1981/109.

ROYAL COURT (INFERIOR NUMBER)

Before: Mr. P.L. Crill, C.B.E. Deputy Bailiff.
Jurat R.H. Le Cornu.
Jurat M.G. Lucas.

appeal reported
Award of costs - whether to grant stay of execution pendin appeal REPORTED IN 1981

Between

Derek Miles — Plaintiff

and

Thomas Charles Walker
Bernard John Bowick
David Charles Hunt
John Douglas Wells
Lawrence John Monument
Dennis Charles Burling
David William Rothwell
John Arthur Le Feuvre
Richard John Pirouet
Denis Charles More O'Ferrall
Peter Mendlessohn
John William Henry Gough — Defendants

Advocate P. Mourant for the Plaintiff
Advocate R. Vibert for the Defendants

Mr. D. Miles is an inventor. He lives in Portugal. His residence was important at the time when Exchange Control regulations were in force until 1979, because it enabled him to acquire non-residential status vis-a-vis the Scheduled Territories which included the United Kingdom. This meant that he could use what was called an external account to operate his business in a foreign currency while trading both in and out of the Scheduled Territories. At the relevant time between 1973 and 1977 he was assisted in his work on the design side, and occasionally secretarially, by his wife. Mr. Miles wished to exploit his inventions as widely as possible and at the same time take such steps as would enable him legitimately to reduce his liability to income tax particularly that levied in Portugal. He intended not only to patent his inventions and obtain Royalties from them when used by other manufacturers but also to make the products himself, or through manufacturers, and sell them in Portugal and possibly in the United Kingdom itself. In 1971 he consulted Mr. P.G. Tyrer a London partner in the firm of Turquands Barton Mayhew & Co., the defendants in this action (which hereafter we shall call T.B.M.). Some correspondence was exchanged between them but with the advent of the Portuguese revolution the project, such as it was, lapsed. Before this had happened, however, some inter-office

memoranda on Mr. Miles' position had been exchanged between Mr. Tyrer and Mr. L.J. Monument, one of the named defendants, and another partner in T.B.M, working in Jersey. However, the plaintiff does not place much reliance on these exchanges.

There matters rested until the coming of a more stable trading atmosphere in Portugal in 1977. Mr. Miles revived his ideas, although he had been working on them during what we may call the interregnum in Portugal, and accordingly wrote to Mr. Monument on the 27th January, 1977, followed it up with a telex and met Mr. Monument on the 14th February, 1977, about which we will have more to say. In the meantime, assisted by his wife, Mr. Miles had invented a kind of ceramic hot-plate which he called a hot stone and which he hoped to exploit in the manner we have described already.

It was common ground between the parties that, at that time, in order for a person with non resident status to be able to trade in the United Kingdom, as well as outside it and the other Scheduled Territories he would require what was called a two tier system. That is to say he would need one company which would be given external status by the Bank of England for the trade outside the Scheduled Territories and another company which would be resident in the Scheduled Territories for trade within those territories including of course in particular the principal country of those Scheduled Territories, he United Kingdom. This system was well known to the defendants, in particular to Mr. Monument and to Mr. Gough another of the partners of T.B.M. in Jersey. There was also of course Mr. Miles' tax affairs to be taken into account which we have mentioned already. Eventually Mr. Miles was provided with two companies, one called Polymead registered in the Royal Court on the 16th August, 1977, and the other called Unimead registered in the Royal Court on the 22nd February, 1978. The plaintiff conceded that up to the end of April, 1977, when he had finally provided sufficient information to Mr. Monument for the purposes of the formation of Polymead, it would not be right to attribute any delay on the part of the defendants.

In the Autumn of 1977, Mr. Miles met a Mr. Owen, the Manager of a United Kingdom firm called Interplan Sales (which hereafter we shall call Interplan). They reached an agreement, partly oral and partly written, for the sale to Interplan of a number of Hot Stones for sale in the United Kingdom. The agreement was subject to a formal contract and to being assigned to a Jersey Company (which would have been Unimead Limited). Neither Interplan nor Unimead Limited derived any benefit from that agreement, such as it was, because the plaintiff alleges that it was cancelled without his authority on the 20th February, 1978, upon the orders of Mr. J.S. Cunningham, an employee of the defendants.

