

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 46

Suit 7195/1985

Between

Multi-Pak Singapore Pte Ltd
(in receivership)

... Plaintiff

And

Intraco Ltd

... Defendant

GROUND'S OF DECISION

Companies — Directors — Duties; Companies — Shares — Allotment; Tort
— Conspiracy; Trusts — Constructive trusts; Words and Phrases

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

**Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd
and Others**

[1994] SGHC 46

Suit 7195/1985
Chao Hick Tin J
26 February 1994

1 The plaintiffs were in the business of a paper mill and are under receivership. Two other companies, City Carton Co Pte Ltd and Box Pak (S) Pte Ltd, were in the business of making paper cartons with the latter being a subsidiary of the former. The second and third defendants were, at all material times, directors of City Carton, Box Pak and the plaintiffs. The fourth defendant was the financial controller of City Carton and Box Pak from 1 June 1984 to March 1985 and of the plaintiffs from the same date to 31 January 1985.

2 City Carton and Box Pak had obtained supplies from Intraco Ltd, the first defendant herein, a public listed trading company. For some time prior to 24 May 1984 (the significance of this date will become apparent later), City Carton and Box Pak owed Intraco a total sum of \$2,545,897. The relevant accounts of City Carton and Box Pak show that, at the time, they were in a very bad financial state, so much so that, of the total amount owing, Intraco had already written off \$1.5m as irrecoverable.

3 It was clear that City Carton was insolvent (in the sense of total liabilities exceeding total assets) and was functioning solely on the continued support of

its financiers and creditors and their willingness not to seek immediate repayment. Very much the same condition prevailed in Box Pak. There was only a very slim chance of unsecured creditors being paid. The evidence would appear to show that at the very most only 4-5% of the debts of unsecured creditors of these two companies could be repaid.

4 For about a year prior to 24 May 1984, Intraco had, together with the other creditors of City Carton, held discussions to see how City Carton, and its subsidiary Box Pak, could be rescued. Intraco's objective in these efforts was no doubt to seek the recovery of the debts due to them from City Carton and Box Pak. Various proposals were considered to revive City Carton. At the end of 1983, one of the proposals discussed was the conversion of the debts owing by City Carton and Box Pak to Intraco into equity in those two companies (PB24-25). The conversion of other creditors' debts into equity was also explored (DB531-2 and 542-3). As late as 17 April 1984, the option contemplated was the conversion of Intraco's receivables from City Carton into equity in that company (DB554-5).

5 Sometime very close to 24 May 1984, Multi-Pak became involved in the discussions. Multi-Pak was represented by the second and third defendants.

6 On 24 May 1984, an important event occurred, which gives rise to the present cause of action. Multi-Pak entered into an agreement with Intraco to take an assignment of the debts owing by City Carton and Box Pak to Intraco and, in consideration thereof, Multi-Pak agreed to pay Intraco the sum of \$2,371,079.62 (the assignment agreement). It was a straight forward assignment with no other terms or conditions attached. At the time, neither City Carton nor Box Pak was in any way related to Multi-Pak. But Mr Peter Ng, the

second defendant herein, was the managing director of all three companies, City Carton, Box Pak and Multi-Pak. The financial position of Multi-Pak was then rather precarious.

7 As this agreement is crucial to this action, and is only a very brief document, I shall set it out in full, excluding the long title:

Whereas City Carton Co Pte Ltd and Box Pak (S) Pte Ltd (hereinafter called the debtors) are indebted to the vendor in the sum of \$2,545,897.83 for goods sold and delivered and the vendor has agreed with the purchaser for the absolute sale of such debt for the price of \$2,371,079.62

8 Now this agreement witnesseth that, in consideration of the sum of \$2,371,079.62 paid by the purchaser, the vendor, as beneficial owner, hereby sells to the purchaser all the said debt of \$2,545,897.83 due and owing to the vendor by the said debtor and all interest due and to become due for the same and the full benefit and advantage thereof to hold the same unto the purchaser absolutely.

9 In the agreement above, `the vendor` refers to Intraco and `the purchaser`, Multi-Pak.

10 On 6 June 1984, a cheque for \$2,371,079.62 was issued by Multi-Pak to Intraco in payment of the assignment. The cheque was signed by the second and third defendants, as directors of Multi-Pak.

