) and their remedy of account was limited to the funds paid out of the HSBC overdraft account from 7 July 1992 onwards. In respect of the period of limitation, the learned judge found that there was no fraud or fraudulent concealment of any breach of trust postponing the running of the time under s 29(1) of the Limitation Act, as the defendants had merely mixed their own funds in the overdraft account without any intent to defraud.

Lastly, the learned judge ordered that interest be paid on the judgment sum and any sum found due on the taking of accounts, and this interest was to run only from the date of writ. For convenience, we shall hereafter refer to Casetech, Linden and Wiffen as `the defendants`, where appropriate.

The appeals

Against the decision of the learned judge two appeals were filed. Civil Appeal 203/99 was filed by the plaintiffs, and CA 204/99 was filed by Casetech, Wiffen and Mrs Wiffen. From the respective cases filed the appellants have appealed against numerous points dealt with by the learned judge in his judgment, and their cases have raised a host of issues. For our purpose, the issues which we need to

decide are the following:

(a) whether Wiffen was a party to the 1990 oral agreement;

(b) whether there was a constructive trust or any trust over the funds from the overdraft facilities;

(c) whether Mrs Wiffen was an accessory to the breach of trust which the learned judge held that the defendants had committed;

(d) whether Mrs Wiffen should be awarded costs below;

(e) whether any part of the claim for the sum of $929,712.08 as damages for breach of contract was time-barred; and

(f) whether interest on the judgment sum and sum found on the taking of account should run from the date of writ as ordered by the learned judge.

Our decision on these issues would resolve all the material points raised in their respective cases.

The 1990 oral agreement

We deal first with Wiffen`s personal liability under the 1990 oral agreement. Counsel for Wiffen contends that the trial judge`s finding on the personal liability of Wiffen under the 1990 oral agreement was erroneous. He complains that the learned judge placed too much emphasis on the contradictions in Wiffen`s testimony on whether he met Friis in Kuala Lumpur and failed to consider that Friis` evidence was vague and plagued by memory lapses.

In our view, there is absolutely no merit in Wiffen`s appeal on this issue. The learned judge considered the evidence adduced before him at great length. He properly tested both the evidence of Wiffen and that of Friis against other evidence before him and entertained serious doubts on the credibility of Wiffen`s evidence. On the other hand, he found that the evidence of Friis was consistent with the other evidence and in particular with the documentary evidence produced. He accepted Friis` evidence that Casetech was merely a vehicle that Linden and Wiffen used to conduct the transactions, and that he did not have any idea of the makeup of Casetech and therefore would not have provided the financial assistance (which he did), if he had not had the assurance from both Linden and Wiffen that they would be personally liable. The learned judge rejected Wiffen`s evidence that he was not a party to the arrangement made at the meeting at Kuala Lumpur and that he was not present at that meeting. The learned judge arrived at the following conclusion at [para] 19 of his judgment:

> *Taking the evidence in its entirety, and comparing the demeanour of Friis and of Wiffen and the consistency of their versions with the documents and the surrounding factual matrix, I conclude that Wiffen was at the Lake Club meeting in July 1990 and that the 3 of them arrived at the oral agreement as Friis claims. Both Wiffen and Linden were parties to the oral agreement and therefore personally liable to the Plaintiffs in respect of damages arising from their breaches of its terms.*

The learned judge was amply justified in coming to this conclusion, and we agree with him entirely. Given the fact that Wiffen was at the time Linden`s partner, that the arrangement made was to

provide finance for the operations of Casetech in Singapore, and that Wiffen himself was in charge of such operations, it would be surprising if he could implement the arrangement agreed with Friis without having been involved in the negotiations with Friis and coming to an agreement with him. We ourselves are also unable to accept Wiffen`s evidence that he did not participate in the negotiations with Friis at Kuala Lumpur and was not a party to the arrangement made with Friis.

