THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 77/2004

In the matter between :

SAMUEL HENRY SYMINGTON	**FIRST APPELLANT**
JACQUES DURANDT	**SECOND APPELLANT**
FRANCOIS RADEMAN	**THIRD APPELLANT**

and

PRETORIA-OOS PRIVAAT HOSPITAAL BEDRYFS (PTY) LTD	**RESPONDENT**

CORAM :	**SCOTT, STREICHER, CAMERON,**
	BRAND, PONNAN JJA
HEARD :	**13 MAY 2005**
DELIVERED :	**27 MAY 2005**

Summary: Claim by the respondent against the appellants as its former directors for alleged breach of their fiduciary duty – first issue – when 'debt' became 'due' in terms of s 12(1) of Act 68 of 1969 – dependent upon categorisation of claim – whether claim for damages and not for disgorgement of profits – second issue – whether completion of prescription period extended in terms of s 13(1)(e) of the Act – dependent on whether the appellants resigned as directors by agreement with respondent company.

JUDGMENT

BRAND JA:

[1] This appeal is about extinctive prescription. The respondent ('the plaintiff') instituted action against the three appellants ('the defendants') in the Pretoria High Court for payment of about R7,3m. Though it is common cause that the claim is based on an alleged breach of the fiduciary duty that the defendants, as its former directors, owed the plaintiff, the exact categorisation of the claim is one of the central issues in the case. I will therefore refrain from labelling it at this early stage. Apart from their defences on the merits, the first defendant, on the one hand, and the second and third defendants on the other, raised separate special pleas of prescription. By agreement between the parties, only the defence of prescription was adjudicated while all other issues stood over for determination at a later stage.

[2] Two questions arose. First, whether the defendants were right in contending that the 'debt' relied upon by plaintiff became 'due', as contemplated by s 12(1) of the Prescription Act 68 of 1969, more than three years before the plaintiff's summons in the action was served. Second, whether the completion of the prescription period was extended by virtue of s 13(1)(e) of the Prescription Act, as the plaintiff contended.

Evidence was led by both parties. At the end of the separate proceedings, the court *a quo* (Du Plessis J) held that, although part of the debt relied upon by the plaintiff became due more than three years before the summons was served, the same could not be said about the major portion of the claim. In consequence, the greater part of the defendants' special pleas of prescription was dismissed. The defendants were also ordered, jointly and severally, to pay the plaintiff's costs occasioned by the proceedings. Two separate appeals were lodged against this judgment, one by the first defendant and the other by the second and third defendants jointly. The court *a quo* further held that the plaintiff's reliance on the provisions of s 13(1)(e) could not be sustained. The cross-appeal is against that finding, which resulted in the partial upholding of the special pleas. Both appeals as well as the cross-appeal are with the leave of the court *a quo*.

[3] I revert to the facts. The plaintiff company was incorporated in about 1995 to operate a newly established private hospital in the eastern suburbs of Pretoria. First defendant, a specialist radiologist, was one of the founding shareholders. In terms of a shareholders agreement entered into during June 1995, the first defendant undertook to conduct a radiologists' practice, either personally or through radiologists proposed by him, in the radiology section of the new hospital building. The shareholders agreement further provided that the first defendant would be

entitled to occupy the radiology section free of rent for a period of ten years, on condition that these premises were utilised for the purposes of conducting a radiologists' practice.

[4] Pursuant to these provisions of the shareholders agreement, a lease agreement ('the lease') was entered into in June 1996 between the plaintiff as lessor and first defendant or his nominee as lessee. In terms of the lease the radiology section in the hospital, comprising about 1 000 m², was let out to the lessee for a period of ten years at a nominal rental of R1,00 for the entire period.

[5] A company, Independent Advisors SA Incorporated ('Independent Advisors') was then nominated by the first appellant to be the lessee in his stead. In terms of an arrangement between the first defendant and Independent Advisors, a small portion of the radiology section was utilised to accommodate first defendant's magnetic resonance imaging equipment. Independent Advisors required no part of the leased premises for itself. It therefore entered into a sublease ('the sublease') with a partnership of radiologists in terms of which that part of the radiology section not occupied by the first defendant, comprising about 900m², was let for a period of nine years and eleven months. The date of the sublease, which took on some significance in the present context, was 8 November 1996. The rental agreed upon was R45 000 per month as from

1 February 1997, subject to an increase of 10% per year as from 1 November 1997. In addition the subtenant undertook to pay the rates, water and other utilities in respect of the leased premises.

