Privy Council Appeal No. 7 of 1995

The Personal Representatives of Tang Man Sit (deceased) (Tang Wing Hon Alan appointed to represent the Estate of Tang Man Sit, deceased) *Appellant*

v.

Capacious Investments Limited *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 18th December 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Lloyd of Berwick
Lord Nicholls of Birkenhead
Lord Steyn
Mr. Justice Hardie Boys

*[Delivered by **Lord Nicholls of Birkenhead**]*

This appeal arises out of breaches of trust committed by Mr. Tang Man Sit from 1985 onwards. In 1978 Mr. Tang and Mr. Kung Yerk Man engaged upon a joint venture for the construction of 22 houses on a piece of land at Kam Tin, Yuen Long, New Territories. Mr. Kung acted through a company controlled by him, Capacious Investments Limited, the plaintiff in these proceedings. Mr. Tang owned the land, and the plaintiff provided the money.

The houses were finished in about September 1981. By a deed dated 20th March 1982, replacing an earlier agreement, the parties agreed that Mr. Tang would assign to the plaintiff 16 of the houses. The deed specified which these houses would be. By this date Mr. Kung had died.

No assignment was executed. The houses stood empty. There were complications over Mr. Kung's estate. In 1985, in circumstances which it is unnecessary to relate, Mr. Tang proceeded to let some and progressively all of the 16 houses. They were used as homes for the elderly. The plaintiff did not know or approve of the lettings at the time.

The history of the proceedings

In December 1991 the plaintiff started this action. Mr. Tang died two days before the writ was issued, and the defendant is his personal representative. The plaintiff claimed (1) an order that the defendant do assign the 16 houses to the plaintiff free of incumbrances, (2) a declaration that the plaintiff was from at least 20th March 1982 the equitable owner of the 16 houses, (3) an account of all secret profits in respect of the use and letting of the 16 houses, and payment of all such secret profits, and (4) damages for breach of trust.

On 25th August 1992, on an application by the plaintiff for summary judgment, Mayo J. made orders as sought. He ordered the defendant to assign the 16 houses free of incumbrances. He made a declaration as asked. He ordered the defendant to furnish an account of all secret profits in respect of the use and letting of the 16 houses and payment of all such secret profits to the plaintiff. Finally, he made an order for "damages for breach of trust to be assessed". The Judge considered the defendant would not be prejudiced by having to proceed separately with his counterclaim. His counterclaim included a claim for reimbursement of money spent by Mr. Tang on rates and property taxes and maintenance of the houses.

In October 1992 Mr. Tang's son, Mr. Tang Wing Hon Alan, made an affirmation pursuant to the order for the account of profits. He had searched among his father's papers and found rent receipts and details of eight tenancies. The money received totalled a little over HK $2 million: $2,035,474. The plaintiff lost no time in applying to the court for a charging order over an adjoining lot of land belonging to Mr. Tang's estate. On 30th October an order nisi was made in the sum of $1,807,774. Nothing turns on the unexplained discrepancy between these two amounts. The charging order was made absolute on 17th December.

A few months later, in April 1993, a further 16 tenancy agreements came to light. Affirmations produced on behalf of the defendant showed that the rents payable under these agreements, and presumably paid, amounted altogether to $4,650,300. A charging order nisi in respect of this sum was made on 1st June.

The next event was that on 26th June the defendant paid the plaintiff $1,807,774, the amount secured by the earlier charging order. This order was then discharged by consent.

Meanwhile the plaintiff had been taking steps to proceed with the assessment of damages. A summons seeking directions was issued in February 1993. Particulars of the damages claimed were served in April. The claim was made under two heads. It was for a substantial amount. Head A was for damages for loss of use and occupation, comprising loss of market rental from January 1985 to January 1993. As later amended, the amount claimed was almost $8.6 million. The amount paid in respect of the account of profits, $1,807,774, was then deducted, as were two smaller sums, totalling $189,984, paid in October 1992 in respect of current rental payments received from the tenants. The net amount claimed under this head was almost $7 million. The claim under head B was for $14 million, as damages in respect of the loss caused by the diminution in value of the property due to (1) the wrongful use and occupation and (2) the property having been wrongfully incumbered by the tenancies. In September 1992 the defendant executed an assignment of the 16 houses in favour of the plaintiff, but vacant possession was not given. The property still remained incumbered with tenancies created by Mr. Tang in breach of trust while he was the owner of the legal estate. As an alternative to (1), there was a claim for the cost of repair and reinstatement.