Constructive trust

We now turn to the question of constructive trust as found by the learned judge, which is the most important issue in these appeals. It is necessary to consider what the arrangement made between, on the one hand, Linden and Wiffen and, on the other, Friis, was. The terms of this arrangement, namely the 1990 oral agreement, have been set out in [para] 3 above, and there does not appear to be any dispute with regard to such terms. The arrangement was varied in 1991 and 1992. The learned judge made the following finding on this arrangement at [para] 22 of his judgment:

> *As concerns CTL and Wiffen, the facts before me are as follows. Wiffen and Linden had entered into an oral agreement with Friis in July 1990 wherein Friis would procure financing for CTL`s trades in equipment in return for which Friis would receive one third of the profit. Initially the financing was done by way of LCs and bank drafts procured by Friis. This proved cumbersome and in early 1991 this method was changed. On the security of a DDB guarantee procured by Friis, CTL obtained credit facilities in DB up to $950,000. In June 1992, the DB account was closed and credit facilities for up to $1m was obtained under CTL`s HSBC account. This was also secured by a DDB guarantee procured by Friis.*

It is implicit that the overdraft facilities, provided by DB or later by HSBC secured by the bank guarantee procured by Friis, were to be used solely for the back-to-back trading of equipment as contemplated in the 1990 oral agreement, although such a term was not expressly spelt out in the variations made in 1991 and 1992. It was clearly a term of the 1990 oral agreement that the transactions to be financed by Friis were to be confined to the back-to-back trades only. It could not have been the intention of Friis, in 1991 and 1992, to provide security to finance the use of the overdraft facilities for other purposes.

The learned judge found that Casetech had used the overdraft facilities for purposes other than financing the back-to-back transactions contemplated in the 1990 oral agreement, and that Wiffen and Linden did not bother to keep separate the two types of transactions. After referring to the case of **Coulthard v Disco Mix Club Ltd & Ors** [1999] 2 All ER 457, he said at [para] 25:

> *I do not find the **Coulthard** case to be relevant to the question of whether Wiffen and Linden owed the plaintiffs a fiduciary duty in this case. There was an arrangement in which Friis had, in effect, placed $1m of his money at the disposal of Wiffen and Linden in order that they may carry out the undertaking. It is akin to a partnership arrangement and I can see no reason not to impress Wiffen and Linden with a constructive trust over the funds in the DB account and subsequently, the HSBC account.*

This is the core finding on the basis of which the learned judge held that the funds in the overdraft accounts with DB and HSBC were impressed with constructive trust. With respect, we are unable to

agree with this finding. Friis did not `in effect, [place] $1m of his money at the disposal of Wiffen and Linden`. Friis merely provided security in the form of a bank guarantee to secure the overdraft facilities provided by Casetech`s bank, which was first DB and later HSBC. Friis himself was quite clear in his own mind of what he had provided for Casetech, namely, a bank guarantee of $1m to secure Casetech`s overdraft facilities. In giving evidence in the cross-examination he said as follows:

> *Q: After all, you yourself invested $1m in Casetech based on an oral agreement.*
>
> *A: I did not invest $1m in Casetech Trading. I did not invest $1m in the venture, I provided a $1m guarantee.*
>
> *Q: You had exposed yourself to $1m liability based on an oral agreement alone?*
>
> *A: Yes.*

Thus what Friis had provided was a bank guarantee for $1m to secure the overdraft facilities of Casetech. It is true that these overdraft facilities were to be used solely for the purpose of back-to-back trades and not for other transactions of Casetech. But that restriction on the use was based on the terms of the 1990 oral agreement (as varied); it was purely contractual and did not arise out of the creation of any trust. The funds made available by Casetech`s bank on the overdraft facilities and utilised by Casetech, whether for the back-to-back trading in compliance with the agreement or for other purposes in breach of the agreement, did not belong to Friis in law or in equity. Nor were these funds held in trust for Friis. In our opinion, neither Linden nor Wiffen was at any time a trustee for the plaintiffs or either of them and consequently no breach of trust was committed by either Linden or Wiffen.

Nonetheless, the question remains whether by reason of the 1990 oral agreement, as varied in 1991 and 1992, Linden and Wiffen stood in any other fiduciary relationship with the plaintiffs and in particular Friis. As we have held, both Linden and Wiffen were in a contractual relationship with Friis: they were both parties to the 1990 oral agreement made with Friis, as varied in 1991 and 1992. The question is whether this contractual arrangement also gave rise to a fiduciary relationship between, on the one hand, Linden and Wiffen and, on the other, Friis, such that the former became fiduciaries of the latter. We think not. The arrangement made between them was purely a commercial financing arrangement whereby Friis would provide security for the overdraft facilities to finance certain transactions to be carried out by Casetech and in return would receive a share of the profits. Such an arrangement did not give rise to a fiduciary relationship.