[6] During June and November 1996, when the lease and the sublease were entered into, the three defendants were shareholders and directors of the plaintiff. The second and third defendants were also directors of Independent Advisors.

[7] On 25 June 1998 all the shares in the plaintiff company, including those of the three defendants, were sold and transferred to a company in the Network Healthcare Group of companies ('Netcare'). In terms of the share sale agreement all the directors of the plaintiff were obliged to resign. The three defendants sought to comply with this obligation by handing their letters of resignation as directors to a representative of Netcare. This also happened on 25 June 1998 whereupon each of them received a cheque for the purchase price of his shares. The plaintiff then became a wholly owned subsidiary of a company in the Netcare Group. The summons in the action was served on the three defendants on different dates in November and December 2000. However, because it will make no difference to the consideration of the issues, I shall refer to the date of service of the summonses on all three defendants simply as November 2000.

[8] Against this background, I turn to the plaintiff's cause of action as formulated in its particulars of claim. Omitting unnecessary elaboration, the plaintiff's claim thus formulated rested on the following four propositions (the expressions emphasised are quoted directly from the particulars of claim):

(a) The fact that first defendant and Independent Advisors as his nominee did not require the entire radiology section of the hospital, but only a small portion thereof, created a '**corporate opportunity**' for the plaintiff to let the remainder of these premises for '**a commercial rental**'.

(b) By '**causing or permitting**' Independent Advisors to enter into the sublease on 8 November 1996, the defendants '**diverted this opportunity**' away from the plaintiff, which constituted a breach of their fiduciary duty owed to the plaintiff.

(c) The defendants' breach of duty '**deprived**' the plaintiff of the '**rental stream**' and ancillary payments for rates, water and other utilities paid by the subtenant to Independent Advisors in terms of the sublease.

(d) In consequence, the defendants were jointly and severally liable to the plaintiff for the '**present value**' of the '**rental stream**' which was calculated at R6 601 868,78 as well as for the rates, water and utilities paid by the subtenant in respect of the period already elapsed, which was calculated, together with the interest on these payments, at a total of R646 553.60.

[9] The calculation of the 'present value' of the rental stream is set out in a schedule to the particulars of claim. According to the schedule it comprised three components. First, rental that became payable prior to the date of calculation, which was 31 October 2000. Second, interest on the rentals that became payable during the period already elapsed. Third, the capitalised value of rentals for the remainder of the period of the sublease which would only become payable after the date of calculation.

[10] The defendants' special pleas of prescription were based on the supposition that the plaintiff's claim was for damages caused by an alleged breach of fiduciary duty which occurred when the sublease was concluded on 8 November 1996. Based on this supposition they contended that the 'debt' relied upon by the plaintiff became 'due', as contemplated by s 12(1) of the Prescription Act 68 of 1969, on that date and that, in terms of s 11(d) of the Act, it therefore became prescribed three years thereafter, that is by no later than 8 November 1999, while the plaintiff's summons was only served in November 2000. In its replication to these special pleas, the plaintiff admitted that its claim was one for damages resulting from the defendants' breach of their fiduciary duties. It denied, however, that this claim for damages became due more than three years prior to November 2000.

[11] Apart from this denial, the plaintiff's further contention was that since the three defendants resigned as directors of the plaintiff only on 12 September 2000, the completion of the prescription period was in any event extended for a period of one year after that date by virtue of the provisions of s 13(1)(e) of the Prescription Act. Consequently, so the plaintiff contended, its claim could become prescribed only on 12 September 2001, which was long after the summons had been served. The relevant part of s 13(1) provides:

'13(1) If - …

(e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or

…

and …

(i) the relevant period of prescription would, but for the provisions of this section, be completed before or on or within one year after, the day on which the relevant impediment referred to in paragraph (e) … has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i).'