The assessment of damages hearing took place in July 1993 before Master Woolley. On 10th August he assessed the amount payable at $16,937,197. He assessed the amount due under head A, based on the open market rental of the houses, at $7,934,955. He assessed the amount due under head B at $11 million. This represented the difference between the actual market value of the houses and their market value had they been in good condition and free from incumbrances. He then deducted the payments, totalling $1,997,758, received by the plaintiff in respect of the account of profits and current rentals as mentioned above. The Master also held, for good measure, that the damages payable under head B(1) on the alternative basis, of the cost of repair and replacement, would be not less than the amount payable under the primary claim.

The defendant appealed. The Court of Appeal (Hon. Macdougall V.P., Godfrey J.A. and Sears J.) held that, having received payment of $1,997,758 on account of the profits made from letting the houses, the plaintiff could not thereafter claim compensation for having been kept out of possession of the houses. It had made its election between two inconsistent remedies. The court held, further, that the plaintiff's election

regarding income account (head A) did not preclude it from pursuing its claim for loss on capital account (head B). Accordingly the court reduced the damages award to $11 million. From that decision the defendant appealed to Her Majesty in Council, and the plaintiff cross-appealed.

The defendant's case

In agreement with the Court of Appeal their Lordships accept the defendant's submission that there is an inconsistency between an account of profits, whereby for better or worse a plaintiff takes the money the defendant received from the use he made of the property, and an award of damages, representing the financial return the plaintiff would have received for the same period had he been able to use the property. These remedies are alternative, not cumulative. A plaintiff may have one or other, but not both. (Strictly, the claim for damages might be more accurately formulated as a claim for compensation for loss sustained by a breach of trust. In the present case nothing turns on the historic distinction between damages, awarded by common law courts, and compensation, a monetary remedy awarded by the Court of Chancery for breach of equitable obligations. It will be convenient therefore to use the nomenclature of damages which has been adopted throughout this case.)

Building on this foundation, Mr. David Oliver Q.C. submitted that the Court of Appeal was correct to hold that the plaintiff had elected to take the remedy of an account of profits. The plaintiff passed the point of no return at the latest when it enforced, and accepted, payment of $1,807,774.

The next stage in Mr. Oliver's argument was that this election had a more far-reaching effect than the Court of Appeal held. The money Mr. Tang received, and for which his estate is having to account, was from the lettings he made. The plaintiff's case is that the lettings involved an intensive use of the houses, with an unusually high degree of wear and tear. If the plaintiff chose to take Mr. Tang's receipts from the lettings, it could not at the same time complain of the lettings and obtain damages in respect of the adverse incidents of the lettings. The plaintiff might take the financial return from the lettings, in which case it must accept everything inherent in the lettings, including the length of the tenancies and the nature of the use envisaged by the tenancies. Or the plaintiff might reject the tenancies lock, stock and barrel, and claim damages. What the plaintiff could not do is to pick and choose, taking the benefits of the leases but repudiating their disadvantages. It could not have the profits without the drawbacks attendant on the means whereby the profits were earned.

Accordingly, the submission continued, since the present plaintiff had elected to take an account of profits, it was barred from pursuing any claim for damages based on the existence of the lettings or on the terms of the lettings or on the inevitable consequences of the lettings. Head B is such a claim. Hence the plaintiff was not entitled to recover any damages. That was the essence of the defendant's submission.

Two remedies

Their Lordships will consider first whether the plaintiff did choose to take the remedy of an account of profits, with the consequence that it could no longer pursue a claim for damages so far as this would be inconsistent with an account of profits. This issue lies at the heart of this case. This issue calls for consideration of the principles governing election between remedies.

The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed, is (1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss.

Sometimes the two remedies are cumulative. Cumulative remedies may lie against one person. A person fraudulently induced to enter into a contract may have the contract set aside and also sue for damages. Or there may be cumulative remedies against more than one person. A plaintiff may have a cause of action in negligence against two persons in respect of the same loss.

Alternative remedies

Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant. A plaintiff is not required to make his choice when he launches his proceedings. He may claim one remedy initially, and then by amendment of his writ and his pleadings abandon that claim in favour of the other. He may claim both remedies, as alternatives. But he must make up his mind when judgment is being entered against the defendant.

