Judgment 1, 1973

IN THE PRIVY COUNCIL No. 21 of 1972

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

NEW ZEALAND NETHERLANDS SOCIETY "ORANJE" INCORPORATED a duly incorporated Society under the Incorporated Societies Act 1908, having its registered office at 40 Gordon Road, Northcote, Auckland — Appellant

- and -

LAURENTIUS CORNELIS KUYS of Auckland, Company Director

and

THE WINDMILL POST LIMITED a duly incorporated Company having its registered office at Norfolk House, High Street, Auckland — Respondents

CASE FOR THE APPELLANT

RECORD AND EXHIBITS

This is an Appeal from a Judgement dated the 7th day of April, 1971 of the Court of Appeal of New Zealand (North, P., Turner and Haslam, JJ.) disallowing an appeal from a decision of the Supreme Court of New Zealand (Speight, J.) dated the 22nd day of September, 1969 holding that the Appellant should be restrained by injunction, from publically distributing or selling a newspaper under the name or style of the Windmill Post or any use of the words "Windmill" or "Post" or from the use of a large windmill device on the front page, and also dismissing the Appellant's Counterclaim for a similar injunction against both respondents.

The primary allegations of fact and issues arising therefrom are set forth in the Respondents' original Statement of Claim and

RECORD AND EXHIBITS

Pp.2 & 3 & Pp. 5-7

the Appellant's Amended Statement of Defence and Counterclaim.

The following are the facts and matters relevant to this Appeal :-

1. The Appellant is an incorporated Society which was so incorporated on the 27th day of January, 1967 pursuant to the

E. 97 provisions of the Incorporated Societies Act 1908. The Appellant's predecessor, for present purposes, The Netherlands Society "Oranje" (hereinafter referred to as "the Auckland Society") was also incorporated under the Incorporated Societies Act 1908 some 18 years previously. The Appellant society was not incorporated for private profit or gain and its principal objects are social and

E. 98 cultural in nature.

2. The Incorporated Societies Act 1908 is as is set out in its preamble "an Act to make provision for the incorporated of societies which are not established for the purpose of pecuniary gain". Section 6 of the Act makes provision for there to be written Rules governing the affairs of incorporated societies. Section 14 makes it clear that except when otherwise expressly provided by the Act or by the Rules of the society, membership of the society shall not be deemed to confer upon the members any right, title or interest, either legal or equitable in the property of the Society.

3. Rule 4 of the Appellant Society provided as one of its main objects that it was to take over and acquire the assets of the national organisation which then formed part of the Auckland Society and in addition to take over the publication and distribution of the Holland Bulletin. Rule 12 (d) gave the

E. 98 National Executive Committee of the Appellant the power and duty to organise, publish and distribute such publications as should be determined by the National Council, which were to be sent to all members of the Society and, if thought fit, to engage a contractor for the purposes of carrying out the foregoing

E. 101 subject matter. Rule 10 provided that the National Council had the right to pay such salary or remuneration to the officers or servants of the National Executive Council, as

E. 101 it thought fit.

RECORD AND EXHIBITS

4. The first-named respondent Kuys, who describes himself as a company director, became a member of the Auckland Society in October, 1962. He served as a member of the committee of the Auckland Society and then in 1963 became the secretary of the society. He continued in that office until June, 1967 when, shortly after the National Executive Committee had voted that it had no confidence in him, he resigned. During the period of his tenure of the office of secretary Kuys undoubtedly occupied a position of responsibility and trust. He himself, under cross examination, acknowledged that this was the case. His duties included responsibility for general administration, publications and group travel activities. From a fairly early stage, he received some payment for his services and latterly a figure of £550 per annum was agreed between the parties. He was a custodian of the Aucland Society's property and funds and operated a group travel bank account which was in the Auckland Society's name. This National Savings Account with the Auckland Savings Bank was a repository for substantial sums on which interest accrued. Kuys subsequently declined to account for monies including interest received into this group travel account. Unbeknown to the Appellant, at the time Kuy's wife was for some time in receipt of a secret commission of $50 per month during the latter part of her husband's secretaryship, from K.L.M., the national Dutch airline. Kuys incidentally declined on the ground of possible self incrimination to answer any question touching on group travel funds held overseas.

P.50 Ll.18

E. 25 & 26

P.65 Ll. 25-30

Pp.50-52

P.60 Ll.31 & 32

E.106 & E. 65

P.68 Ll. 27-29

P.65 Ll. 50-61

P.70 Ll. 1-30

He admitted that some monies at least received by him payable to the Auckland Society were banked by him in his own personal account.