[12] I shall first deal with the plaintiff's contention based on s 13(1)(e) because it would, if well-founded, result in the dismissal of the prescription plea in its entirety, which would at the same time dispose of both the appeal and the cross-appeal. The central question of fact pertinent to this contention is when the three defendants could be said to

have resigned as directors of the plaintiff. The defendants' case was that this happened when they handed their letters of resignation to the plaintiff's representative on 25 June 1996. The plaintiff's counter-argument was that the defendants' resignation as directors became effective only on 12 September 2000. The basis for this counter-argument was twofold. First, because that was the date on which the Registrar of Companies received notice of the defendants' resignation. Second, because art 66(c) of the plaintiff's articles of association, which is derived from table B in the first schedule to the Companies Act 61 of 1973, provides that:

'the office of director shall be vacated if the director resigns his office by notice in writing to the company and the registrar.' (My emphasis.)

[13] These opposing contentions must be considered against the background of the undisputed evidence from which it is clear that, after the defendants handed in their letters of resignation on 25 June 1996, everybody concerned accepted that they were no longer directors of the plaintiff company. On the same day, all the erstwhile shareholders in the plaintiff transferred their shares to a company in the Netcare Group. Shortly thereafter, the new shareholder appointed two new directors. The plaintiff's register of directors, kept in terms of s 215 of the Companies Act, reflected that on 25 June 1996 all its former directors, including the three defendants, had resigned and were replaced by the two newly

appointed directors. The plaintiff's letterheads, newly printed by Netcare, indicated the same change. The day to day running of the plaintiff's hospital operation was conducted by Netcare. Formal board resolutions were taken by the two new directors. The defendants no longer attended any board meetings, nor were they notified of these meetings. The functions of the plaintiff's company secretary were taken over by an employee of Netcare.

[14] Section 216(2) of the Companies Act 61 of 1973 imposes the obligation on a company to inform the Registrar of Companies of the fact that a director has vacated his office within fourteen days after the event. This information is conveyed to the Registrar by means of the prescribed form CM29. In this case the form CM29, indicating that the defendants had resigned as directors on 25 June 1996, was lodged with the Registrar by the plaintiff's company secretary only on 12 September 2000.

[15] It is common cause that the person responsible for the non-compliance with the provisions of s216(2) was the plaintiff's company secretary who was an employee of Netcare. The plaintiff's argument was, however, that it is of no consequence that the defendants were not responsible for lodging the form CM29 timeously. Nor is it of any consequence, so the plaintiff contended, that it had been accepted by everybody concerned, including the new shareholder and the new

controlling body of the plaintiff, that the defendants had terminated their directorships on 25 June 1996. All that is relevant, so the argument went, is that, in accordance with the clear meaning of art 66(c), the defendants could render their resignation as directors effective only by giving notice to both the company and the Registrar. Since they had failed to do so, they cannot blame anybody else for the fact that their resignation became effective only when notice eventually reached the Registrar at a much later date.

[16] The court *a quo* found the appellants' argument fundamentally flawed in that it is based on the supposition that plaintiff's articles preclude its directors from resigning their directorships in any way other than as prescribed by article 66(c). That, the court *a quo* found, is not so. Apart from giving notice in terms of article 66(c), the court held, the directors could also terminate their directorships by agreement with the company. Although the articles do not specifically provide for termination by agreement, that does not mean that this form of termination is excluded. In consequence the plaintiff's directors could have terminated their directorships in one of two ways: unilaterally by giving notice in terms of 66(c), or by virtue of an agreement between them and the company. As authority for these propositions the court relied on the judgments of this court in *Cape Dairy Cooperative Ltd v Ferreira* 1997 (2) SA 180 (A) and *Kaap Suiwelkoöperasie Bpk v Louw* 2001 (2) SA 80

(SCA). Having found that the defendants could in principle have terminated their directorships by agreement, the court proceeded to find that such an agreement had in fact been reached between defendants and the plaintiff, now controlled by Netcare, on 25 June 1996.

[17] On appeal, plaintiff contended that the court *a quo* erred in two respects. First, in finding that as a matter of principle the termination of the defendants' directorships by way of agreement was not precluded by plaintiff's articles. Second, by finding that such an agreement had in fact been reached.