In this respect, there is a material feature in this financing arrangement which bears mentioning. Under the 1990 oral agreement, there was no requirement or obligation on the part of Linden and Wiffen that any or all of the back-to-back trades undertaken by Casetech were to be financed by the use of the overdraft facilities. Casetech was entitled to act entirely in its own self-interest in determining when the overdraft facilities were to be used, and when it should use its own funds for the purpose. Casetech was certainly at liberty, at any time, to enter into transactions, even if they were back-to-back trades of equipment, with its own resources without the use of the overdraft facilities, and in such case would be entitled retain the profits from such transactions wholly for itself. It is implicit from the terms of the agreement made with Friis that Friis would only be entitled to a one-third share of the profits from the back-to-back transactions actually financed by the overdraft facilities. The corollary of this is that Friis had no right to participate in the management of the back-to-back trades or determine which trades were to be accepted. Thus, if and when the overdraft

facilities (secured by the bank guarantee procured by Friis) were used for such trading, then and only then would Friis be entitled to a one-third share of the profits.

Arising from the change in the arrangement made in 1991 and 1992 in the way in which the back-to-back transactions of Casetech were to be financed, there was no doubt greater confidence and reliance reposed by Friis in Wiffen and Linden to effectuate the purposes of the 1990 oral agreement. Confidence and reliance per se, however, have never been a touchstone of a trust or fiduciary relationship in a commercial context. Otherwise, almost every contractual relationship involving some form of confidence or reliance (unilateral or mutual) would give rise to a fiduciary relationship between the parties concerned.

We find the Australian case of **Hospital Products Ltd v United States Surgical Corp** [1984] 156 CLR 41 of some assistance. Briefly the facts there were these. An American company was the manufacturer of surgical stapling products which were made of its own design and marketed under the name of `Auto Suture`. The company appointed a dealer to be the sole distributor of the stapling products in Australia. After the appointment, the dealer went about setting up the distributorship. He acquired from the company a large quantity of demonstration products. He caused them to be sterilized and then sold them in competition with or in substitution of the company`s products. Later, he also manufactured his own products locally and deferred filling orders for the company`s products but instead filled the orders with his own products. The company instituted proceedings in the Supreme Court of New South Wales, claiming, inter alia, a declaration that the dealer`s assets were held on constructive trust and other consequential orders. The trial judge held that a fiduciary relationship existed between the parties, that the dealer had acted in breach of his fiduciary duty and ordered an account of profits. On appeal, the Court of Appeal declared that there was a constructive trust over the dealer`s assets in favour of the company. On further appeal, the High Court of Australia held, inter alia, that the dealer was in breach of the distributorship agreement and, by a majority, that there was no fiduciary relationship between the parties. Gibbs CJ said at p 72:

> *An examination of all the circumstances confirms in my opinion that the relationship between the parties was not a fiduciary one. It is true that USSC relied on HPI to promote the sale of its products and left it to HPI to determine how it should go about doing so, and that HPI had it in its power to affect USSC`s interests beneficially or adversely. However, there are two features of the case, in particular, which together constitute an insuperable obstacle to the acceptance of USSC`s contention that a fiduciary relationship existed between itself and HPI. In the first place, as I have said, the arrangement was a commercial one entered into by parties at arm`s length and on an equal footing. ... An ordinary commercial contract made in those circumstances, even as a result of fraud, is unlikely to give rise fiduciary to obligations. Secondly, it was of course clear that the whole purpose of the transaction from Mr Blackman`s point of view, as USSC knew, was that he, and later HPI, should make a profit.*

Dawson J at p 147 made the following general observations:

> *The circumstances in which the contract between USSC and Blackman was made do not suggest any disadvantage or vulnerability on the part of USSC requiring the intervention of equity to protect its interests. Those negotiations were of a commercial nature and were at arm`s length. They were conducted by persons on both sides who were experienced in the market place ...*
>
> *It may be conceded that USSC eventually accepted that there was no need for*