E. 107

5. Over the years that he was Secretary, Kuys had been closely connected both with the Appellant's members and with the airlines and travel agents who were the principal advertisers in the Holland Bulletin. He was able, by the virtue of his official duties to travel overseas, both to Holland and to Australia and to collect information relevant to general promotional activity and newspaper knowledge and news sources. It subsequently has been admitted that Kuys while still secretary of the Auckland Society from 1965 onwards was contemplating a somewhat similar type of organisation to be called "The Windmill Post Social Club."

P.72 Ll. 38-48

E.18 & 19

RECORD AND EXHIBITS

6. Kuys had edited the existing Society's publication "Holland Bulletin" for approximately 3 years between 1963 and 1966 when he travelled to Europe under Society auspices. The Holland Bulletin had been distributed to all the Society Members and had enjoyed substantial advertising support. It had included on its front piece a small windmill insignia. Towards the end of 1966, there was a meeting of the executive committee of the Auckland Society and a minute accepted on all sides appears to have envisaged the appointment of a paid secretary on a part time basis to carry out day to day activities (monthly publications, secretary work and club travel). It was part of the Respondents case that this type of arrangement did not come into effect or was varied by further arrangements made at an informal meeting of private individuals, on 5th January, 1967. It is accepted on all sides that at this latter meeting, Kuys was given approval to bring out a publication under the title "Windmill Post" which would be distributed to society members at a fixed fee of one shilling per copy. It has always been a matter of considerable dispute between the parties as to what, if anything, was agreed further between the persons attending the meeting on 5th January, 1967. Reference will be made to the contemporaneous documents (from which inferences have to be drawn) leading up to the Society's announcement sent out by Kuys as Secretary on 6th January, 1967 and the Society's notification of 27th January, 1967, also signed by Kuys, to the Chief Post Master.

P.51 L.57

E. 56

P.33 Ll. 33-35

E.48 & 49

7. The Appellant, as previously mentioned, was duly incorporated on 27th January, 1967 subject to the Rules that have also been referred to. There were various meetings in the months that followed resulting finally in Kuys resigning his office as Secretary in June, 1967. It would not appear however, that any new arrangements were ever suggested or agreed, at any such meetings although various interpretations have been given to same. There are few documents relating to this period, apart from somewhat conflicting "minutes", which appear to assist neither side.

E. 97

8. Possibly more attention thatn is usual has been directed in this case to factual matters but it should be emphasised that no attempt was made in the Court of Appeal, nor is it made now to dispute the primary findings of fact (as contrasted with matters of inference) made by His Honour, Mr Justice Speight.

RECORD AND EXHIBITS

Mr. Justice Speight ruled that the Society's representatives at no time turned their mind to what would happen to the new publication if they subsequently fell out with Kuys. He also found that Kuys' understanding of the arrangements made was that he was authorised to start a paper as his own enterprise. The learned Judge obviously did not consider that there was any true consensus ad idem but held, notwithstanding what he described as the "Society's mistake" that "the paper" was Kuys' property. He reached this judgement, as he stated, by adopting the stance of an "officious onlooker" or in other words by giving to the matter the meaning that he believed would have been given by some independent third party. In dealing with the Appellant's position, he summed up his opinion by saying "the fact that they (semble, the Appellants representatives) did not necessarily understand that they were consenting to a situation, does not prevent the Court from determining the sense of the promise, if it can ascertain what a sensible third party would have understood the arrangements to mean." What is perhaps remarkable, is that the trial judge did not make any findings in regard the status of Kuys vis-a-vis the Appellant. He did not even turn his mind to the possible question as to whether there had been any dispensation sought by or extended to Kuys. Kuys himself had admitted that he was the person most informed about the Society's organisation, membership, contacts, source of funds and general management. He had also admitted that in his position he had duties of trust and confidence placed in him bu the learned judge apparently saw fit to disregard all these matters and their legal consequences.