[18] As to the first proposition, I believe that the reasoning in *Cape Dairy Cooperative v Ferreira* supra 185C-H (as confirmed in *Kaap Suiwelkoöperasie v Louw* supra 84G-H) also finds application in this case. Like the membership of a cooperative society, with which those cases were concerned, the relationship between a director and a company is essentially contractual and I can see no reason why that relationship cannot be terminated by mutual consent. Unless, of course, such an agreement is specifically excluded by the articles of the company. However, the mere fact that the articles do not specifically provide for termination by agreement does not mean that this has been excluded. Thus understood, article 66(c) deals only with resignation by a

director unilaterally while the possibility of termination by agreement is simply left unstated.

[19] The plaintiff sought to distinguish the two earlier decisions of this court on the basis that there is a difference between the position of members of a cooperative society, on the one hand, and the directors of a company on the other. The difference, so it was argued, is that while the public has an interest in knowing the identity of company directors, it has no such interest in the membership of a cooperative society. That much is true. I do not believe, however, that the possibility of termination by agreement must be taken to have been excluded by the plaintiff's articles because the public would have no knowledge of such agreement. The articles provide for termination of directorships in a number of ways of which the public would be unaware. So, for instance, the public is unlikely to know when a director has vacated his office in terms of s 66(d) which provides that a director's office shall be vacated if he remains absent from meetings, without permission, for a period of more than six months.

[20] I think the public interest in knowing when a directorship has been terminated is sufficiently catered for by s 216(2) of the Companies Act. In terms of this section a company is compelled by threat of a criminal conviction to notify the Registrar of Companies when the director has vacated his or her office within fourteen days after the event. I therefore

agree with the court *a quo* that the two judgments of this court in *Cape Dairy Cooperative* and *Kaapse Suiwelkoöperasie* are not distinguishable. It follows that, for the reasons applied in those cases, article 66(c) must be understood to govern the resignation of a director unilaterally and that it does not exclude the termination of a director's office by way of an agreement between him and the company.

[21] The plaintiff's further contention was that, in any event, the inference arrived at by the court *a quo*, that the plaintiff had agreed to accept the defendants' resignation as directors in a manner other than the one provided for in article 66(c), was not justified. In support of this contention it was pointed out that there was no direct evidence of acquiescence by the company to deviate from article 66(c) and that an agreement to this effect was inferred by the court *a quo* from facts which indicated that as from 25 June 1996 the plaintiff conducted itself in a manner indicating its acceptance that defendants' directorships had been terminated. This inference, the plaintiff argued, was unwarranted. These facts, so the argument went, were equally consistent with the inference that Netcare was under the mistaken impression that the defendants had in fact complied with the requirement of article 66(c) by notifying the Registrar of Companies as well.

[22] I do not agree with this argument. As I have said, the share sale agreement between Netcare and the erstwhile shareholders of the plaintiff was entered into on 25 June 1996. In terms of this agreement, all the directors of the plaintiff were obliged to resign. The undisputed evidence of defendants was that Netcare had refused to pay for their shares until letters of resignation by the directors had been submitted. In consequence, the defendants signed these letters of resignation and handed them to Netcare's representatives whereupon they received their cheques for the purchase price. All this happened on the very same day. On these facts, the possibility can, in my view, be excluded that Netcare's representative might have thought that the defendants had in the meantime also notified the Registrar. The overwhelming probabilities support the inference arrived at by the court *a quo*, namely that the plaintiff, as represented by its new management, agreed that the defendants' directorships had been terminated on its acceptance of their letters of resignation on 25 June 1996. For these reasons it follows that the cross-appeal cannot succeed.

[23] I now turn to the question central to the defendants' appeal, namely when the debt claimed by the plaintiff became 'due' for purposes of s 12(1) of the Prescription Act. As I have said, the defendants' special pleas were founded on the underlying supposition that the debt claimed by the plaintiff was one for damages resulting from a breach of their fiduciary

duty. Based on this premise their argument was that the debt became due when the breach giving rise to the damages occurred, which, according to the plaintiff's particulars of claim, was when the sublease was entered into on 8 November 1996. Cardinal to the court *a quo*'s reasoning for its dismissal of the special pleas was the finding that this was incorrect.