Later in the same year Mr. Miles became dissatisfied with the defendants' services and changed his accountants. He has now actioned them for breach of their professional duty to him. In essence his case falls under three heads: (1) wrong advice, (2) delay and (3) the ending of the agreement between Interplan and himself. Because we have found, as we shall explain later, that Interplan, through Mr. Owen, terminated the agreement and at best had not acquiesced in Mr. Miles' actions, and also even if he had not done so, Mr. J.S. Cunningham did not put an end to it without instructions, it might be argued, as Mr. Vibert did for the defendants, that the plaintiff has suffered no loss and therefore has no right of action. Although paragraph 5 of the Order of Justice refers to negligence (and breach of duty) by the defendants, it is clear that the claim is a contractual one and, unlike a claim in tort, proof of actual damage is not necessary to make the act or omission actionable. Sometimes of course the two actions, in tort and contract, can overlap but the duty of an accountant to his client arises out of contract. He is liable if he fails to use that skill and diligence which a reasonably competent and careful accountant would exercise. Here it is not alleged that the defendants, acting through Mr. Monument and Mr. Gough, did not have the necessary skill in that, for example, they did not know of the Exchange Control Regulations, but that they failed to exercise

it in the two ways we have mentioned by giving wrong advice with consequent delay. And it is true that despite the Bank of England having established what were called "clinics" in Jersey to help lawyers and accountants with the day-to-day problems of obtaining the Bank's consent when forming non-resident companies, Mr. Monument did not attend such "clinics" in person although he did know that they were there to be consulted. Mr. Monument did not, however, undertake the work of forming the company Polymead Limited and obtaining personally the consent of the Bank of England but entrusted these duties to Advocate Wheeler. He accepted very frankly that Mr. Wheeler was his agent and that any failure on the latter's part to fulfil the duty owed by Mr. Monument to Mr. Miles, would be accepted as the defendants' responsibility. That admission extended by inference to the work Mr. Wheeler did when it became necessary to form Unimead Limited. Even if Mr. Vibert is right and any loss suffered by the plaintiff stems only from the loss of the Interplan agreement, we do not think it right to limit our consideration of the evidence to the Interplan matters only. We asked ourselves whether if substantial delays were caused to the plaintiff, through the actions of the defendants so that he was unable to start trading until very much later than he would have done by means of the two-tiered companies, that couldn't be the nexus between those acts or omissions of the defendants and the Interplan agreement. In other words did the delay, and we must not mince our words, even at the cost of causing some embarrassment to highly respected professional men, and incompetence of the defendants (including where applicable Advocate Wheeler) prevent Mr. Miles from being in a position to conclude what might have been a profitable connection, at least at the beginning, with Interplan? Looked at in this way, it is clear that they might have done, and accordingly, we find that the pleadings were sufficiently widely drawn to enable us to look into the whole question of the

formation of Polymead and Unimead and the Bank of England matters, and we have done so.

Two other matters may be mentioned here before turning to the evidence. First, the earlier events about which the witnesses testified took place nearly four years ago and it would not be surprising if some recollections were not as clear as others. Despite this even when we have come to prefer the evidence of some witnesses to that of others, we are sure that each witness answered the questions put to him or her as fairly and honestly as they could. It was fortunate that a great deal of evidence was adduced in the form of an agreed bundle of documents which was of great help to us, as it had been exceptionally well put together, for which we are indebted to counsel. It will be convenient first to examine the evidence relating to the Interplan agreement and to give our reasons for finding that the action of Mr. Miles in preparing a number of hot stones to be sent to Interplan under the Agreement were not acquiesced in by Interplan.

Secondly, the Bank of England designated a number of persons to act as Authorised Depositaries on its behalf. This meant that the Bank of England looked to such persons to enforce any conditions imposed on particular transactions to which the Exchange Control Regulations applied. Advocates were authorised depositaries in their own right, accountants had to be nominated. Turquands Barton Mayhew and Co. had become authorised depositaries and were of good standing with the Bank of England.