11 It would appear that, at about that period of time, Intraco began discussions with Multi-Pak with a view to becoming a shareholder in Multi-Pak. On 28 May 1984, a letter of confirmation of allocation of shares was issued by Multi-Pak to Intraco as follows:

This serves to confirm that 20,000 shares of \$100 each have been allocated to your company. These shares have been allocated at par and shall be payable fully in cash within one month from the date of allotment.

12 It was only on 11 June 1984 that Multi-Pak passed a resolution to allot the shares to Intraco. It would seem that, as of 14 June 1984, Intraco's board had yet to formally approve the taking up of the \$2m shares (PB67-68 and DB572-3). But, on 6 June 1982, Intraco's company secretary wrote to Multi-Pak to confirm that its board had approved the subscription of the \$2m shares in Multi-Pak. Having examined an internal memorandum from Mr Leslie Tan, a senior manager at Intraco, to the executive committee (PB60-61), it is clear to me that the approval then was that of the executive committee, not of the board. It is probable that the formal board approval came a little later. It was only on 20 June 1984 that Multi-Pak notified the Registry of Companies of the allotment to Intraco. What is significant is that, as of 24 May 1984, there was neither approval of the board nor of the executive committee of Intraco to take up the \$2m shares in Multi-pak.

13 As part of the agreement to subscribe for the \$2m shares in Multi-Pak, Intraco also agreed to lend \$371,079.62 to Multi-Pak. Two cheques were accordingly issued by Intraco to Multi-Pak for the said two sums.

14 On 21 June 1984, a coordinated effort was made by both Multi-Pak and Intraco to deposit the said two cheques and the earlier cheque issued by Multi-Pak to Intraco for \$2,371,079.62, into their respective accounts with the Standard Chartered Bank. The two cheques issued in favour of Multi-Pak were deposited first, followed immediately by the cheque issued in favour of Intraco for the assignment of the debts. All three cheques were banked in through the same teller. It is clear to me that this manner of banking in the cheques was

made in an attempt to avoid any allegation that Intraco was using the money of Multi-Pak to buy its own shares, thus infringing s 76 of the Companies Act (Cap 185, 1970 Ed). I should mention here that an earlier attempt by the plaintiffs to include s 76 of the Companies Act as a ground to challenge the propriety of the payment of \$2,371,079.62 to Intraco was unsuccessful as it was made after the limitation period had expired: see decision of the Court of Appeal in ***Multi-Pak Singapore Pte Ltd v Intraco Ltd*** .

15 Sometime in January 1985, it soon became apparent that the concerted efforts to save Multi-Pak and City Carton could not succeed. It appears that the banks could not agree. On 24 January 1985, Arab Bank appointed three auditors from M/s Price Waterhouse as receivers and managers of Multi-Pak pursuant to a power under a debenture. Thereafter, all the efforts to revive Multi-Pak and City Carton came to a grinding halt.

16 By this action, the receivers on behalf of Multi-Pak are suing Intraco, the two former directors of Multi-Pak (the second and third defendants) and the financial controller of Multi-Pak (the fourth defendant) for the return of the \$2,371,079.62 paid to Intraco. The action is based on three grounds, namely, constructive trust, conspiracy and resulting trust. I should mention, at this juncture, that the second to the fourth defendants are not parties to these proceeding because they have not been served with the papers. The present proceeding is entirely between Multi-Pak and Intraco.

17 **Constructive trust**

18 The main ground advanced by the plaintiffs for the return of the money is based on constructive trust. Counsel for the plaintiffs submitted that, in law,

where officers of a company, in breach of their fiduciary duties, misapply the funds of the company, and the funds then come into the hands of a stranger, as in this case Intraco, with actual or constructive knowledge of the misapplication or of the facts and circumstances underlying the transaction, the stranger becomes a constructive trustee for the misapplied funds. He further submitted that funds of a company are trust funds to be used by those in charge only for the purposes of the company.

19 In ***Barnes v Addy*** , an attempt was made to make two solicitors of a trustee, who acted in breach of a trust, constructive trustees, without success. Lord Selborne LC laid down the principles on constructive trust as follows:

Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

20 In ***Russel v Wakefield Waterworks Co*** , at p 479, Jessel MR said:

In this court, the money of the company is a trust fund because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this court say that he is not a constructive trustee.