[24] On a proper understanding of the plaintiff's claim, so the court *a quo* held, it is not one for damages but a claim for disgorgement of profits received by the defendants as a result of permitting a diversion of a corporate opportunity away from the plaintiff, contrary to their fiduciary duties as directors of the plaintiff. According to this understanding, the legal basis for the plaintiff's claim is therefore to be found in the principle that where someone who owes a fiduciary duty to another, such as a director to his company, makes a profit for himself through a breach of his fiduciary duty, the law does not allow the director to retain the benefit that he acquired by such breach. Consequently, the company has an action, described as *sui generis,* to claim a disgorgement of that profit from him (see eg *Robinson v Randfontein Estates Goldmining Co Ltd* 1921 AD 168 (per Innes CJ 177-178, 192 and per Solomon JA 241-242), *Phillips v Fieldstone Africa (Pty) Ltd and another* 2004 (3) SA 465 (SCA) par 30 and cf *Ganes and another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) pars 25-28). As was made clear by Solomon JA in *Robinson* (241) the company's claim by virtue of this remedy is not one for damages. The fact

that the company has suffered no damages is therefore of no consequence. The director's liability arises from the mere fact of a profit having been received (see also *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL), *Phillips v Fieldstone Africa (Pty) Ltd and another* supra par 31).

[25] On the basis of this understanding of the nature of the plaintiff's claim, the court *a quo* held that, since the requirement that the defendants receive a profit was a prerequisite of the debt claimed by plaintiff, this debt could not be said to have become due before such profit had been received. The conclusion of the sublease in itself was therefore not enough. The obligation to disgorge would arise only on the actual receipt of rental and ancillary expenses. Prescription could therefore commence only from the time of each such receipt. In accordance with this reasoning the court *a quo* concluded that the bulk of the plaintiff's claim fell outside the prescription period. Only payments of rental and ancillary expenses that were received more than three years prior to service of the summons in November 2000, ie payments received between February 1997 and November 1997, had become prescribed. All payments received after November 1997 were not affected.

[26] The appeal was argued by all parties on the assumption that if the plaintiff's claim was indeed one for damages resulting from a breach of fiduciary duty, it would have become due when the sublease constituting

the breach relied upon by the plaintiff was concluded on 8 November 1996 and that, consequently, it would have become prescribed before the summons was served in November 2000. I think this assumption was fairly made. It would be in accordance with the so-called 'once and for all' rule. This rule is based on the principle that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law presents upon such cause. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation. As explained by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 835 the effect of the rule on claims for damages, both in contract and in delict, is that a plaintiff is generally required to claim in one action all damages, both already sustained and prospective, flowing from the same cause of action.

[27] It was also accepted by all parties that a director's breach of fiduciary duty can in principle give rise either to a claim for disgorgement of profits or to a claim for damages. Again I think the assumption was rightly made. It is directly supported by the judgment of Friedman JP (Van Zyl J concurring) in *Du Plessis NO v Phelps* 1995 (4) SA 165 (C) 171 and, in the absence of any argument to the contrary, I can think of no reason why this principle should not be accepted. Though the common element of the two actions would be a breach of fiduciary duty, the other requirements would, of course, be quite different. While, for example, it is not a requirement of a

claim for disgorgement of profits that the company suffer any damages, such damages would by its very nature be the central requirement of a damages claim. On the other hand, while the question whether the director had received any profit from the breach of his fiduciary duty would be of no consequence in a claim for damages, this would be the essential requirement in a disgorgement of profits claim.

[28] In the light of the aforegoing, the issue to be decided in this case is a narrow one. It is whether, on a proper analysis of the plaintiff's particulars of claim, it can be construed as a claim for disgorgement of profits or whether it can be construed only as a claim for damages. As I have said, the court *a quo* opted for the former construction.

[29] The first difficulty encountered by the plaintiff in its support of the court *a quo's* construction is that it formally admitted in its replication to the defendants' special pleas that its claim was indeed one for damages. Its first response to the defendants' reliance on this 'admission' was that a claim for disgorgement of profit had been referred to by Laskin J in the Supreme Court of Canada as a claim for damages (see *Canadian Aero Service Ltd v O'Mally* [1974] 40 DLR (3rd) 371 (SCC) 392). All I can say is that, whatever the law of Canada may be, the proposition does not reflect South African Law. On the contrary, it was expressly held by Solomon JA in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 241

that the claim for disgorgement of profits is not a claim for damages (see also the judgment of Innes CJ at 199).

