JUDGMENT : THE HONOURABLE MR JUSTICE PETER SMITH : Ch.Div. 26th May 2005

INTRODUCTION

I have before me 3 applications:-

i) An application by the Claimant pursuant to directions given by Deputy Master Rhys on 4th March 2005 requiring it to serve any application notice to amend its particulars of claim by 11th March 2005, which was duly done.

ii) An application by the Second Defendant Mrs Theresa Anne Schneider issued as recently as Monday 16th May 2005 for an order requiring the Claimant to provide certain information sought by-part 18 requests for further information served on 8th March 2005 and 16th May 2005. It will be observed that the Second Defendant issued her application on the same day a letter requesting the information was sent.

iii) An application by the Third Defendant issued on 5th May 2005 for an order that the Claimant supplies within seven days from the date of the Court Order clarification and information as requested by the Third Defendant in its further request for information and in default that the Claimant's claim can be struck out and 3 further heads of relief which I shall say nothing more about save to observe that Ms Taylor who appears for the Third Defendant conceded that the relief sought was ambitious.

4. The latter two applications arise out of the Order of Deputy Master Rhys whereby he set aside an ex parte Order made by Deputy Master Lloyd on 14th February 2005 granting the Claimant permission to amend the Particulars of Claim. He ordered, as I have said, the Claimant to serve a fresh application by 11th March 2005, which it did. He required any cross applications to strike out and/or for summary determination to be issued by 18th March 2005, and required any evidence to be served by 29th March 2005. Paragraph 8 of his order stayed the proceedings generally until after the hearing of the applications referred to above. For reasons that are not really relevant all of these matters came before Mr Justice David Richards on 21st March 2005 when he gave the Second Defendant permission to issue an application for an Order that the Claimant answer the request for further information and clarification and equally gave Third Defendant permission to issue an application for an Order that the Claimant answers her outstanding request dated 21st March 2005.

5. Mr Boyle QC who with Mr Daniel Lightman appears for the Claimant objected to the Second and Third Defendants's counter-applications being heard at the time of the present application. The objections were both procedural and substantive. The procedural objections were that the bulk of the Third Defendant's applications were out with the permission granted and therefore subject to the general stay. Ms Taylor conceded that was the position in respect of items (b), (c) and (d). She maintains (correctly in my view), that item (a) and the ancillary unless order relief are within the permission granted.

6. In respect of the Second Defendant's application Mr Boyle QC submitted it went far beyond the permission sought and was in any event served too late for him properly and fairly to be able to consider it.

7. In response to both requests the Claimant has on 12th May 2005 provided extensive voluntary information.

8. Neither Defendant is apparently satisfied with the answers given. However the procedure in my view is not to persist with an application that information be provided as it has been provided. The debate is over the quality of the provision. It seems to me that the Defendants should if they wish to persist in their applications identify to the Claimant specifically in which way it is contended the information is not as sought. This also helps the Court. There simply was not enough Court time to deal with an analysis of the further information provided by the Claimant in response to each request without elucidation in advance of the hearing as to the inadequacy of the information allegedly provided.

9. Accordingly at the hearing I indicated that I would not hear the Second and Third Defendants' applications but would order them to be adjourned to be fixed on the first available date before me with a half-day estimate after 6th June 2005. In the meantime I ordered each of the Second and Third Defendants within seven days to provide a schedule and in that schedule identify the original request, the answer in respect of that request and the way in which the Defendant in each case considers the

answer is not in accordance with the request. I also ordered the Claimant within seven days after service of that document on it to respond to each of the relevant Defendant's observations on the inadequacy of its existing particulars and/or whether or not it objected to the provision of the information and if so on what basis.

10. Accordingly that determination left for resolution the main application, the Claimant's application for permission to amend the Particulars of Claim.

BACKGROUND

11. The Claimant ("OEM") is a property and investment company listed on the London Stock Exchange.

12. From 1988 until his death on 11th March 2004 Mr Brian Schneider ("Mr Schneider"), the late husband of Mrs Schneider, was a director and employee of OEM. It is alleged that the Third Defendant (Miss Schoeffler-Lubbock) was for a period the mistress of Mr Schneider.