21 A recent case which adopted the principles enunciated in ***Barnes v Addy*** is ***Belmont Finance Corp v Williams Furniture Ltd (No 2)*** , where, under an

arrangement, the money of one company was used by another company to buy the shares of the first mentioned company in breach of s 54 (the equivalent of our s 76) of the English Companies Act 1948. There, Buckley LJ declared (at p 405):

*If a stranger to a trust (a) receives and becomes chargeable with some part of the trust fund or (b) assists the trustees of a trust with knowledge of the facts in a dishonest design on the part of the trustees to misapply some part of a trust fund, he is liable as a constructive trustee (**Barnes v Addy**, per Lord Selborne LC).*

22 A limited company is, of course, not a trustee of its own funds; it is their beneficial owner; but, in consequence of the fiduciary character of their duties, the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and, if they misapply them, they commit a breach of trust (**Re Lands Allotment Co** , per Lindley and Kay LJJ). So, if the directors of a company, in breach of their fiduciary duties, misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds.

23 I now turn to consider how these principles are to be applied to the facts of the present case. For a constructive trust to arise in the instant case, three things must be shown: (i) the payment of \$2,371,079.62 by the directors of Multi-Pak to Intraco was in breach of trust (ii) that Intraco did receive the sum and (iii) that Intraco received the sum with actual or constructive knowledge of the breach.

24 In so far as the second element is concerned, it is not in dispute that Intraco did receive the \$2,371,079.62. As for the third element, it is also not in dispute that if the payment of the \$2,371,079.62 is shown to be in breach of trust by the directors of Multi-Pak, it cannot seriously be argued that Intraco did not know about it or could not have known about it. Intraco clearly knew the financial state of City Carton and Box Pak. Intraco negotiated with Multi-Pak on the assignment. Intraco had already written off \$1.5m of the \$2,545,897 as being bad debts. The only contentious issue that remains is the first: was there a breach of duty when the directors paid \$2,371,079.62 for the assignment of what would appear to be bad debts amounting to \$2,545,897?

25 Under s 157 of the Companies Act, a director is required at all times to act honestly and use reasonable diligence in the discharge of his duties. The word `honestly` does not mean that a director would only be in breach of duty if he had acted fraudulently. It means to act bona fide in the interests of the company: *Marchesi v Barnes & Keogh* . In exercising their discretion, the directors should only act to promote or advance the interest of the company: see *Walker v Wimborne* .

26 **What benefits for Multi-Pak?**

27 So the question is: did the directors act in the interest of Multi-Pak when they decided to take the assignment of the debts of City Carton and Box Pak at the aforesaid price? The receivers` case is that there is no benefit at all for Multi-Pak to take an assignment of those bad debts. City Carton and Box Pak could never pay up those debts. Mr Nicky Tan Ng Kuang (PW3), a chartered accountant with M/s Price Waterhouse, having examined the accounts of City Carton and Box Pak, expressed the view that there was no commercial

justification for Multi-Pak to purchase the debts of City Carton and Box Pak.

He gave these reasons:

(a) assets of the companies are significantly less than their liabilities; (b) current assets are significantly less than current liabilities; (c) both companies have been making losses; (d) the whole paid-up share capital of these companies have been lost; (e) these companies had been selling their assets to fund their working capital requirements; and (f) the assets of these companies were all subjected to prior charges and there was no significant surplus for unsecured creditors.

28 I agree with Mr Tan that, on the face of it, there does not appear to be any commercial sense for Multi-Pak to have bought over the debts from Intraco when the debts were literally worthless.