P.134 Ll.8-10
P.134 Ll.1 & 2
P.134 L.35
P.133 Ll.37-40
P.134 L.7
P.131 Ll. 37 to 40
P.65 Ll. 26-30

9. In the Court of Appeal, the matter took a very different turn. There is a careful summation of most of the relevant facts, pleadings and issues in all three individual judgements. The judgement of Haslam, J., is particularly instructive in this respect. With the greatest of respect however, there is very little reference in any of the judgements to the legal principles applicable to the established fiduciary relationship and there is but a single reference to judicial authority (to be found in the concurring judgement of North, P.). In the final result, the Court of Appeal concluded, but without, it is submitted, any examination of the legal nature and extent of Kuys' obligations or the particular onus of proof placed on him, that Speight, J., had been correct in his finding of "fact" that Kuys had proved he was "the owner" of the Windmill Post. All three Judges in the Court of Appeal approached the matter in a completely different manner to that which had found favour with

Pp.143-146
Pp.147 & 148

RECORD AND EXHIBITS

Speight, J. Although urged to do so, none adopted the sort of approach which has commended itself to other judicial authorities as exemplified by the judgement of Roskill, J., in Industrial Development Consultants v. Cooley (1972) a AIIE.R. 162.

10. The Appellant's three main submissions before the Court of Appeal are properly set forth in the judgement of North, P. As these submissions remain of critical significance, the Appellant now would reiterate same but with some small changed in phraseology and ordering.

P.147 Ll. 28-39

I. Kuys by virtue of his status as a trustee, officer and servant of the Appellant, not only as Secretary but also as an executive Committee member, was at all material times in a fiduciary relationship to the Appellant. He neither fulfilled his obligations as a fiduciary nor obtained any or a sufficient discharge or dispensation from his fiduciary position.

II. There was no proper ground at law, either at first instance or in the Court of Appeal, for any implication of a term that the name, insignia, or goodwill of the Windmill Post ever belonged or passed to Kuys.

III. In the alternative to submissions I and II, the Respondents should not, having regard to Kuys' conduct, be granted the extraordinary remedy they are seeking.

11. Before proceeding to a closer examination of the judgement at first instance and the individual judgements in the Court of Appeal, it is essential for the purpose of this appeal to outline in broad brush some of the more fundamental legal principles which, it is submitted, have hitherto been ignored or given quite insufficient consideration.

12. The onus of proof in endeavouring to establish their claims, has at all times rested with the Respondents. The Appellant accepts that its Counterclaim for damages was not sustainable as a matter of procedure. It submits however, that it was for the Respondents to demonstrate, having regard to the ordinary civil standard of assessment on the balance of probabilities, that the Appellant had been guilty of tortious conduct

in selling and passing off its newspaper in a manner calculated and likely to deceive. When it is borne in mind that the circulation of both Windmill Post Publications was almost exclusively within the Appellant Society's own membership, who incidentally were bombarded with information as to the source of the rival publications, it is very difficult to find as a fact or inference that the Appellant was guilty of deceiving anyone or particularly its own members. The position of the major advertisers was made quite clear from the evidence of two airline representatives Prentice and Van Dongen. They had thought that they were dealing with Kuys in his capacity as the Secretary of the Appellant Society and that they were dupporting the Appellant. The Second Named Respondent did not even come into existence until 12th July 1967 after Kuys had resigned his official position and the parties were at loggerheads. Neither Respondent called any evidence from any subscribers or advertisers of either publication as to their having been deceived or mistaken. While it must be conceded that the use of an identical name, if unjustified, might well wrongly confuse uninformed persons, there is no evidence whatsoever that this was the result. No single member of the public was called to discharge this aspect of the Respondent's case.

P.3 Ll. 1-10

E. 5

Pp.31,32, 120 & 121 & Pp.124-126 E.53 & P.125

P.2

13. The categories of trust and confidence, like certain other categories in the law, have never been closed, but the nature of the duties imposed on those in a fiduciary position has been subject to close scrutiny over a long period of time and on a great many occasions. Without attempting to define the various categories, it is submitted, that the following are probably the most important examples of fiduciary relationships:

(a) Trustee and Cestuis Que Trust

(b) Medical and Legal Men and their Patients or Clients

(c) Company Directors and their Companies

(d) Servants and their Masters

(e) Agents and their Principals.

It has been submitted that the First Named Respondent's position clearly falls within the last three categories. Although there is no direct authority it will be submitted that Kuys' position and obligations are also akin in important respects to the obligations of that of persons

falling within the first and prime class or category.