> *a formal agreement because of the misplaced trust which Hirsch and Josefsen had in Blackman`s integrity and ability. But that is not the sort of trust or confidence which equity will protect by the imposition of fiduciary obligations.* ***A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other.*** *In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one ... A fiduciary relationship exists where one party is in a position of reliance upon the other* ***because of the nature of the relationship and not because of a wrong assessment of character or reliability****. That is to say, the relationship must be of a kind which of its nature requires one party to place reliance upon the other; it is not sufficient that he in fact does so in the particular circumstances ... [Emphasis is added]*

In our opinion, the 1990 oral agreement made between, on the one hand Linden and Wiffen and, on the other, Friis, as varied in 1991 and 1992, was purely a commercial financing arrangement, whereby Friis would provide security for the overdraft facilities financing the back-to-back trading of equipment and in return would receive a one-third share of the profits. In our judgment, the rights of the parties are purely contractual, and neither Linden nor Wiffen stood in any fiduciary relationship with Friis and none of the defendants were fiduciaries of Friis or his company, Combined. In the words of Dawson J, the circumstances in which the agreement was made did not suggest any inherent disadvantage or vulnerability on the part of Friis requiring the intervention of equity to protect his interests. The negotiations conducted were of a commercial nature and were at arm`s length.

Account of profits

The learned judge ordered that an account of the profits be taken of the use of the funds withdrawn from the overdraft facilities, on the ground that the defendants held those funds in trust for the plaintiffs and in breach of trust had used the funds for other purposes. As we have now held that the defendants were not trustees of the funds, and also did not stand in a fiduciary relationship with the plaintiffs, it follows that there was no breach of trust or breach of fiduciary duty on the part of the defendants. The defendants had committed a breach of contract and for such breach an award of damages has been made.

The question now is whether in this case the plaintiffs are entitled to an account of the profits derived from the use of the funds. We revert once again to the terms of the 1990 oral agreement, the terms of which have been set out in [para] 3 above and it is unnecessary to replicate them here. Under the terms of the agreement, as varied in 1991 and 1992, the transactions to be financed by the overdraft facilities were to be confined to the back-to-back trading of equipment, and Friis was given to understand that Casetech would only purchase the equipment from the seller when there was a ready purchaser therefor, and consequently only profits from such transactions were contemplated. On the basis of such terms as agreed, no sharing of any loss from these trades was stipulated and agreed, and Friis was insulated from any loss arising. In other words, under the 1990 oral agreement, as varied in 1991 and 1992, Friis would not be responsible for any loss occasioned by such back-to-back transactions, and would not have to bear any part of it.

It is not in dispute that Casetech had used funds from the overdraft facilities provided by DB and later by HSBC for the purpose of financing back-to-back transactions of equipment, and also for other

purposes. The learned judge said at [para] 22:

> *There is evidence that CTL had used the overdraft in the DB and the HSBC accounts for purposes other than financing transactions under the oral agreement. What happened was that Wiffen and Linden had not bothered to keep separate the two types of transactions. Wiffen also gave evidence that although the funds were mixed, at all times the amount drawn down did not exceed the cost of equipment purchased under the oral agreement.*

In so far as the funds from the overdraft facilities had been used for the purpose of the back-to-back transactions - and these transactions had been agreed by the parties - Casetech had not breached the agreement made with Friis. As we have said above, if losses were incurred in any of such transactions, Friis would not be responsible for such losses and would not have to bear any part thereof. On the other hand, if profits were made, as the parties had contemplated, Friis was entitled to a one-third share thereof, as provided in the agreement. Thus, under the 1990 oral agreement, as varied in 1991 and 1992, Friis is entitled to an account of his share of the profits, and an order should be made for an account to be taken of the profits from such transactions but limited to the transactions occurring after 7 July 1992. This is purely a contractual right to an account.