The evidence about the agreement between the plaintiff and Interplan showed that in August, 1977, Mr. Miles placed some advertisements in the Financial Times and the New York Times newspapers hoping that he would be enabled thereby to market the hot stones in the United Kingdom and the U.S.A. He notified

Turquands, Barton Mayhew and Co. of these advertisements by letter dated the 20th August, 1977. It is clear that he hoped also that the product would be marketed through Polymead Limited and indeed referred to that Company in the letter. As a result of the advertisements in the Financial Times he met Mr. Owen in London in the middle of September, 1977. Mr. Owen's position with Interplan was such that he could not bind the Company although he was entitled to negotiate contracts. Having done so, the terms of such contracts had to be referred to and approved by his directors. About a week after their meeting, Mr. Owen wrote to the plaintiff as follows:-

"26th September, 1977

I was very pleased to have the opportunity of meeting you in London last week and I thank you for our especially interesting discussion about "Hot Stones" and your various other interesting projects.

I confirm our verbal agreement (to be later confirmed in writing) that we have the exclusive U.K. distribution rights for "Hot Stones" with an exclusive option on Switzerland for a period of six months w.e.f. 1st January, 1978, thereafter by arrangement.

To acquire exclusive U.K. distribution rights this company undertakes to sell approximately 12,000 (twelve thousand) "Hot Stones" w.e.f. 1st January, 1978.

Prices quoted were £7 and £6.50 per unit.

It was agreed that on your return to the U.K. you would bring six of each pattern together with any available publicity material.

We should particularly like to receive any photographs particularly of the designer, the place where they are made, the home made painting and production photographs, together with any technical information tests etc. These will either be brought with you or sent when available.

I will leave you to write a formal letter giving terms and conditions in due course, but this letter is to briefly confirm our discusion. (sic)

This letter also confirms that in the event of your being able to introduce a licence for Portugal we will pay you an introductory commission of 15% (fifteen percent) of any licence fee obtained and on the value of the production equipment ordered. Commission will be payable within 15 days of receipt of payment by Interplan Sales. I am enclosing a copy of our standard letter to prospective customers and we can prepare a feasibility study on receipt of answers to questions 1-6.

Look forward to seeing you again in about 10-14 days.

With kind regards."

Mr. Miles did not reply until the 10th October, 1977, because by that time he had discovered that Polymead Limited could not trade in the United Kingdom. His letter is therefore somewhat equivocal as regards the agreement but we are satisfied that neither he nor Mr. Owen regarded their agreement as being more than a basis for a formal contract. From Mr. Owen's point of view it was important for Interplan to have the exclusive rights of marketing the hot stones in the United Kingdom. Turquands, Barton Mayhew and Co. had by then set in train the formation of Unimead Limited and wrote a letter to Interplan on the 30th November, 1977, as follows:

"Our client, Derek Miles Esq. of Portugal, has instructed us to write to you concerning a proposed contract between yourselves and a company being formed in Jersey which is to be finalised shortly.

In the meantime, we acknowledge receipt of your letter dated 26th September 1977 addressed to Derek Miles Esq. and we can confirm it is the intention that,

with effect from 1st January 1978, you will have the exclusive U.K. distribution rights for the products "Hot Stones" subject to yourselves undertaking to purchase 12,000 (twelve thousand) "Hot Stones" during the year commencing 1st January, 1978, from our proposed client company.

Prices of "Hot Stones" are in the range £6.50 to £7.00 subject to type, f.o.b. Porto, Portugal, cash in advance and a detailed price list will be issued in due course.

You will understand these arrangements are subject to confirmation by the Jersey company in due course when a formal contract will be entered into."

This letter was drafted by Mr. Cunningham who was the company administrator of Turquands, Barton Mayhew & Co. and who had taken over the day to day paper work and administration necessary to operate Polymead and Unimead. Mr. Owen replied on the 2nd December and accepted the terms.

Until then Mr. Owen had believed that the arrangements were to be between Interplan and the plaintiff personally but he was not very concerned whether the final contract would be with Mr. Miles or a company.