14. Your Petitioner's humble submission is that on the accepted facts in this case Kuys at all times owed to the Appellant duties in law of fidelity, honesty, obedience, diligence and that he has been shown, on his own evidence to have, at various time, disregarded all such obligations. It is further and perhaps more importantly submitted that Kuys was in a similar position to that of a trustee both in regard to the formulation or invention of the name "Windmill Post" and the windmill insignia as well as in regard the goodwill of the Appellant Society's Publications including, of course, the member subscribers and established advertising connections. Information gathered or received by Kuys while he enjoyed the office of secretary, belonged to the Appellant and should, in the Appellant's submission, have been kept by Kuys in complete confidence. Kuys further owed an affirmative obligation to protect all of the Appellant Society's property, goodwill and other interests. Finally in this connection, it is submitted that Kuys had a duty not to place himself in a position of conflicting interest where there might even be suspicion that he was profiting from his office, without first having made the fullest disclosure and received a clear and fully informed discharge or dispensation in that regard from the Appellant Society.

15. In the Court of Appeal the Appellants sought under the submission referred to in Paragraph 10 II herein to bring to Their Honours' attention certain established authorities which deal with the obligations of persons in Kuys' situation. The recent decision of the House of Lords in Boardman v. Phipps (1966) A.C. 46 (1966) 3 All E.R.721 was quoted and I would like to refer in particular to the speech of Lord Upjohn where (at P.123) he said:

> 'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case. The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not place himself in a position where his duty and his interest may conflict. I believe that the rule is best stated in

Bray v. Ford by Lord Herschell, who plainly recognised its limitations: "It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the plaintiff's, is not unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services." It is perhaps stated most highly against trustees or directors in the celebrated speech of Lord Cranworth, L.C., in Aberdeen Ry. Co. v. Blaikie Brothers where he said: ". . . and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect." The phrase "possibly may conflict" requires consideration. In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in conflict.'

16. In considering the legal principles relevant to the present Appeal it does not appear to be an over-statement to assert that every agent owes to his principal certain fiduciary duties. Furthermore, it seems that some of such duties are of the same nature as those owed by a trustee to his beneficiary. While some of the

RECORD AND EXHIBITS

duties may be implied by contract, in the view of at least one leading authority: Bowstead on Agency 13th Edition at Page 127 "they should probably be regarded as duties arising independent of contract, being imposed by equity as a result of his (i.e. the agent's) special relationship with his principal. Reference has already been made to the prime obligation on persons in the First Respondent's general situation, not to place themselves in a position of conflict of interest. It is admitted however, that under the ordinary law relating to agency, there may be a good defence to an agent in respect of such conduct, provided always that the agent has made full discovery of his personal interest and where the principal with full knowledge of all material circumstances and the nature and extent of the agent's interest, has given his consent. Even in this sphere however, it is important to know that the burden or proving full discovery lies on the agent: Dunne v. English (1874) L.R.18 Eq.524.

17. So far as company directors are concerned, it has long been held that it is not sufficient for a director merely to disclose his interest, he must disclose the nature of his interest: Imperial, Mercantile Credit Association Co. v. Coleman (1873) L.R. 6 H.L.189. It will be submitted that the First Respondent, Kuys, failed to adduce any proof that the Appellant Society had properly considered the question of granting to him a release or dispensation. Further, and in the alternative however, it will be submitted that even if it is permissible for the Courts to find or imply such a dispensing term, then as a matter of law, Kuys could avail himself of such dispensation only if he had acted in perfect good faith, and made discovery of all material facts and everything known to him which might have influenced the Appellant Society: Halsbury's Laws of England Third Edition, Vol.1 Para.443 at P.191. Your Lordships may feel that Kuys owed to the Society a greater duty than that of a mere agent. Even applying the agency criteria, however, it is fairly obvious that Kuys treated the Appellant with an extreme economy of candour. The Society was not informed of many matters, as for example, the secret commission being received by Kuys' wife, which would have been of considerable interest and relevance. The Appellant only discovered such information after Kuys had resigned his office.