We now turn to the use of the funds from the overdraft facilities for purposes other than financing the transactions under the 1990 oral agreement. Such use of funds by Casetech was clearly in breach of the agreement, and such breach was not disputed by Casetech or Wiffen. The remedy for a breach of contract is an award of damages. Subject to what is said below on restitutionary damages, the general rule is that damages awarded for breach of contract are compensatory and are intended to compensate the innocent party for the loss he has sustained and not to disgorge the gain the wrongdoer has made and transfer it to the innocent party. The object is to put the innocent party, so far as money can do so, in the same position as if the contract had been performed. In **Tito & Ors v Waddell & Ors (No 2)** [1977] 1 Ch 107, 332, Megarry V-C said:

> *[I]t is fundamental to all questions of damages that they are to compensate the plaintiff for his loss or injury by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong. The question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff.*

The question now is whether, in addition to the award of damages, the plaintiffs are entitled to an account of profits derived from the use of the funds in breach of the agreement. In **The Siboen; Occidental Worldwide Investment Corp v Skibs A/S Avanti & Ors** [1976] 1 Lloyd`s Rep 293, where, among other things, the owner of the two vessels on charter to the charterers wrongfully withdrew the vessels in breach of the charterparties, it was held that the charterers were entitled to damages in respect of the remainder of the charter periods, and not to an account of the profits the shipowner had derived from a more lucrative employment of the vessels elsewhere. Kerr J said, at p 337:

> *In respect of the remainder of the charter periods they [the charterers] claim either an account of the profits which the owners made from the use of the ships or alternatively damages. I can see no basis for the charterers being entitled to an account of the profits made by the owners. If they are entitled to anything they are entitled to damages in the normal way on the ground that the owners wrongfully repudiated charter-parties by withdrawing the ships from their service.*

It is helpful to refer also to **Surrey County Council & Anor v Bredero Homes Ltd** [1993] 3 All ER 705. There, two local county councils, who were the owners of two parcels of adjoining land, sold the land to a developer. In the sale contract, the developer undertook to obtain planning permission for the development of the site in accordance with the councils` scheme. Such planning permission was duly obtained by the developer. The developer subsequently applied and obtained fresh planning permission which enabled it to build more houses than the number specified in the scheme approved by the councils. In breach of contract, the developer proceeded to build the houses, and the houses were eventually completed and were sold. On being sued by the councils, the developer conceded the breach of contract, but argued that the councils were entitled only to nominal damages. Both the judge at first instance and the Court of Appeal held that the councils had not suffered any loss and were not entitled to recover any substantial damages. The headnote of the case states:

> *The remedy at common law for breach of contract was the award of damages to compensate the victim for his loss, not to transfer to the victim, if he had suffered no loss, the benefit which the wrongdoer had gained by his breach of contract. Furthermore, the innocent party was to be placed, so far as money could do so, in the same position as if the contract had been performed. Although damages might in an appropriate case cover profit which the injured plaintiff had lost, they did not cover an award to the plaintiffs of the profit which the defendant had gained for himself by his breach of contract when the plaintiff had himself suffered no loss. Since the plaintiff councils had not suffered any loss, it followed that the damages recoverable had to be merely nominal.*

Dillon LJ said at p 709:

> *[T]he remedy at common law for a breach of contract is an award of damages and damages at common law are intended to compensate the victim for his loss, not to transfer to the victim, if he has suffered no loss, the benefit which the wrongdoer has gained by his breach of contract.*

Later his Lordship said at p 712:

> *Given that the established basis of an award of damages in contract is compensation for the plaintiff`s loss, as indicated above, I have difficulty in seeing how Sir William Goodhart`s suggested common law principle of awarding the plaintiff, who has suffered no loss, the gain which the defendant has made by the breach of contract, is intended to go.*

Steyn LJ, the other member of the court, while agreeing with Dillon LJ on the award of damages, went further to consider whether the plaintiffs were entitled to restitutionary damages. His Lordship said at p 714:

> *An award of compensation for breach of contract serves to protect three separate interests. The starting principle is that the aggrieved party ought to be compensated for loss of his positive or expectation interests. In other words, the object is to put the aggrieved party in the same financial position as if the contract had been fully performed. But the law also protects the negative interest of the aggrieved party. If the aggrieved party is unable to establish the*