29 Intraco`s case is that taking over the debts of City Carton and Box Pak did give Multi-Pak some benefits. In their amended further and better particulars, Intraco listed out the following as being `the benefits given and/or would be given` to Multi-Pak:

(a) the first defendant`s equity participation in the plaintiffs; (b) the first defendant`s management participation on the plaintiffs` board of directors; (c) facilitating the plaintiffs` obtaining of banking facilities; (d) new line of credit of \$1m; (e) additional \$1m credit line to be implemented but for the collapse of the plaintiffs; (f) the first defendant arranged to purchase raw materials (pulp and paper) with a view to eventual sale to the plaintiffs. The first defendant arranged to store the cargo in the first defendant`s warehouse free of storage charges for delivery to the plaintiffs as and when required; (g) all raw materials stored would be free of interest costs to the plaintiffs; (h) all deliveries of raw materials were intended to be made to the plaintiffs on a credit basis; (i) the first defendant agreed to purchase the whole of the plaintiffs` production regardless of market conditions, thus ensuring proper cash flow for the plaintiffs; (j) the first defendant arranged to create a market share for the plaintiffs` products by reducing the first defendant`s imports; (k) the first defendant arranged to provide

the plaintiffs with expertise in marketing paper which the plaintiffs did not possess; and (l) the plaintiffs would be able to capture City Carton as a captive customer but for the collapse of the plaintiffs and City Carton.

30 It is of significance to note that Intraco have not identified the debts themselves as being a benefit. This certainly affirms what the plaintiffs have asserted: that the debts are of no value or of hardly any value.

31 From the list, it is quite clear that the most substantial benefits are those in items (a), (b) and (c). In his submission to me, counsel for Intraco conceded that there was no evidence to support benefits (d) to (h). The first three items of benefit effectively amount to this: that because Multi-Pak took an assignment of the debt, Intraco had agreed to invest \$2m in Multi-Pak and be a shareholder; as a result, Multi-Pak was able to tap the management expertise of Intraco. Furthermore, because of the equity participation of Intraco in Multi-Pak, banks were more willing to extend credit facilities to Multi-Pak.

32 So it is crucial that we examine whether there is any evidence to link the assignment with Intraco's equity participation in Multi-Pak. As I have indicated above, the assignment agreement itself provides no such link. It was not stated in the assignment agreement that, because of the agreement of Multi-Pak to take an assignment of the debts of City Carton and Box Pak, Intraco had agreed to inject \$2m as equity into Multi-Pak. There was simply no connection between the two. Neither did Intraco call any evidence to support their contention that they injected \$2m as equity into Multi-Pak because of the assignment.

33 Mr Jeffrey Heng (PW1), one of the receivers, said that when he spoke to Mr Leslie Tan about the \$2,371,079.62 payment made by Multi-Pak to Intraco, Leslie Tan did not tell him much. Leslie Tan was the senior executive

in Intraco who was in charge of this matter. He was the main person who dealt with the creditors and financiers of City Carton and Multi-Pak. He did not produce to Jeffrey Heng a copy of the assignment agreement when both copies were in fact held by Intraco. Neither did he say that the payment was linked to Intraco's equity participation. I think this is significant. Another related aspect is this. On being appointed, the receivers instructed their solicitors to write to Intraco seeking information on the various payments. No explanation was offered that the equity participation was an integral part of the understanding relating to Multi-Pak taking an assignment of the debts.

34 Instead of producing evidence to show that the assignment was related to the equity participation, Intraco sought to rely on certain opinions expressed by Jeffrey Heng in court to these effects pursuant to cross-examination: 'it was in the interest of Multi-Pak to see City Carton being viable'; 'Multi-Pak wanted to take over City Carton as a subsidiary and that it would make a lot of commercial sense provided that City Carton would be viable'; 'it fits with Multi-Pak's commercial interest to have City Carton as its downstream'; 'it would make a lot of commercial sense for Multi-Pak to have Intraco as a shareholder'; and 'that it was in the interest of Multi-Pak to salvage City Carton'. These are expressions of opinion, not fact, and facts are what we should be looking for. Jeffrey Heng came into the picture long after the events. He has no knowledge of the facts.