Court orders are intended to be obeyed. In the nature of things, therefore, the court should not make orders which would afford a plaintiff both of two alternative remedies.

In the ordinary course, by the time the trial is concluded a plaintiff will know which remedy is more advantageous to him. By then, if not before, he will know enough of the facts to assess where his best interests lie. There will be nothing unfair in requiring him to elect at that stage. Occasionally this may not be so. This is more likely to happen when the judgment is a default judgment or a summary judgment than at the conclusion of a trial. A plaintiff may not know how much money the defendant has made from the wrongful use of his property. It may be unreasonable to require the plaintiff to make his choice without further information. To meet this difficulty, the court may make discovery and other orders designed to give the plaintiff the information he needs, and which in fairness he ought to have, before deciding upon his remedy. A recent instance where this was done is the decision of Lightman J. in *Island Records Ltd v. Tring International Plc* [1995] 3 A.E.R. 444. The court will take care to ensure that such an order is not oppressive to a defendant.

In the ordinary course the decision made when judgment is entered is made once and for all. That is the normal rule. The order is a final order, and the interests of the parties and the public interest alike dictate that there should be finality. The principle, however, is not rigid and unbending. Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely, that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider public interest in the conduct of court proceedings. Thus in *Johnson v. Agnew* [1980] A.C. 367 the House of Lords held that when specific performance fails to be realised, an order for specific performance may subsequently be discharged and an enquiry as to damages ordered. Lord Wilberforce observed, at page 398:-

> "Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity."

Cumulative remedies

The procedural principles applicable to cumulative remedies are necessarily different. Faced with alternative and inconsistent

remedies a plaintiff must choose between them. Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments. When the remedies are against two different people, he may sue both persons. He may do so concurrently , and obtain judgment against both. Damages to the full value of goods which have been converted may be awarded against two persons for successive conversions of the same goods. Or the plaintiff may sue the two persons successively. He may obtain judgment against one, and take steps to enforce the judgment. This does not preclude him from then suing the other. There are limitations to this freedom. One limitation is the so-called rule in *Henderson v. Henderson* (1843) 3 Hare 100. In the interests of fairness and finality a plaintiff is required to bring forward his whole case against a defendant in one action. Another limitation is that the court has power to ensure that, when fairness so requires, claims against more than one person shall all be tried and decided together. A third limitation is that a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery.

The authorities

The leading authority on the subject of election is the decision of the House of Lords in *United Australia Limited v. Barclays Bank Limited* [1941] A.C. 1. Contrary to the view sometimes expressed, there is no inconsistency between the various speeches in that case if the different considerations applicable to alternative remedies and cumulative remedies are kept firmly in mind.

In that case an officer of United Australia improperly endorsed in favour of a third party, MFG Trust Ltd, a cheque which was made payable to United Australia. MFG paid the money into its account with Barclays Bank. The bank collected the proceeds of the cheque and placed them to the credit of MFG's account. United Australia sued MFG for "money lent" and "money had

and received". MFG went into compulsory liquidation, the action was automatically stayed, and United Australia recovered nothing from MFG. United Australia then sued Barclays Bank, as the collecting bank, for damages for conversion and negligence. At the trial the bank's only defence was the technical one that the earlier abortive proceedings against MFG had relieved it, the bank, from all liability. The House of Lords rejected this defence. The earlier proceedings against MFG could provide the bank with no defence unless, as a result, United Australia had received full satisfaction for its loss.

Against MFG the plaintiff had a choice of one of two alternative and inconsistent remedies. It could claim redress either in the form of compensation, that is, damages as for a tort, or in the form of restitution of money to which it was entitled but which MFG had wrongfully received: see Viscount Simon L.C., at pages 18-19. In this context Lord Simon stated, at page 19:-

> "At some stage of the proceedings the plaintiff must elect which remedy he will have. There is, however, no reason of principle or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment."

Likewise Lord Atkin, at page 30:-

> "..on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one.."

Lord Romer's statement of principle, at page 34, regarding election between two alternative remedies was to the same effect. Obtaining judgment for one remedy against a wrongdoer precludes a plaintiff from thereafter claiming the alternative remedy.