13. Mrs Schneider is the executor of Mr Schneider's will but probate has not been obtained because a Mr Noonan a significant force behind OEM and two offshore associated companies, has lodged a caveat. That is, I understand, an issue to be resolved by the Family Division in due course.

14. In addition to being a director, Mr Schneider was a chartered accountant, the chief executive and finance director of the company.

15. It is alleged that the Claimant in 1992 gave a mandate to Midland Bank in respect of account number 41632655 and that mandate was changed so that either Mr Schneider or Mr Noonan could sign for any cheque up to £20,000 without a counter signatory.

16. A similar situation transpired in respect of the Claimant's bank mandate established on 10th June 1997 with Coutts Bank account number 44358851.

17. It is claimed by the Claimant that between 1997 and 11th March 2004 Mr Schneider fraudulently, wrongfully and in breach of his duties stole a sum in excess of £5,000,000 from the Claimant. That is a large amount. It represents a removal of in excess of £500,000 per annum, which went undetected for seven years. To show the significance of the figure, the amount removed equalled or exceeded the net annual profits of the Claimant for each year.

18. This is a point I shall refer to further in this judgment.

19. The modus operandi of Mr Schneider involved drawing cheques for sums less than £20,000 and falsifying in the books of the Claimant and the two other associated companies, Prime Trust Corporation Limited ("Prime"), a company incorporated in Gibraltar and Tanson Investment Holdings Limited ("Tanson"), a company incorporated in Panama.

20. It is said that Mr Schneider concealed the fraud by making entries in the Claiment's books to show sums were made by way of payments made in discharge of sums due from the Claimant to Tanson and Prime in respect of property transactions undertaken on their behalf. The counterpart involved a falsification of the sums due to Prime and Tanson with regard to their entitlement.

21. Since the commencement of the action the Claimant has readjusted its accounts as regards Tanson and Prime for the years 1996/7 through to 2001/3, resulting in adjustments of £2,653,000 in favour of Prime and £1,440,000 in favour of Tanson. The Claimant has paid the sum of £2,653,000 to Prime but has not paid the £1,440,000 to Tanson.

22. The reason for the non-payment is that Tanson was apparently dissolved either in 1998 or 1999. Despite that apparent dissolution on the present state of the evidence Tanson continued to make payment it is alleged to the Claimant and received payments from the Claimant for property transactions that took place after its apparent dissolution. According to the further information provided by the Claimant, some of these funds moved through Prime to the Claimant and vice versa.

23. Mr Tager QC, who with Mr Jackson appears for the Second Defendant, contends (with some justification in my view) that this apparent movement of funds without full explanation raises serious doubts about veracity of the Claimant's claim. In addition Mr Tager submitted that the Second Defendant will apparently contend that the movement of these monies are disguised money laundering transactions

created at the instigation of Mr Noonan, and that Mr Noonan knew all about the removals by Mr Schneider in addition, Mr Tager also submitted that the possibility that Mr Noonan himself was stealing money from the Claimant cannot be disregarded, and finally submitted that it might well be the case that all of the monies removed by Mr Schneider actually belonged to him.

24. None of these various allegations appears in the Second Defendant's original Defence; it is said to be capable of being put forward only in the light of recently acquired information.

25. Of the sum of £5,000,000 wrongfully removed allegedly as set out above, some £2,347,527 between February 1999 and March 2004 was paid into a joint account held in the name of Mr Schneider and Mrs Schneider at Lloyds Bank, Lloyds TSB account number 01758165 and a Coutts account number 08005052.

26. As regards the Third Defendant the Claimant says since March 2000 she has received a sum of £474,270 to her own use as set out in schedule A annexed to the proposed amendment.

THE CLAIMANT'S CASE AGAINST THE SECOND DEFENDANT

27. The Claimant's case is relatively straightforward. It claims (see paragraph 32 of the proposed amendment) that the monies paid to that account are monies paid to her for her own use and that she is liable to repay them because she has been unjustly enriched by the receipt of said sums and any other sums obtained by Mr Schneider by fraud and/or breach of fiduciary or implied contractual duty.

28. The Claimant's case therefore is that all the monies received into the joint account of the Second Defendant and Mr Schneider are monies stolen by him from it and for which she has given no consideration.