35 It is not in dispute that Intraco did inject \$2m as equity into Multi-Pak. But that alone is not enough. There must be evidence to show that Intraco's injection of the \$2m as equity into Multi-Pak was a consideration or part of the arrangement for Multi-Pak taking the assignment of the debts at a price of \$2,371,079.62. Speculations or opinions of Jeffrey Heng, pursuant to questions

put to him, are no substitute for real evidence, which is completely lacking. I am conscious that the main person in Intraco who dealt with Multi-Pak was Mr Leslie Tan, and he had passed away. But, from the records, there were also others who were involved. There was one Mrs Catherine Kuan, financial controller and company secretary of Intraco, who, from the records, was also closely involved in the whole matter. She was, together with Leslie Tan, made a director of Multi-Pak upon Intraco's injection of \$2m equity into Multi-Pak. Surely it cannot seriously be suggested that, in a public company, a decision of such a dimension rests on the shoulder of a single executive. A committee or a board of Intraco must have been involved in the whole venture. Indeed, the documents show that. There must be somebody from Intraco who could come forward to say what the whole arrangement was; what was paid for what. Only one witness was called by Intraco. He testified that he witnessed Leslie Tan's signature. His evidence is of no help at all.

36 There is a further aspect in this matter which, on the face of it, does not support Intraco's case; at least in the absence of explanation. The assignment agreement was entered into on 24 May 1984. The decision on Intraco's part to inject \$2m into Multi-Pak came later. As mentioned above, it was only on 11 June 1984 that Multi-Pak's board passed a resolution to allot \$2m of shares to Intraco. By 14 June 1984, the board of Intraco had yet to approve its equity participation in Multi-Pak. On 20 June 1984, Multi-Pak notified the Registrar of Companies that \$2m shares had been issued to Intraco. In the normal course, one would expect that, if the equity participation constituted part of a larger arrangement, which included Multi-Pak taking an assignment of the debts of City Carton, all the necessary consents of the parties would have been obtained/given on or by the same date. If that did not happen and yet a party asserts that there was such an overall arrangement, the burden must surely be

on that party by evidence to prove the link, to show what in fact happened and to explain why the documentation or formality proceeded on a slightly different footing.

37 Accordingly, I accept the submission of counsel for the plaintiffs that it is not proved that Intraco`s equity participation in Multi-Pak was a consideration for Multi-Pak accepting the assignment of City Carton`s debt to Intraco at a price of \$2,371,079.62. It follows that benefit (a) has not been proved. For the same reasons, benefit (b) is also not proved: there is no evidence to show that because Multi-Pak had accepted the assignment of the debt at the price of \$2,371,079.62, Intraco, in turn, agreed to participate on the board of directors of Multi-Pak. Similarly, for benefit (c). In fact, it seems to me clear that what are set out as benefits (b) and (c) are the things which would flow naturally from Intraco being a substantial shareholder [19%] of Multi-Pak.

38 Turning to benefits (i), (j) and (k), there is no evidence that such benefits were in fact conferred upon Multi-Pak by Intraco. Furthermore, even if there is such evidence, there is nothing to suggest that those benefits were part of the deal involving the assignment of the debts. Those benefits, if at all, and in all probabilities, arose from the fact that Intraco had decided to inject \$2m into Multi-Pak and become a shareholder. Furthermore, or in the alternative, they came about because of the subsequent agency agreement entered into between Intraco and Multi-Pak.

39 It may be appropriate if I should, at this juncture, touch briefly on some aspects of the agency agreement. It is undated. There is no evidence before me to indicate when it was executed by the parties. I find, on a balance of probabilities, that it is more likely to be signed soon after Intraco had become a

shareholder of Multi-Pak. Under the agency agreement, Intraco was given the exclusive right to market all Multi-Pak's products in Singapore, Malaysia and Indonesia. There was no fixed quantity which Intraco had to market. This was to be worked out between the parties quarterly. Neither were the prices agreed. The commission was fixed generally at 2%. Intraco agreed to provide a letter of credit at sight for all purchases from Multi-Pak. The agreement was for a period of one year with automatic renewal, subject to three months' notice by either party.

40 Under the agency agreement 90 days' credit was to be given. Intraco was to issue a letter of credit in respect of each purchase, but with regard to this, Intraco ran no great risk because Multi-Pak also agreed with Intraco that:

in the event that [Intraco's] customers have not paid, [Multi-Pak] shall arrange with the banks to extend the period of credit. If the banks are unable to extend the credit, or if, at the end of the extended period, the bill has still not been retired, Multi-Pak will arrange for repayment of the bank's bills drawn against Intraco Ltd without recourse to them.