18. Continuing for the moment to dwell only on the least exacting requirements of his situation, Kuys, as an agent, owed to the Appellant a duty to keep its property separate

from his own and to account for all dealings and transactions in the course of his agency. In the final eventuality of his failure to have done so, the only presumptions which can and should be made are those unfavourable to him, and in favour of the Appellant: Bowstead op.cit. Pp.161 and 163. When we pass to the realm of trust obligations simpliciter there is a more positive presumption that any accretion to property held in a fiduciary capacity e.g. bank interest, cannot be retained by a fiduciary: Halsbury op.cit. Vol.38 P. 857. The situation is of course, similar in regard profits from property held by persons in a fiduciary position. It was not disputed at any stage that the goodwill of the "Holland Bulletin" was purchased with monies drawn from a bank account which was in the name of the Auckland Society. E. 66

19. It appears to have been accepted in the Court of Appeal or at least in the judgement of the learned President, that Kuys did owe to the Society some of the duties of an employee to his employer. The Appellant's submission however, is that Kuys, as a member of the executive committee of both the Auckland Society and the Appellant Society, owed in addition, duties similar to those of a director of a limited liability company. It may be that his duties were more akin to those of a trustee of a charitable trust or, at a slightly lower level, akin to the duties of a trade union official or an elected representative of some other benevolent organisation. Even in his role as a paid servant, it is submitted that Kuys owed a duty not to disclose confidential information obtained by him in the course of his office: Halsbury op.cit. Vol.25 P.462 Para.895. It is similarly submitted that he owed a duty not to solicit the Society's members to become members of his own rival organisation. A matter which would appear to have been much relied upon by Kuys, namely that he was the originator of the name or title "Windmill Post" becomes of little value to his case when it is borne in mind that a servant in the normal course is a trustee for all inventions or discoveries made in the course of his employment: Halsbury op.cit. Vol. 25 P.462 Para.895. E.46 & P.130 L.3

20. To sum up the Appellant's major submission touching upon the relevance of the particular status of the First Respondent, it is proposed now briefly to refer to the legal principles affecting the somewhat analagous position of company director. Professor L.C.B.Gower's treatise Modern Company Law Third Edit. at P.256 sets out the position as follows :- "As fiduciaries, director must not place themselves in a position in which there is a conflict between

RECORD AND EXHIBITS

their duties to the company and their personal interests. Good faith must not only be done but must manifestly be seen to be done, and the law will not allow a fiduciary to place himself in a situation in which his judgement is likely to be biased and then to escape liability by denying that in fact it was biased." It is submitted that Kuys as well as being an agent and a servant also owed to the Appellant, higher duties similar to those found by the Courts to be incumbent on directors of limited liability companies.

21. In the Appellant's submission there was never any contract touching upon ownership of Windmill Post between Kuys and itself. If however, this view of the facts does not find favour with yourLordships it is submitted that Kuys' director-like position served to vitiate any such contractual arrangement to the extent of making same voidable at the instance of the Appellant. It is accepted that a director can obtain a release in certain circumstances from the full rigour of his fiduciary duties, but it needs to be kept in mind that the rule as stated above is for the protection of the company and that a contract can be avoided even though it is perfectly fair if the company has not given a sufficient discharge. Putting the matter another way and to borrow the language of Upjohn L.J., as he then was, in Boulting v. The Association of Cinematograph Technicians /1963/ to Q.B. 606 at P. 637, "the duty cannot be used as a shield by the person owing the duty; that is clear; it is a sword and can only be used by the person entitled to the benefit of it, and he may sheath the weapon." In the present case it is urged that the Appellant Society was entitled in law to the complete and undivided loyalty of all its executive officers, including the First Respondent. It was obliged to accept any less standard only if it had been affirmatively demonstrated that it had agreed to surrender its rights in the publication question and also its right to the loyalty of one of its most important executive committee men; the remarks of Upjohn L.J., in Boulting v. The Association of Cinematograph Technicians op.cit. at P. 636 appear to give support to his submission. Finally the Appellant would comment that it must be a rare case where even company directors will be able to satisfy the four criteria suggested by Professor Gower as being pre-requisites of their taking personal advantage of a business opportunity originally offered to their company. The final condition so suggested, is that the

directors use of the opportunity must not be related to their position as directors: Gower op.cit. at P. 539. This certainly was not Kuys' situation, for it will be remembered that he continued in his office using the Appellant Society's stationery and other facilities and claiming his secretarial expenses. It is noteworthy in this connection that even the Windmill Post fees were claimed by Kuys under the head of "N. E. C. Expenses" i.e. National Executive Committee expenses and as "Sekr.Exp." i.e. secretarial expenses. With respect to the approach adopted by all three members of the Court of Appeal, it has been held by your Lordships that the onus of establishing that he is not accountable, rests with the fiduciary: Gray v. New Augarita Porcupine Mines Ltd. /1952/ 3 D.L.R.1.