Up to Christmas the relations between the plaintiff and Interplan through Mr. Owen were quite cordial; indeed Mr. Owen sent a Christmas card to Mr. Miles. Mr. Miles then took the bit between his teeth and notwithstanding that there was no formal contract, either between him or one of his companies, which would have to be Unimead and Interplan started production in Portugal of the hot stones and decided to ship approximately one twelfth of what had been the agreed first annual consignment of twelve thousand stones to Interplan and he offered some slight alterations in the terms of delivery by Telex. However, he had instructed

Turquands, Barton Mayhew & Co. to arrange for the dispatch to Interplan of some twelve hot stones by way of samples. On the 24th January, 1978, Turquands, Barton Mayhew & Co. wrote, through Mr. Cunningham, to Interplan as follows:

> ""Hot Stones" and "Quiche Crocks"
>
> Please find three invoices numbered 101, 102 and 103, in triplicate, of samples supplied and initial issues of the above goods.
>
> As Unimead (Jersey) Limited is still in the process of formation in Jersey, we have prepared the invoices in accordance with Mr. Mills (sic) instructions in order to avoid delay in delivery.
>
> Upon receipt of your cheque in favour of ourselves, i.e. Turquands Barton Mayhew & Co. - Clients Account, we will arrange immediate delivery of the goods as invoiced.
>
> Awaiting your early reply and instructions."

Mr Owen told us that at that time he had no knowledge of Unimead; he was still waiting for some action on the part of Mr. Miles or his company to produce a draft contract which he could then submit to his directors. On the 7th February, 1978, Turquands Barton Mayhew & Co on behalf of the plaintiff sent a telex to Interplan as follows:-

> "Attn : I Owen
>
> Further our invoices dated 23 Jan
>
> | | |
> |---|---|
> | 101 | 86.26 |
> | 102 | 7230.00 |
> | 103 | 245.00 |
>
> In process arranging despatch of goods to U.K.
>
> When can we expect settlement of above invoices please?"

By this time, not having received any draft contract, Mr. Owen was getting irritated and stopped the preparatory work on the project. Later, Mr. Miles telephoned and asked Mr. Owen, who could not remember the exact date of the telephone call, if he would accept delivery but he said he would not. Moreover he wanted to decide for himself which of the two designs his firm would wish to order subject of course to a satisfactory contract being concluded between the parties. Nothing further took place until the letter of the 20th February, 1978, which we have mentioned, and which was written by Mr. Cunningham cancelling the arrangements. Mr. Owen said that it was probably a good idea to have done so. Later a short meeting was held between the plaintiff and Mr. Owen in London which was not satisfactory inasmuch as the plaintiff asked Mr. Owen if he (or the company) were going to pay for the goods and Mr. Owen said that he was not. Both men were rather angry at that time. As between them at the time of the arrangement, Mr. Miles was the offeror and Mr. Owen the offeree. Mr. Owen's silence did not mean that Interplan, assuming he had taken the agreement to the directors for prior approval, was bound to accept the samples and subsequent deliveries of the first consignment. Nor, in our opinion, was his silence and inaction sufficient to entitle Mr. Miles to say that Interplan had acquiesced in his production plans. Thus whether Mr. Cunningham wrote the letter of the 20th February, 1978, with instructions from the plaintiff or his wife is only important if we are wrong in our assessment of the legal position as it appears to us between Mr. Miles and Interplan at that time. We say nothing here about Mr. Owen's background and his financial difficulties which were elicited in cross-examination. In assessing the financial position of Interplan such evidence might be of assistance if the occasion arises and the weight to be attached to it will then be a matter for the Court. However in Mr. Owen's recollection of such contractual dealings as there

were between him and Mr. Miles, we are satisfied that his evidence can properly be relied upon.