29. Of course, the Claimant acknowledges that the Second Defendant may be able to raise a defence of change of position in respect of those payments.

30. In addition, the Claimant seeks to trace into assets that represent those monies. It has identified a number of Life and Pension policies and seeks to trace into the proceeds of those policies (which were all written in trust for the Second Defendant and therefore do not form part of Mr Schneider's estate). In addition it seeks to trace into various other assets identified and the property (certain mortgage instalments have been discharged out of the joint account).

31. As part of that exercise the Claimant acknowledges that it will ultimately have to analyse the operations of the bank accounts to identify where the stolen monies have been utilised. It also acknowledges that in so far as the account is blended with monies in respect to which it has no claim and assets acquired partly using those funds and partly using stolen funds there will be a share in any assets sought to be traced. Third, it acknowledges, as I have said the availability (but not accepted on the facts necessarily) of a defence of change of position. Finally it acknowledges that, if the Second Defendant establishes that the operation of the account was done by the deceased and the account was used as a conduit for him to syphon off the stolen monies so that she achieved no benefit, that may be a basis for suggesting that she has not been unjustly enriched as regards the entirety of the funds that passed through the joint account.

32. It is also possible that at the trial when deciding whether it is just to make restitution as against the Second Defendant and the Third Defendant the Claimant's own conduct might be taken in to account. In ***Transvaal & Delagoa Bay Investment Co Ltd v Atkinson and Wife [1944] 1 All ER 579, at page 586 D*** Atkinson J said:-

"This view is in harmony with a principle which I take from Lloyd v Grace Smith & Co. [1912] A.C. 716, at p.727: He that employs and puts a trust and confidence in the deceiver should be a loser. The defendant may also possibly be able to pray in aid the principle that when one of two innocent persons must suffer a loss, he whose negligence is the cause of the loss must bear it. In Farquharson v King [1902] A.C. 325, and Macmillan v The Joint Stock Bank [1918] A.C. 777, the conditions for the application of this principle are laid down very clearly."

33. However Mr Boyle submits that all of those matters are things which the Second Defendant must raise by way of defence. He submits that the primary entitlement of the Claimant is to recover all of the monies which came into the possession of the Second Defendant via the joint account and to be able to trace into such assets as can be shown as representing the uses of those monies. This he submits is to be derived from two House of Lords decisions ***Lipkin Gorman v Karpnale [1991] 2 AC 548 and Foskett v McKeown [2001] 1 AC 102.***

34. I should add that it is now (although the contrary might have been the case earlier) that the Claimant makes no allegation against either the Second or Third Defendant that they knew of the alleged dishonesty of Mr Schneider. However, knowledge of the wrong doing of Mr Schneider is not a prerequisite to recovery in a claim for money had and received as the ***Lipkin Gorman*** case shows. It will, to some varying degree, have been necessary for a claim to make the Defendants liable as constructive trustees either on a knowing receipt or knowing assistance basis but such a claim does not feature in the Claimant's pleading. The claim for tracing arises out of the consequence at common law of the monies being stolen and not out of a desire to seek to impose a constructive trusteeship on the recipients of the monies.

OBJECTIONS BY SECOND DEFENDANT

35. Mr Tager makes two objections. The first is that he submits as a matter of law the claim for money had and received is not sustainable in the present way formulated by Claimant. His submission is that it is not sufficient to show the monies going into the joint account to make the Second Defendant liable for all the monies received into this account. He in the course of his submissions described the possession of the monies in the account by virtue of them having been credited as being "notional" or "theoretical". He stressed that she had no knowledge of any alleged wrongdoing. As I have said above, that is not a relevant factor as regards the make up of the claim for money had and received. I have considerable difficulty with the view that receipt of monies into the joint account as regards the Second Defendant is theoretical or notional.