41 There appears to be a somewhat different arrangement for the sale of products of Multi-Pak through Intraco to City Carton. Not only did Intraco take no risk, namely, that if City Carton did not pay Intraco, Intraco need not pay Multi-Pak, what is also significant is that, irrespective of whether City Carton made payment for the products supplied, Intraco would be entitled to 1% commission from Multi-Pak.

42 What I can say is that there was nothing in the agency arrangements between Intraco and Multi-Pak which overly favoured Multi-Pak.

43 Turning to the last benefit (l), there is again no evidence to suggest that, but for the collapse of the rescue effort, a result of the assignment would be that

Multi-Pak would capture City Carton as a captive customer. Apart from the fact that this is, at best, only a speculation, a question may be asked if it really was a benefit to Multi-Pak to have City Carton as a captive customer where, to all intents and purposes, City Carton was an insolvent company and was in no position to pay for the goods it would take. In my view, this alleged benefit begs the very question in this action.

44 Payment by Multi-Pak of other debts of City Carton

45 A great deal of reliance was placed by Intraco on a transaction in August 1984 where the Bank of Montreal provided a term loan of \$1.2m to Multi-Pak to enable the latter to provide a security in respect of City Carton's debt to the Bank of Montreal. Counsel for Intraco contended that, as the receivers of Multi-Pak have not challenged the propriety of that transaction, it must be deemed to be in order, and, if that transaction is in order, there is hardly any basis to differentiate the present assignment from that arrangement.

46 I must point out that, on the facts, there is at least one major differentiating element in the Bank of Montreal arrangement. There, the offer of the \$1.2m term loan was coupled with a further facility of \$800,000 to be used by Multi-Pak for the following purposes:

- (i) issuance of commercial sight letter of credit covering the importation of raw materials up to a limit; (ii) trust receipt financing and/or bill discounting up to a limit of \$750,000; and (iii) overdraft up to a limit of \$50,000;

47 subject to an overall limit of \$800,000 at any one time.

48 Apart from this differentiating factor of an additional \$800,000 facility, which was an integral part of the overall offer, Jeffrey Heng told this court that the receivers did seek advice from their solicitors on the propriety of the Bank of Montreal arrangement and it was only after obtaining solicitors' advice that they decided not to challenge that transaction. In any case, in my view, even if the decision not to pursue the Bank of Montreal on the \$1.2m is not correct, that could not convert another transaction which is improper (like the present assignment from Intraco) into a proper transaction.

49 It is of interest to note that one of the terms of the offer by the Bank of Montreal was that Intraco must have 'injected at least \$2m in the form of equity' into Multi-Pak. I would expect to see some such express reference if the equity participation by Intraco in Multi-Pak formed a part of the arrangement whereby Multi-Pak would take the assignment of the debts from Intraco.

50 I ought to add that there is some evidence in the documents to show that, during July/August 1984, Multi-Pak had been paying off some other debts of City Carton. Without making a detailed study of the situation involved in each of the payments by Multi-Pak, I do not think it is possible to draw any conclusion. The general remark I made regarding the Bank of Montreal arrangement is equally applicable to these other payments.

51 I wish to re-emphasize that the assignment of the debts to Multi-Pak was a straightforward assignment with no other terms or conditions whatsoever. If it was in fact part of a wider arrangement, then it would be for Intraco to prove that. There is no evidence whatsoever of that. He who asserts must prove and cannot rely on conjecture.

52 In the premises, I hold that the directors of Multi-Pak had paid \$2,371,079.62 to Intraco in return for worthless receivables. They had misapplied the assets of the company. By paying out the money to Intraco they had acted in breach of their fiduciary duties. I also hold that Intraco held the money as constructive trustees for they were fully aware of the circumstances surrounding the payment; they knew the financial state of City Carton. I think in law Intraco could be considered as having actual knowledge of the breach of fiduciary duties on the part of the directors of Multi-Pak, being aware of all the relevant facts. At the very least, there was clearly constructive knowledge.

53 **Conspiracy**

54 In view of my decision above on the question of constructive trust, I think I need only deal very briefly with the second and third grounds of the plaintiffs' claim, namely, conspiracy and resulting trust.