> *value of a loss of bargain he may seek compensation in respect of his reliance losses. The object of such an award is to compensate the aggrieved party for expenses incurred and losses suffered in reliance of the contract. These two complementary principles share one feature. Both are pure compensatory principles ...*
>
> *There is, however, a third principle which protects the aggrieved party`s restitutionary interest. The object of such an award is not to compensate the plaintiff for a loss, but to deprive the defendant of the benefit he gained by the breach of contract. The classic illustration is a claim for the return of goods sold and delivered where the buyer has repudiated his obligation to pay the price. It is not traditional to describe a claim for restitution following a breach of contract as damages. What matters is that a coherent law of obligations must inevitably extend its protection to cover certain restitutionary interests. How far that protection should extend is the essence of the problem before us.*

Having said this, his Lordship went on to consider various authorities and the circumstances of the case, and declined to allow restitutionary damages: see p 715.

It is perhaps pertinent to mention that in the very recent case of **A-G v Blake (Jonathan Cape Ltd, third party)** [1998] Ch 439, the Court of Appeal in England considered (without however the benefit of any argument) the question of retitutionary damages as a proper remedy for breach of contract, and held obiter that there are at least two situations in which justice requires the award of restitutionary damages where compensatory damages would be inadequate. The first is where the defendant fails to provide the full extent of the services which he has contracted to provide and for which he has charged the plaintiff. The second is where the defendant has obtained his profit by doing the very thing which he contracted not to do: see p 458.

Reverting to the case at hand, the learned judge has made an award of damages for breach of contract. That award is to compensate the plaintiffs the loss they had sustained. In our judgment, the plaintiffs are not entitled, in addition, to have an account taken of the profits derived from the use of the funds by Casetech in breach of contract. In any event, even if the plaintiffs were so entitled, we would not be disposed to make such an order in this case, as the defendants did not appear to have made any profits from such use but had sustained a loss, and it would be futile to order an account to be taken of the profits, if any. For completeness, we would add that this is not a case where an award of retitutionary damages is an appropriate remedy.

We therefore set aside the order made below for the taking of accounts, and in lieu thereof order an accounts to be taken of the profits made from the use of funds from the overdraft facilities for the back-to-back trades or transactions which the parties had agreed, but such taking of accounts be limited to the back-to-back transactions occurring after the 7 July 1992. In respect of the earlier period, the claim for an account is time-barred.

Claim against Mrs Wiffen as an accessory to breach of trust

As there was no breach of trust committed by Linden or Wiffen, the question of Mrs Wiffen`s involvement as an accessory to the breach of trust as alleged by the plaintiffs does not arise. We would dismiss such claim against her.

Mrs Wiffen`s costs below

The plaintiffs` claims against Mrs Wiffen for damages for breach of contract and for an account of profits as an accessory to the alleged breach of trust failed and were dismissed by the trial judge. However, the learned judge did not make an order awarding her any costs. She now appeals against the failure or refusal to make such an order.

Presumably, the learned judge took the view that she, Wiffen and Casetech were represented by the same firm of solicitors and by the same counsel in court, and that she and Wiffen filed a joint defence, and no extra time and expenses were incurred in her defence. We think that in this case some extra time and expenses were incurred in preparing for her defence. She filed her affidavit evidence in defending the claims and she gave evidence in court on the extent of her involvement in the matters alleged by the plaintiffs. In our opinion, an order as to costs should have been made in her favour. We would allow her appeal.

The limitation defence in respect of the claim for $929,712.92

Casetech and Wiffen raised the defence of limitation under s 6 (1) of the Limitation Act in respect of a part of the claim for damages for breach of contract. The amount of damages was quantified in the sum of $929,712.92, after deducting the amount paid to Friis from the proceeds of sale or rentals pursuant to the December 1992 agreement. That amount was part of the outstanding sum of $1m on the overdraft account with HSBC at the time, when the call was made on DDB`s guarantee and Friis` account with DDB was debited with the sum of $1m. That was on or about 30 December 1992. Counsel for Casetech and Wiffen submits that the plaintiffs` right of action for damages for breach of contract arose with each amount overdrawn on the overdraft account, and as at 6 July 1992, the overdraft account with HSBC was overdrawn by a sum of $563,510.78, and this represented part of the damages which, in counsel`s submission, was time-barred. Accordingly, the amount of damages awarded should be reduced by this amount.