36. Mr Boyle QC reminded me of the principles of the operation of a joint account to be derived from the decision ***In re Bishop [1965] 1 Ch 450 at page 456 C, as follows:-***

"Where a husband and wife open a joint account at a bank on terms that cheques may be drawn on the account by either of them, then, in my judgment, in the absence of facts or circumstances which indicate that the account was intended, or was kept, for some specific or limited purpose, each spouse can draw upon it not only for the benefit of both spouses but for his or her own benefit. Each spouse, in drawing money out of the account, is to be treated as doing so with the authority of the other and, in my judgment, if one of the spouses purchases a chattel for his own benefit or an investment in his or her own name, that chattel or investment belongs to the person in whose name it is purchased or invested: for in such a case there is, in my judgment, no equity in the other spouse to displace the legal ownership of the one in whose name the investment is purchased. What is purchased is not to be regarded as purchased out of a fund belonging to the spouses in the proportions in which they contribute to the account or in equal proportions, but out of a pool or fund of which they were, at law and in equity, joint tenants. It also follows that if one of the spouses draws on the account to make a purchase in the joint names of the spouses, the property purchased, since it is purchased in joint names, is, prima facie, joint property and there is no equity to displace the joint legal ownership".

37. He also referred me to page 458 as follows:-

"That case seems to me to establish the principle that in the absence of some circumstances or some evidence of intention that the joint account was to have a limited operation or was set up and kept up for some special purpose, each spouse has power to draw on the joint account not only for the benefit of the spouses but for his or her own benefit. In the absence of some circumstances from which one infers an agreement to the contrary, one must treat the joint account as truly a joint account, a joint account on which each party has power to draw to take the money out of the ambit of the joint account and to employ it as he or she thinks fit either for his own purpose or not, and if he does draw money out and invests it in his own name I see no room for any inference that he holds that investment on trust for himself and his wife either in equal shares or in any other shares".

38. The joint accounts as between Mr and Mrs Schneider were apparently operated on those bases.

39. Mr Tager submits that there is no case yet which makes liable an innocent recipient who disposes of stolen money so as to make that person liable for the stolen monies when they have been disposed of innocently. He referred me to the ***Transvaal*** case above.

40. The reasoning of Atkinson J in that decision has been extensively criticised in so far as the claim is based under an implied contract. However the decision has not been criticised as to its application on the particular facts. Mr Tager QC fastens on the fact that the fraudster who ran money through his wife's bank account did not through that operation make her liable for the money that he had stolen. Thus he

submits the situation is the same here as regards Mr Schneider running money through the joint account.

41. There are a number of difficulties facing Mr Tager's submission. First, Mrs Schneider's present defence admits receipt of the money into the account. Second, it is important to look at the factual basis for the decision in ***Transvaal.*** That is to be found at pages 585 g as follows:-
"It is clear law that prima facie the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally clear that an intermediary who has received money for the purpose of handing it on to a third party, and has handed it on, is no longer accountable to the sender. In such case he is a mere conduit pipe, and has not had the benefit of the windfall".

And page 586 as follows:-
"*I am satisfied in this case that the defendant did not receive money for her own benefit or personal enrichment, but merely as her husband's agent. The husband was not a thief in order to benefit her but himself, and so far as she was concerned the money came not from the plaintiffs but from her husband on the terms that part was at once to be returned, and that household and her personal expenses (for which as a husband he would be bound to provide) were to be paid out of the rest. Regular payments from his salary were later made into the account, and it is plain that she was in truth but her husband's agent for the distribution of the money. Where is the unjust enrichment in this case? What are the circumstances which make it ex aequo et bono that the defendant ought to refund? I can see none. The position, therefore, is that it is impossible to imply a promise to repay, that it would be unjust to imply such a promise even if it were possible, and that there are no circumstances which make it unconscientious for the defendant to resist a personal judgment against her, and I think the defendant is entitled to judgment*".

42. Thus the ***Transvaal*** case is on it's facts a situation whereby an agent has received monies and accounted to her principal before notice of the dispute in respect of such monies was given to her. On the facts of the case, therefore, the use of the wife's account was merely a conduit. There is no such plea put forward in the Second Defendant's defence yet and no material put before the court to justify such a contention. On that analysis the ***Transvaal*** case follows a well established principle. The various text books on restitution and banking treat ***Transvaal*** as providing guidance as to when agents are exposed to claims for money had and received. In the ***Lipkin Gorman*** case Lord Templeman referred to the decision in passing at page 566 as follows:-
"In Transvaal & Delagoa Bay Investment Co Ltd v Atkinson [1944] 1 All E.R. 579, money stolen from a company was paid by the thief into a bank account of his wife. All the money was expended, mostly by being returned to the husband. The difficult questions which arise when a donee innocently disposes of stolen money do not arise in the present case where the stolen money has been retained by the club".