55 Counsel for the plaintiffs submitted that the tort of conspiracy is constituted where it is shown that there has been a combination or agreement between two or more persons to effect an unlawful purpose resulting in damage to the plaintiffs. He said that, in the instant case, what happened was that Intraco, in combination with the directors of Multi-Pak, entered into the agreement for the assignment of the City Carton receivables with the unlawful purpose of making the directors breach their fiduciary duties as directors by not acting honestly and diligently in the discharge of their duties when they agreed to purchase worthless receivables for \$2,371,079.62 from Intraco, causing damage or injury to Multi-Pak.

56 There are clearly two types of conspiracy. One is that which employs only lawful means but aims at an unlawful end, and the other, which employs unlawful means: see ***Crofter Hand Woven Harris Tweed Co Ltd v Veitch*** , at pp 157-158, per Lord Wright; and ***Rookes v Barnard*** , at p 397, per Lord Devlin. The former would only be actionable if it is shown that the predominant purpose of the conspirators is to injure the plaintiffs in his trade or business while, for the latter, no such predominant purpose need be shown. This distinction is reaffirmed by the House of Lords in ***Lonrho plc v Fayed*** , where Lord Bridge, after reviewing the authorities, said (at pp 309-310):

Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But, when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

57 Lord Bridge clarified that the House did not intend, in ***Lonrho plc v Shell Petroleum Co Ltd*** , to depart from the established rule and create a new principle that a plaintiff, seeking to establish the tort of conspiracy to injure, must in every case prove that the intention to injure him was the predominant purpose of the defendant, whether the means used were lawful or unlawful.

58 In the present case, in order to succeed in conspiracy, it must be shown that there was a conspiracy to do an unlawful act which caused damage to the plaintiffs. On the facts as discussed before, I am of the view that a case has been made out. Intraco and the two directors were working very closely to effect the assignment. Intraco knew the full facts. If, as I hold it is, that the directors had

acted in breach of their fiduciary duties when they agreed with Intraco to take an assignment of the receivables, it seems to me to follow that Intraco and the directors had acted in concert to do an unlawful act: to cause a breach of s 157(1) of the Act, which is an offence under s 157(3). This will be the second type of conspiracy mentioned above and there is no need for the plaintiffs to show that the predominant purpose of the conspiracy was to injure the plaintiffs, so long as injury had in fact been caused.

59 The fact that Intraco might not have known that the directors of Multi-Pak would be acting in breach of s 157(1) is beside the point so long as Intraco were aware of all the relevant facts. As Buckley LJ said in ***Belmont Finance (No 2)***, at pp 404-405:

*In my judgment, the alleged conspiracy is established in respect of these three defendants, and they are not exempt from liability on account of counsel's opinion or because they may have believed in good faith that the transaction did not transgress s 54. If all the facts which make the transaction unlawful were known to the parties, as I think they were, ignorance of the law will not excuse them: see **Churchill v Walton**. That case was one of criminal conspiracy but it seems to me that precisely similar principles must apply to a conspiracy for which a civil remedy is sought. Nor, in my opinion, can the fact that their ignorance of, or failure to appreciate, the unlawful nature of the transaction was due to the unfortunate fact that they were, as I think, erroneously advised excuse them.*

60 **Resulting** **trust**

61 I turn now to the point relating to resulting trust. The plaintiffs aver that the assignment agreement of 24 May 1984 did not exist `in or about May-June 1984 and was executed by the second defendant purportedly on behalf of the plaintiffs and by one Leslie Tan on behalf of Intraco subsequent to the issue of

the writ herein,` and thus claim that the sum of \$2,371,079.62 is repayable by Intraco to the plaintiffs as there is a resulting trust on the ground that it is money lent by the plaintiffs to Intraco or money held by Intraco for failure of consideration. The writ herein was issued on 24 July 1985.

62 There is no direct evidence as to the date on which the assignment agreement was executed by the parties. One Mr Tang Kum Hoong, an assistant manager in Intraco at the relevant time, said that he witnessed the signature of Leslie Tan to the assignment agreement though he could not recall when the date was. At the time, the directors of Multi-Pak had not signed the document yet. While he ventured to say that he witnessed Leslie Tan`s signature before the collapse of Multi-Pak, it seems to me that that was only speculative as he did not read the document and would not know to what it related.