P.34 E.48 & E.62, 63 & 64

22. Your Petitioner would seek to conclude this portion of its case by endeavouring to apply the principles earlier enunciated to a few of the most relevant factual circumstances. Kuys continued up to the time of his resignation to be in a fiduciary relationship to the Appellant. He deliberately placed himself in a position of direct conflict of interest by organising for personal gain a rival competitive body. He did not account for some monies received on the Auckland Society's behalf when he should have and he chose to mix his funds with those of the Auckland Society. He drew from such mixed funds in the purchase of the goodwill attaching to the Holland Bulletin. He made use of personal information that he had gained by virtue of his office and membership of the various executive committees to promote his own Windmill Post Club and the newspaper that he then proceeded to claim as his own personal property. He did not obtain any or a sufficient dispensation from his various fiduciary obligations. Having regard to these circumstances, your Petitioner humbly submits that he should in law be held accountable to the Appellant both in respect of the name and goodwill of the Windmill Post.

23. The Appellant desires to pass now to the second of its three principal submissions. As previously stated, this submission was to the effect that there was no proper ground at law, either at first instance or in the Court of Appeal, for any implication of a term that the name, insignia or goodwill of the Windmill Post ever belonged or passed to Kuys.

24. It is trite law that the implication of a term is a matter of law for the Court:

RECORD AND EXHIBITS

Chitty on Contracts 23rd Edition Para. 692 at P. 313. As has been suggested on a number of occasions this power of judicial implication is a convenient means of repairing an obvious oversight. It is most often used to repair an oversight of the parties rather than of the judge at first instance. In the Appellant's submission, it is apt to keep closely in mind that the rule or practice sometimes referred to as The Moorcock, can be easily overstrained. It has more often than once received the doubtful compliment of citation by counsel as a last desparate expedient in a tenuous case: Cheshire and Fifoot, The Law of Contract Third New Zealand Edition, Page 147.

25. It remains the Appellant's submission that before resort is had to inferring or implying important contractual terms then, to employ the language of Scrutton L.J., in Re Comptoir Commercial Anversois and Power Son & Co. [1920] 1 K.B.868 at P.899 "it must be such a necessary term that both parties must have intended that it should be a term of the contract." (My emphasis) Courts of the highest authority have shown a reluctance to apply a term unless compelled to do so in order to give effect to the intention of the parties: Luxor Eastbourne Limited v. Cooper [1941] A.C. 108. More recently it was held Companie Algerienne die Meunerieu Katara Societa de Navigatione Maritima SPA [1960] 2 Q.B.115 that the warranty sought to be implied by the judge at first instance was erroneous in principle, since it could not be said in the circumstances that both parties must have intended that it should be a term or inferred or what their attitude might have been had they known all the facts.

26. The real danger, in the Appellant's submission, of what has been done heretofore in this case in the Courts below is an insufficient appreciation that by the implication of terms there has been put to one side the questions of much greater importance having a profound effect on the relationship the First Respondent bore to the Appellant Society. It is submitted that the true question remains, not what terms could be implied in a contract between two individuals, dealing as stranger, whowere assumed to be making a bargain in regard to a particular transaction, but as previously submitted, a question involving determination of a matter of status. See the remarks of Viscount Simonds in Lister v. Romford Ice Co. [1957] A.C. 555 at P. 576.

RECORD AND EXHIBITS

27. The Respondents in this case have chosen to make application to the Supreme Court of New Zealand under Chapter II of the Code of Civil Procedure which deals exclusively with the so called "extraordinary remedies."
It must be conceded, as it was in the Court of Appeal that in this special type of proceeding, it is not competent for the Appellant to set up a Counterclaim: Edmonds v. Edmonds (1903) G.L.R. 262. An action for damages still awaits trial after the disposal of this appeal. In such action, both sides will be very much concerned with the question of what matters decided in these proceedings, must then be regarded as res judicata. Turner J., in delivering the first judgement in the Court of Appeal, made mention that he had listened "with some sympathy" to certain matters of merit advanced on behalf of the Appellant. He went further and said that these matters "may well have their relevance" in other litigation between the same parties where different relief is canvassed. Your Petitioner's respectful submission is that these so called "merits" remain of extreme relevance deciding the question of what, if any, remedy should be granted to the Respondents at this stage of the matter.

P.143 Ll. 36-39

28. The short point made in the Appellant's third and final submission referred previously to in Paragraph 10 III herein is to the effect that whilst still denying that the Respondents are entitled to any remedy or relief, it is submitted that they should not now, having regard to Kuys' conduct, be confirmed in the extraordinary remedy of injunction that they are seeking.