43. I am not convinced that merely because monies were run through the wife's bank account in ***Transvaal*** of itself has any significance. I am not inclined to accept Mr Tager's analysis that the law for money had and received requires the Claimant to identify the individual use to which monies were put as formulating a claim. I do so for the following reasons.

44. First, it seems to me it flies in the face of the general principles under which bank accounts are operated. Both parties to a joint account permit the other usually to have full drawing rights on those accounts as they think fit. Thus, as Mr Boyle submitted when the monies were credited to the account it was always open to Mrs Schneider to draw the full extent of those funds as she wished.

45. Second, Mrs Schneider expressly or impliedly consented to the operation and granted Mr Schneider reciprocal drawing rights. There was a dispute before me, which I cannot begin to resolve as the extent to which Mrs Schneider has participated directly or indirectly in payments being made out to third parties and the purpose of those payments. As I have said, Mr Boyle conceded that if it can be shown that money was merely siphoned through the account of which Mrs Schneider was unaware that might be a basis for suggesting that it would be unjust to require her to make restitution in respect of such payments. One example I posed to him was £20,000 paid in on one day and removed almost immediately to a third party source or purchase in respect to which Mrs Schneider had no direct or indirect benefit. Mr Boyle was careful not to concede that as being anything other than a possibility.

46. His primary submission which echoes ***Lipkin Gorman*** and earlier cases, is that it is a question of fact and degree to determine whether a recipient of money stolen from a claimant has to make restitution, and to what extent, on the basis that it is just for that person to make such restitution. That takes into account the above possibility and the ability of the recipient to argue that there was mere siphoning or agency and any change of position of defence. Mr Boyle submits that all of these matters arise out of defences if any and should not be uses as a basis for resisting an application for permission to amend.

47. He submits that the present application is within the established principles enshrined in CPR 17 whereby the Court generally should grant permission to amend unless to do so would cause prejudice or unfairness to the other party.

48. I agree with his analysis. I do not think it appropriate for me to decide definitely whether or not Mr Tager's submissions are correct because the submissions will turn on the facts which have to be established at trial. Essentially, the decision to order restitution is a decision based on the facts of each individual case and it would be quite wrong to suggest that there is any clear proposition that arises based on the ***Transvaal*** decision in particular.

49. Equally, I am of the view that the Claimant's formulated claim in the proposed amended Particulars of Claim is sufficiently clear so as to enable the defendants to understand the nature of the case and for them to plead to it. It is not in my view for the Claimant as a prerequisite to the amendment to have to delve into the transactions on the other side of the table as it were, i.e. in respect of the removal of the monies from the joint bank account. That is for the Second Defendant, in my view, if she wishes to avoid what is a prima facie case based on three simple propositions, namely it is the Claimant's money, it has been stolen, and it has come into her possession via the joint bank account. Anything else beyond that involves defences or mitigation, in my view.

50. That also, in my view, disposes of Mr Tager's second submission. I have referred to the apparent difficulties which affect the Claimant's case in respect of the offshore companies, the potential involvement of Mr Noonan, the failure to discover the fraud and the doubt as to whether or not some of the monies belong to the offshore companies as opposed to the Claimant. Once again, in my view, it would be quite wrong to require the Claimant as a condition precedent to obtaining permission to amend to deal with all of these matters. These are matters which the Second Defendant might wish to raise by way of a defence. They are no part of the Claimant's primary case. The simple fact whichever way the Second Defendant puts it is that £5,000,000 has been removed from the Claimant's bank account. That money either belongs to it or it holds it upon trust for some third party. On either of those eventualities it has the legal title to sue for the stealing of the monies. The only difficulty will be if it is established that the monies belonged to Mr Schneider beneficially or that the Claimant through the actions of lawfully authorised representatives agreed to or acquiesced in the payments. Those matters self-evidently are matters in respect to which the burden of proof falls upon the Second Defendant. If she wishes to run these arguments, she should plead them in her defence verified by a statement of truth. In that eventuality the Claimant will have to respond to them in a reply with a positive counter case, if it has one, and evidence. If it fails to do so I have little doubt that the Second Defendant will seek to have the Claimant's case struck out unless it produces a positive case at that stage. It is not appropriate for the Court to embark on some kind of provisional assessment at this stage of the evidence and to require the Claimant to respond positively to allegations raised but not pleaded against it. There is no procedure in the courts in this jurisdiction enabling a court provisionally to assess the strengths or weaknesses of a case. If a case has real prospects of success it goes to trial even if an assessment is that those prospects are not particularly good. The only way in which a court can intervene is if it can be shown that a case has no prospects of success, in which case it will issue an application under Part 24. That cannot be said at this stage. An intervening assessment as to the relative strength is not permissible see ***Wenlock v Maloney [1965] 2 All ER 871 C.A.*** As between the Claimant and the Second Defendant and Third Defendant, it would not be right to prevent the Claimant presenting its case as fully as it contends it is possible and to deal if necessary with such challenges as are made to its prima facia entitlement.