That was the position regarding the company's claims against MFG. But the remedies of United Australia against MFG on the one hand and the bank on the other hand were cumulative, not alternative. Accordingly the earlier proceedings against MFG could not bar the company subsequently bringing fresh proceedings against the bank unless the company had recouped the whole of its loss in the earlier proceedings. It was in this context that Lord Simon stated, at page 20:-

> "...the earlier proceedings against MFG could provide the [bank] with no defence, unless as a result of them the plaintiffs had received satisfaction for their loss."

He reiterated this at page 21. Lord Atkin was similarly of the view that even if United Australia had been called upon to elect which remedy it would take against MFG, and indeed had received part satisfaction, that would have had no effect on the company's remedies against the bank. Lord Atkin said, at page 31:-

> "If a thief steals the plaintiff's goods worth £500 and sells them to a receiver for £50 who sells them to a fourth party for £400, if I find the thief and he hands over to me the £50 or I sue him for it and recover judgment I can no longer sue him for damages for the value of the goods, but why should that preclude me from suing the two receivers for damages?... I can see no justice in the contention: and I know of no authority in support of it."

Lord Porter's observations, at page 50, were to the like effect:-

> "...an action against one..tortfeasor for conversion is no bar to an action against another, nor indeed does the signing of judgment against the first end the matter. The plaintiff can even then proceed to judgment against the second, and his rights are not exhausted until from one or both he has obtained the full measure of his loss."

The original basis of the form of action of indebitatus assumpsit for money had and received was a fictitious contract of loan of the money. The bank argued that by setting up this contract in its claim against MFG, United Australia had "waived the tort" of conversion for all purposes and, hence, could not set up the wrongful conversion against the bank. The House of Lords rejected this contention. Even if the MFG action had reached judgment and the company had taken judgment for money had and received, this election by the company between the alternative remedies available to it against MFG would have been a waiver of the right to recover from MFG damages for the tort, not a waiver of the tort itself. In a celebrated passage Lord Atkin said, at page 29:-

> "These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred."

These principles were applied in *Mahesan v. Malaysia Government Officers' Co-operative Housing Society Ltd.* [1979] A.C. 374. There the plaintiff had to choose between alternative remedies. In return for a bribe, the agent of a housing society

caused the society to buy land at an overvalue. The society sued the agent for both (a) the amount of the bribe, $122,000, and (b) damages for fraud for the loss sustained by the society in connection with its purchase of the land. The Federal Court of Malaysia assessed the damages at $443,000, and ordered the agent to pay both the amount of the bribe and the amount of the overpayment. In assessing the latter no allowance was made for the fact that recovery of the bribe under head (a) would reduce the amount of the society's actual loss recoverable under head (b). On appeal, their Lordships' Board held the society was bound to elect between its claims under the two heads. Since the society would clearly have elected to take damages, judgment should be entered for $443,000.

The present case

Their Lordships turn to apply these principles in the present case. As already noted, to some extent at least the remedies claimed by the plaintiff included two alternative and inconsistent remedies. An account of the profits Mr. Tang had made from the lettings is an alternative remedy to damages for the loss of use of the houses. However, and this is the unusual feature of the present case, matters went awry at the time of summary judgment on 25th August 1992. The plaintiff should have been required, so far as the two remedies were inconsistent, to choose which it would take. If it chose an account of profits, it could have damages only so far as, on the facts of this case, an award of damages was not inconsistent. In the event, the plaintiff was not required to elect. Instead the order gave the plaintiff both remedies. The Judge ordered the defendant to account for the estate's profits and also to pay damages. The latter order was expressed in unqualified terms. The Judge can hardly be blamed for this. The point was overlooked by everybody. No discussion seems to have taken place on the form of the order.

What happened thereafter was that the plaintiff proceeded to enforce both remedies ordered by the Judge. The defendant produced an account showing receipts in excess of $1.8 million. The plaintiff proceeded to enforce payment by obtaining a charging order. The plaintiff also proceeded with the necessary preparatory steps for an assessment of damages. There is thus no question of the plaintiff having chosen to take an account of profits rather than payment of damages. Nor is there any question of the defendant having paid $1,807,774 in the mistaken belief that the plaintiff had done so.

Subsequently the plaintiff's choice was made abundantly clear. As appeared from the amended particulars of damage served in July 1993, the plaintiff was seeking damages and giving credit for

the amounts received in respect of the secret profits. The company sought, and obtained, an assessment of damages on that footing.