63 But it is quite clear to me that, at the time the receivers were appointed, the debts owing by City Carton and Box Pak to Intraco had already been assigned to Multi-Pak. The records at Multi-Pak show that. On 4 February 1985, the receivers made demands on City Carton which included the debts assigned. The amount claimed was as at 31 December 1984. In the statement of affairs of City Carton (PB222) signed by the second defendant, it was stated that City Carton owed Multi-Pak \$6,013,323, which included the assigned debts. A notice of assignment was given by Intraco to City Carton on 10 July 1984. In his evidence before me, Jeffrey Heng, having examined the records that were before him, said, `I would not dispute that Multi-Pak had assumed the debts of City Carton to Intraco.`

64 Taking all the foregoing into consideration, I find it clear that an assignment of the debts was effected before 31 December 1984. I would be

inclined to think that the assignment agreement was probably executed on or about 24 May 1984, and, in any case, certainly well before 31 December 1984. So long as the assignment was effected at any time before 31 December 1984, or indeed before the collapse of Multi-Pak, there is no basis to allege that there is a resulting trust on the ground that it was a loan or that there was a failure of consideration. Of course, I would agree that it is strange that both copies of the assignment agreement should be in the possession of Intraco and both were unstamped. I can foresee a number of possible explanations for that but I do not think it would serve any useful purpose in going into that.

65 **Directors not being parties hereto**

66 Counsel for Intraco submitted that, in view of the fact that the second and the third defendants are not parties to these proceedings, this court should not make any determination which would state that they were involved in the improper application of funds of Multi-Pak in breach of s 157(1) of the Act. Counsel noted that the writ was initially issued only against Intraco, and, later, the plaintiffs amended it to include the second to fourth defendants because they felt it was proper to do so. He submitted that this court has `no jurisdiction or power` to make a finding of breach of trust or conspiracy against the second and third defendants when they are not before the court. Counsel relied on the case ***Kassim bin Adam & Anor v GE Bandukwala & Anor*** in support of his contention.

67 It seems to me that ***Kassim bin Adam***

68 11 is distinguishable. There, the plaintiffs sought (i) a declaration against the first defendant (who was abroad and was never served) that he, having

abandoned the use of a rent-controlled premises, was no longer the statutory tenant and (ii) an order for the recovery of possession of the premises. The plaintiffs also sought to evict the second defendant who claimed to be in occupation of the premises as the licensee of the first defendant. The court held that, unless and until the first defendant was properly before the court, it could not adjudicate on whether he had forfeited his status as statutory tenant by cessor of possession or occupation. The court also held that it had no jurisdiction to make an order for recovery of possession against the second defendant, who claimed to be in possession as the licensee of the first defendant unless the first defendant was properly before the court and an order was made against him as well.

69 I am of the view that ***Kassim bin Adam***

70 11 is a different sort of a case from the present. The plaintiffs here are not seeking a judgment against the second or third defendants. They are relying on the actions and conduct of the first, second and third defendants in seeking relief against the first defendant, Intraco. My judgment herein will only bind the plaintiffs and the first defendant. The plaintiffs cannot use it to enforce against the second or third defendant.

71 **Counterclaim**

72 Finally, there is the counterclaim of \$371,079.62 being the amount lent by Intraco to Multi-Pak. That this amount was paid and received by Multi-Pak is not in dispute. The books of Multi-Pak (PB123 and 125B) show that it was an advance from Intraco. Counsel for the plaintiffs could not and did not seriously contest that this sum should be repaid.

73 **Judgment**

74 In the result, there shall be judgment for the plaintiffs against Intraco for the sum of \$2,371,079.62. There shall also be judgment on the counterclaim of Intraco for \$371,079.62. Interest shall be payable at 6% from 21 June 1984 on the net sum of \$2m, being the difference between the two judgment sums. On the question of costs, having regard to all the circumstances of the case, I rule that the plaintiffs shall be entitled to 90% of the costs of this action.

75 Order accordingly.

Chao Hick Tin J

CR Rajah and S Nithiananthan (Tan Rajah & Cheah) for the
plaintiffs
Tan Kok Quan and Tang Khin Wai (Lee & Lee) for the defendants