[30] The plaintiff's further argument as to why its formal concession, that its claim was one for damages, should not be held against it, was that it was not an admission of fact, properly so called, to which a party can be held bound. I agree that the admission could not be regarded as one of fact. What it amounted to, in my view, was an election by the plaintiff to categorise its claim as one of damages and I do not think that it should be allowed to distance itself from that election when the very issue of categorisation arises. However, be that as it may, the view that I hold on the outcome is such that the question whether the plaintiff can be held bound to its election is not of critical importance. At the very least, it is apparent that counsel who prepared the plaintiff's particulars of claim were also under the impression that what they had formulated was a claim for damages and nothing else.

[31] The plaintiff's argument in support of the construction of its case which was accepted by the court *a quo,* was based on a detailled and rather imaginative analysis of its particulars of claim. I find it unnecessary to repeat the analysis. Suffice it to say that I do not agree with the conclusion that the plaintiff's particulars of claim could reasonably be understood to reflect a claim for disgorgement of profits. I say this for various reasons.

First and foremost is the consideration that there is not a single allegation in the plaintiff's particulars of claim to the effect that the defendants received any profit from the sublease which, according to the plaintiff, constituted the breach of their fiduciary duties. Because the receipt of profits constitutes the central element of such a claim, the absence of an allegation could be regarded as fatal in itself.

[32] However, the plaintiff's difficulties are exacerbated by the fact that on the face of the sublease it conferred no benefits on the defendants at all. The only recipient of any benefit was a company, Independent Advisors. The plaintiff's answer to this difficulty was that the company could conceivably have been used as a conduit for benefits leading to the defendants. That is obviously so. The crux of the matter is, however, that in the circumstances one would have expected an allegation to that effect or at least a description of the relationship between the company and the defendants from which such a link could be inferred. The only reference to any relationship between Independent Advisors and the defendants is contained in par 3.2 of the particulars of claim which reads as follows:

'3.2.1 The second and third defendants were directors of Independent Advisors.

Alternatively

3.2.2 The first, second and third defendants were directly or indirectly beneficially associated with Independent Advisors.'

[33] The plaintiff's contention was that the alternative allegation in para 3.2.2 was sufficient to justify the inference of a conduit between the defendant and the company through which the benefit derived from the sublease could have flowed. In my view this contention is clearly unfounded. Even more significant, however, is that if the main allegation in para 3.2.1 is accepted, there would be no link whatsoever between the first defendant and the company at all, which in my view, is a clear indication that the plaintiff's claim was not for the disgorgement of profits received.

[34] Another consideration why the particulars of claim cannot be understood as constituting anything other than a claim for damages stems from the plaintiff's answer to the defence of prescription, ie that a claim for disgorgement of the profits derived from the sublease could only be made after the subtenant had paid. The corollary to this answer is of course that if the cause of action was indeed one for disgorgement of profits, the claim for the discounted value of future rentals included in the schedule to the particulars of claim would be premature. This, in my view, is another clear indication that the conclusion arrived at by the court *a quo,* that the plaintiff's claim was one for disgorgement of profits, cannot be sustained.

[35] In consequence I hold that the 'debt' which formed the basis of the plaintiff's claim became due when the breach of fiduciary duty allegedly giving rise to its claim for damages occurred on 8 November 1996. This

means that the three year period of prescription had been completed before the plaintiff's summons was served on the defendants. The appeal must accordingly succeed and the pleas of prescription allowed.

[36] The following order is made:

a) Both the appeal by first appellant and the appeal by second and third appellants are upheld with costs including, in both instances, the costs of two counsel.

b) The cross-appeal by the respondent is dismissed with costs including the costs of two counsel, both in respect of first appellant and of second and third appellants.

c) The following order is substituted for the order made by the court *a quo*:

'(i) The special pleas of the first defendant and of the second and third defendants are upheld.

(ii) The plaintiff's claims against the defendants are dismissed with costs including, in respect of the first defendant, the costs of two counsel.'

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F D J BRAND
JUDGE OF APPEAL

Concur:

SCOTT JA
STREICHER JA
CAMERON JA
PONNAN JA