In these unusual circumstances it would make no sense to treat receipt of the amount of $1,807,774 as an election by the plaintiff for an account of profits and against damages. To treat receipt of this payment as an election would lack a rational basis, given the terms of the Judge's order, and given the continuing steps to proceed with the assessment of damages. It would also be extremely unfair to the plaintiff. It would mean that by accepting payment of one sum due under the court order of 25th August 1992, the plaintiff had unknowingly and inadvertently disabled itself from enforcing payment of a much larger amount due under the same order. That would be unfair, because there is no reason to doubt that, in so far as the two remedies are inconsistent in the present case, the plaintiff, armed first with any further information it required, would have chosen damages had it been required to elect at the time judgment was entered.

The conclusion would be otherwise if in the light of all the circumstances it would be inequitable to permit the plaintiff, after receiving the secret profits payment, to proceed with the damages claim even though it gave credit for the amount received. There is no such inequity in this case. The defendant did not make the payment under any misapprehension about the plaintiff's intentions. The belatedness of the plaintiff's choice did not prejudice the defendant.

The defendant sought to meet these points by submitting there is an inflexible rule of law whereby, irrespective of intention, satisfaction of what is due under one remedy is an irrevocable election to have that remedy. There is no later point at which a plaintiff can elect. Satisfaction, it was submitted, includes part satisfaction, as happened in the present case. Having accepted payment, it was not thereafter open to the plaintiff to proceed with a damages claim.

This submission is misconceived. As already noted, the function of satisfaction in this field is that complete satisfaction bars a plaintiff from subsequently pursuing any other remedy in respect of the same loss. He cannot recover more than the amount of his loss. That principle is not in point here. The payment of $1,897,774 to the plaintiff on 26th June 1993 was not full satisfaction even of the profits which by that date were known to be due under the Judge's order. Clearly, in the ordinary way enforcement and acceptance of payment, even in part, confirms and reinforces an election made between alternative remedies at the time judgment was entered. But here

no election was made at that time. So acceptance of the payment signifies nothing, given that the order had (wrongly) provided for the plaintiff to have both remedies and that the plaintiff was actively pursuing both.

It follows that in their Lordships' view the Court of Appeal fell into error in concluding that the plaintiff elected to take the remedy of an account of profits rather than damages. Since the plaintiff did not so elect, it is unnecessary to consider what would have been the consequences for the damages claim had the plaintiff elected. Their Lordships therefore express no view on the distinction between income and capital drawn by the Court of Appeal.

Their Lordships turn, therefore, to Master Woolley's order. As to this, their Lordships can detect no flaw or error in the Master's clear and careful judgment. In particular, on the facts of this case there is no inconsistency between the awards of damages under heads A and B. The defendant was required to assign the 16 houses to the plaintiff free from incumbrances. He did not do this. Further, the houses were not in a good state of repair. This was not due to the fair wear and tear inseparable from any letting. The agreed surveyors' report stated that by far the majority of the defects were caused by the "extraordinary over-use" of the development. Houses intended for two or three people had been occupied by up to thirteen elderly people. The houses had not been designed for such use and had deteriorated badly. There is nothing inconsistent in awarding damages for the loss sustained by this use of the property, including the loss sustained by the property not being handed over with vacant possession when the assignment was executed, and also awarding damages in respect of the market rents at which the plaintiff could have let the houses during the period Mr. Tang was using them.

The defendant also took a point on the form of the pleadings. The defendant submitted that it was not open to the plaintiff to claim damages under head B based on diminution in value, because in the statement of claim the only breaches of trust alleged were Mr. Tang's lettings and his failure to account for the rent or use of the houses. There is no substance in this point. The damages flowed from Mr. Tang having made these lettings. Further, the plaintiff's case on damages was spelled out with sparkling clarity in the particulars of damage served in April 1993, three months before the damages hearing took place. The defendant knew the case he had to meet. He was not prejudiced by the allegations in the particulars of damage not being carried into the body of the statement of claim.

Their Lordships will humbly advise Her Majesty that the defendant's appeal should be dismissed, the plaintiff's cross-appeal allowed, and the order of Master Woolley restored. The defendant must pay the plaintiff's costs before their Lordships' Board and in the Court of Appeal.