51. Accordingly I reject Mr Tager's objections to the application to amend.

OBJECTIONS BY THE THIRD DEFENDANT

52. Ms Taylor supports the second of Mr Tager's objections. She is not faced with the difficulties presented by his first objection.

53. In addition, she submits that her client is faced with uncertain claims which have changed and has limited means to defend the claim. Those are factors which can be taken into account in resisting an application to amend but I do not see that they are so prejudicial as to deprive the Claimant of a legitimate right as perceived by it according to its pleaded case. It would be quite wrong to deprive it of the remedies.

54. It follows therefore that I see no basis on the part of the Third Defendant for resisting the application to amend.

55. Nevertheless, I am mindful of the relatively modest amount in the context of the overall claim and the likely costs of defending the case. It is clear, on the information provided to me by Ms Taylor on instructions that the Third Defendant has very few means with which to defend the claim. She can of course to a large degree defend the claim by relying on the Second Defendant's defence of the claim. In addition she can present her own evidence of change of position on a low key factual basis and rely upon the trial Judge to ensure that she has a fair hearing. If she wishes to challenge the case more vigorously than that then she must do so at the usual risk and cost to any such litigant. As regards to the Claimant, of course it can see a diminishing return. Given the size of the claim and the Third Defendant's relatively modest assets it is unlikely that any significant recovery will be made even if the claim is successful as against her.

56. In my judgment, the Claimant's claim against the Third Defendant should be resolved if possible. Accordingly I indicated that I was minded to stay the claim against her for 28 days to see whether the parties can mediate a result. I wish at this stage to reduce any further expense on the Third Defendant and therefore I impose a stay as I indicated from the time of the granting of permission to amend. If the mediation is unsuccessful the Third Defendant will have to catch up but I do not see that is any great difficulty.

57. In the light of my observation Mr Tager informed me that his client was anxious to mediate without there being an order or stay. I welcome such indication, and I hope that she and the Claimant also participate in mediation.

58. At the end of the hearing I indicated that the parties should endeavour to agree a timetable for the further conduct of this case. I stated that I wished them to agree a timetable, failing which I would impose one with a view to everything apart from preparing of evidence being finished by 31st July 2005. The case already has a trial window for January 2006, and that should not be lost if at all possible. I will reserve the setting of that timetable to the time when this judgment is handed down.

58. Finally, it was suggested that there were papers with the Claimant's former auditors which were germane to the issues in this action. The short answer to any party is to write to the auditors and to seek access to their papers. If they are rebuffed, an application can be made to me on two business days' notice at any day subject to my availability at 10 am, under either CPR 31.17 or CPR 34. Such an application should of course be made on notice to the auditors, but it will capable of being disposed of in 30 minutes in my view.

58. Accordingly I will grant the Claimant's application to amend its particulars of claim in the form of the draft annexed to its application notice.

Mr Alan Boyle QC and Mr Daniel Lightman (instructed by Goldkorn Mathias Gentle) for the Claimant

Mr Romi Tager QC and Mr Hugh Jackson (instructed by Class Law) for the Second Defendant

Ms Deborah Taylor (instructed by Rubinstein Philips) for the Third Defendant