29. It is an elementary first principle in this area of the law that the equitable remedy of injunction should only be granted according to equitable principles: Halsbury op.cit. Vol.21 Para. 798 at P. 380. It is similarly a matter of basic principle that the issue of an injunction remains pre-eminently a matter of judicial discretion. For example, it has been held that an injunction should not issue to restrain breach of an indefinite, ambiguous and uncertain, or vague arrangement, or if there is a lack of full mutuality, between the parties. More importantly, it follows from what has already been said that the Respondents are not entitled to have the extraordinary remedy they seek unless it can be averred that Kuys came before the Court with clean hands. Your Petitioner's submission is that the very same breach of fiduciary obligations, previously referred to in detail, must serve to disentitle the Respondents from being granted the equitable remedy of an injunction. The Appellant submits further that the question of the remedy, if any, the Respondent should have, is a matter best be

RECORD AND EXHIBITS

left to be decided in the further proceedings now pending.

30. The Appellant's principal contention at this time is that the Court of Appeal was wrong in failing to set aside the judgment of Speight J. Most, if not all, of the more difficult matters requiring decision, arise because of the completely inadequate original judgement. Speight J., did not see fit to enquire into the status of Kuys or the legal consequences of such a status. It is indeed difficult to escape the conclusion that the learned Judge at first instance did not really turn his mind to the issues raised by Paragraph 9 of the Appellant's Statement of Defence. It is fairly obvious that Speight J., did not consider that the First Respondent's ethical behaviour was of any relevance. To the extent that the learned Judge did consider these matters, it seems, with respect, that he took the erroneous view that they were of no consequence. Speight J., did appreciate that a party seeking an equitable remedy must come with clean hands, but he rejected the Appellant's argument in this regard by stating that in his view the conduct in question "must relate to the matter before the Court" and concluding that he did not find Kuys "at fault in any relevant matter". It is submitted with respect that Speight J., failed to direct himself adequately in regard the relevance of the facts before him to the issues clearly raised by the pleadings.

P. 5

P.134 Ll. 25-27

P.131 Ll. 51-56

P.134 Ll. 30-34

31. It is understandable that Speight J., not having at any stage conceived of the case in terms of Kuys owing the Appellant fiduciary obligations, did not ever proceed further to consider at all whether or not Kuys had received any or a sufficient release or dispensation from such obligations. The judgment, at first instance, is devoid of even a single reference to matters of principle or judicial authority.

32. It is not always easy to differentiate between matters of act and matters of mixed fact and law. It is conceded before your Lordships as it was in the Court of Appeal, that an Appellant tribunal should not lightly differ from a finding of a Court at first instance, on questions of act. There is however, considerable distinction to be drawn between the perception of facts, their evaluation and the proper inferences to be drawn from them. It is the Appellant's submission that neither Speight J., nor the members of the Court of Appeal enjoy any

advantage over your Lordships in the latter spheres. Even Speight J., did not impute untruthfulness to the Appellant's principal witnesses. He held as a fact that the parties were not ad idem in the sense that they were thinking differently or that the Auckland Society's executive representatives did not have in their minds the full implications of what might happen in the future. Kuys "assumed" that the Auckland Society's representatives were agreeable to his launching the Windmill Post as his own enterprise because of what the learned Judge described as "the Society's mistake". The learned Judge proceeded further on the assumption that he was entitled to resolve the ambiguities between the parties by giving to the arrangements such effect as "an officious onlooker" might have concluded to be the bargain. North P., considered that it was "a little unfortunate" that the learned Judge used language more appropriate to a case where a contract had been made out and the circumstances are such that the Court can draw implications from what was obviously the intention of the parties. North P., notes that "unfortunately too, Speight J., did not in express terms at all events go on to consider whether the fact that Kuys was the Secretary of the Society at the time stood in the way of him claiming ownership of the newspaper". It remains the Appellant's submission that the judgement at first instance is completely unsatisfactory, both in as much as it treated as irrelevant the question of Kuys' fiduciary obligations and in so far as there was implied against the Appellant, terms which its representatives had not accepted or even considered.