We are unable to accept this argument. The sum of $929,712.72 was the balance of the losses which amounted to $1m. On or about 30 December 1992, HSBC called on the DDB`s guarantee for payment of the $1m, and that amount was paid by DDB and debited to the account of Friis. The $1m represented the total amount of the losses incurred by Casetech in or arising out of its performance of the 1990 oral agreement, as varied in 1991 and 1992. Part payments amounting in total to $70,287.08 were made in March and April 1993, leaving the balance of $929,712.72, which was the amount claimed in the action. The claim for this amount or any part thereof is therefore, in our view, not time-barred.

It should be borne in mind that the overdraft account with HSBC was a running account on a fluctuating basis, and deposits to and withdrawals from the account were made from time to time. Assuming that the debit balance on the overdraft account stood at $563,510.78 as at 6 July 1992, thereafter there were made from time to time deposits to and withdrawals from that account, and each deposit made would have gone towards payment, in whole or in part, of the amount withdrawn in breach of the agreement. This account had throughout been maintained as a running account, and the outstanding amount was crystallized only when HSBC demanded payment of the sum of $1m and called on the DDB`s guarantee.

At any rate, under the financing arrangement made between the parties, there was an implied obligation by the defendants to indemnify Friis against any loss, and this implied indemnity could only be invoked when the DDB`s guarantee was called on by HSBC and the amount paid by DDB was

debited to his account. The time on this claim by Friis did not begin to run until the call was made and the amount was paid under the guarantee and debited to Friis` account. It was only then that the true extent of the defendants` liability could be ascertained.

Interest on judgment debt

The trial judge awarded interest on the sum of $929,712.92 and any sum found due under the account of profits from the date of writ. The plaintiffs challenge this exercise of discretion under s 12 of the Civil Law Act (Cap 43, 1999 Ed) on the ground that it is a departure from the general practice of awarding interest from the date of accrual of loss, that is 31 December 1992, when HSBC called on the DDB`s guarantee.

Although the general rule as contended for by the plaintiffs is indeed established, the principal exception of this rule is unwarranted delay by the plaintiff: ***McGregor on Damages*** , para 658, 668-669. This factor was expressly considered by the learned judge in his judgment (at [para] 29), where he noted that Friis was content to sit on his claim for five years before taking any action. The plaintiffs have not offered any other reasonable explanation for the delay. Further, an award of interest covering the period from date of writ to date of judgment is not without precedent in such a context, although other methods are more common: see **Metal Box v Currys** [1988] 1 All ER 341.

The plaintiffs rely on **Mahtani & Ors v Kiaw Aik Kang Land Pte** [1995] 1 SLR 168 in support of the argument that to disallow such interest from the date of accrual of loss would allow the defendants to profit from their own breach of contract. That case is, however, distinguishable for the simple reason that there, the defendants had the use of the money which was the subject of claim, whereas here, the judgement sum represented compensation for loss suffered which was never represented by any sum held by the defendants. We consider, therefore, that there is no compelling reason in principle to interfere with the exercise of discretion below and this order should continue to apply.

Conclusion

For the reasons given, we allow CA 204/99 to the extent as follows: we set aside the order made below for a taking of accounts, and in lieu thereof, order an account to be taken of the profits made from the use of the overdraft facilities for the back-to-back trades or transactions which the parties had agreed, but such taking of account be limited to the back-to-back transactions occurring after the 7 July 1992. We also award interest on the amount found due on the taking of such account at the same rate as that awarded below, such interest to run from the date of the writ. We allow Mrs Wiffen`s appeal on costs, and award her the costs of defending the claims below.

Turning to the costs of this appeal, we award Mrs Wiffen the costs of her appeal. As regards Casetech and Wiffen, they have succeeded in part only, and there are numerous points they took in this appeal, on which they failed. We therefore award them only 30% of the costs of their appeal. The deposit in court as security for costs is to be refunded to the appellants or their solicitors, together with interest, if any.

We dismiss CA 203/99 with costs. The deposit in court as security for costs is to be paid to the respondents in this appeal or their solicitors, with interest, if any, to account of costs.

Outcome:

Order accordingly.