RECORD AND EXHIBITS
p.131 Ll. 28-34
P.134 L.35
P.131 Ll. 37-40
P.132 L.4
P.133 Ll. 48 & 49
P.134 Ll. 19-23
P.147 Ll. 40-45
P.147 Ll. 51-54

33. In the Court of Appeal, all three judges acceded to the Appellant's submission that Kuys, up to the time of his resignation, stood in a fiduciary relationship to the Appellant Society. In an endeavour to overcome this very serious shortcoming of the judgment in the Court below, all the judges saw fit to supplement Speight J.'s., interpretation of the facts, by holding in effect that what the learned Judge would have done had he considered Kuys' fiduciary situation, was to have reached an additional finding that Kuys had been released by the Appellant Society from his fiduciary responsibilities. This re-interpretation of the "facts", can be summed up from the remarks of Turner J., in his judgment, when he said:

> "In a word, I read the judgment, even though the words 'fiduciary' or 'dispensation', do not appear therein, as finding as a basic essential fact that the effect of the conversations of 5th January was to give Kuys

RECORD AND EXHIBITS

a dispensation from the fiduciary duty, which without that dispensation he might have owed."

34. This latter gloss had not been part of the Respondent's case, and indeed both Respondents had resisted and still resist the notion that Kuys has any special obligations by virtue of his status. If your Lordships are minded to accept my submission that the Law requires any dispensation to be derived from the person or body entitled to the benefit of the rule, then it is interesting to note Speight J's., finding that the Appellant's representatives did not in January, 1967 advert their minds to the question of Kuys' future proprietary claims or interests.

P.134 Ll. 8-10

35. With the greatest of respect, the judgment of North P., comes closest to dealing with the true issues raised in the circumstances of the case. It would appear however, that even the learned President (and the other members of the Court of Appeal) rather beg the real question that needed to be answered by stating :

> "it might have been better if the learned Judge had said in express terms that Mr. Kuys had discharged the burden of showing that the fact that he was Secretary of the Auckland Society and later of the National Society, did not in the circumstances require him to hold that he was trustee of the newspaper and its title for the Society."

P.148 Ll. 56-59

It may or may not be rather "surprising" that the Appellant was not more alive to protecting its interests, but in your Petitioner's respectful submission, the members of the Court of Appeal failed to appreciate or appreciate sufficiently, the nature and extent of Kuys' obligations, in regard his establishing a release from his fiduciary position.

P.142 Ll. 13 & 18
P.145 Ll. 52 & 55
P.148 Ll. 37-41

36. Faced with the failure of the Judge at first instance to apply the proper principles, it is submitted that it was the duty of the Court of Appeal, always bearing in mind that the onus of proof had rested heavily on the Respondents, to give their judgment in accordance with the four propositions succinctly summed up by Lord Upjohn in the decision of your Brothers in

Boardman v. Phipps /1967/ 2 A.C.46 at P. 127. The four propositions are as follows :

'(1) The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position...

(2) Once it is established that there is such a relationship, that relationship must be examined to see what duties are thereby imposed on the agent, to see what is the scope and ambit of the duties charged on him.

(3) Having defined the scope of those duties one must see whether he has committed some breach thereof by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.

(4) Finally, having established accountability it only goes so far as to render the agent accountable for profits made within the scope and ambit of his duty.'

If the Court of Appeal had adopted such an approach, having regard to Kuys' director-like status, it is submitted that they would have been compelled to the conclusion that the judgment in the Court below was bad and should be set aside.

37. The Appellant respectfully submits that the judgment of the Court of Appeal of New Zealand was wrong and ought to be reversed and that the Respondents were not entitled to the injunction claimed in the Supreme Court for the following (amongst other)

R E A S O N S

(1) BECAUSE the First Respondent was in a fiduciary relationship to the Appellant and in breach of his duties as a fiduciary especially by putting himself in a situation of conflict of interest.

(2) BECAUSE the Respondents did not discharge the burden of proof lying upon them, that the Appellant, after full disclosure of all relevant matters, had given a dispensation from such a fiduciary relationship.

(3) BECAUSE the Respondents are disentitled from having the equitable remedy of an injunction in their favour.

BERNARD CLARK.

No. 21 of 1972

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N:-

NEW ZEALAND NETHERLANDS SOCIETY "ORANJE" INCORPORATED Appellant

- and -

LAURENTIUS CORNELIS KUYS and THE WINDMILL POST LIMITED Respondents

---

C A S E

FOR THE APPELLANT

WRAY SMITH & CO.,
1, Kings Bench Walk,
Temple, London, E.C.4.

As Agents for:-

EARL KENT MASSEY PALMER & HAMER,
Auckland,
New Zealand
Solicitors for the Appellant.