We now look at what happened on the 16th February. Mr. Cunningham had become increasingly concerned about the lack of progress with Interplan and on the 16th February he telephoned to Mr. Miles at his house in Oporto. He spoke to Mrs. Miles as Mr. Miles was busy although he was in the same room as his wife at the time. There is a complete conflict of evidence about one important part of the conversation relating to the Interplan agreement. Mrs. Miles said that Mr. Cunningham was extremely agitated during the telephone call. Everything had gone wrong inasmuch as Interplan would not, or could not, pay for the samples. He asked her for the consignment documents and invoices. She told him that her husband would deal with the papers. In the meantime she said he was not to do anything. After the telephone call she typed a letter which is dated the same day and which is as follows:

"Re: Despatch of Hot Stones to Unimead for eventual delivery to Interplan, if and when they pay!

Enclosed are two copies of the Bill of Lading and a copy of the invoice to Unimead from Polymead Filial em Portugal. I suggest we call the Portuguese company "Filial" in correspondence to avoid confusion with Polymead Jersey. I imagine that these are all the papers you will need, please let me know if there is anything else I should send.

Re: Despatch of Hot Stones to Royal Doulton, in response to their letter of 22nd December, original with you, copy with us.

Enclosed is the invoice from Filial to Unimead, together with proof of despatch of the goods to Canada, Australia, U.S.A. and Belgium. The goods send to the

U.K. have already been received by Doulton and acknowledged in their letter of 22nd December.

Would you please have Unimead invoice the client, i.e. Royal Doulton Tableware Limited in accordance with the instructions in the last paragraph of their letter of 22nd December, i.e. "should be invoiced altogether to Royal Doulton Tableware Limited, P.O. Box 100 London Road, Stoke on Trent, Staffs, ST4 7QD, England addressed for the personal attention of Mr. J.G. Bellak.

Details and costs for this invoice are as follows:

Qty	4	Hot Stones	style "Vulcan" @ £6.50 f.o.b.	£126.00
	4	Hot Stones	style "Sunrise" @ £7.00 f.o.b.	£ 28.00
		Air Freight to:	Australia	
			Canada	
			U.S.A.	
			Belgium	£208.00
Qty		Hot Stone	style "Vulcan"	
	1	Hot Stone	style "Sunrise"	
	left with Mr. J.G. Bellak			no charge
				£262.00

Could you also put a note with or on this invoice to the effect that current container rates to these various ports would work out at approx 3 dollars for Australia and 1.5 dollars for Canada and the U.S.A. per hot stone

Many thanks."

After typing it she showed it to her husband and at his request made two additions in manuscript between the first and second paragraphs. The first addition is "refer telecom!", and the second is "removed as I shall now need them". Mr. Miles

remembered his wife's conversation with Mr. Cunningham and remembered her mentioning invoices in the conversation which dealt with a special Royal Doulton order which is not relevant to this action. He too thought that Mr. Cunningham was agitated. He did not hear his wife tell Mr. Cunningham to cancel the arrangements with Interplan. As far as he was concerned all was well. He obviously interpreted Mr. Owen's silence as tacit consent to what he, Mr. Miles, had been doing about implementing the agreement.

The version of the telephone conversation as told to us by Mr. Cunningham, at least on the important matter of the agreement between the plaintiff and Interplan, is totally different. He was sure that Mrs. Miles did tell him to cancel all the arrangements written or verbal and not just those relating to the Interplan invoices. He acted upon his instructions and wrote the letter of the 20th February to Interplan. He had contacted Interplan on two occasions before the 16th February but Mr. Owen was not available. Finally /a Secretary said that he had not ordered the hot stones. Because the 16th February was a Thursday he had drafted the letter on the following day, Friday the 17th February and as he had to queue for his typing, it was not typed until the following Monday, the 20th February, when it was posted.

In support of his evidence Mr. Cunningham produced two documents; the first was a diary note, which was really in the form of a note of the number of hours spent upon clients' work so that his firm's fees could be calculated, and the other was an inter-office memo recording. Entries in the diary for the 16th and 17th February are, respectively: "Dialling on busy line Portugal spkg. Mrs. Miles re. Interplan aborting order"; and "drafting letter to Interplan cancelling any arrangements entered into". The memorandum is as follows:-

"Monday P.M. 13.2.78

1. Left message with Mr. Owen of Interplan's

Secretary, as he was out, advising goods now in U.K. - would he settle invoices and let us have shipping instru. Sec. said he phoned in daily and she would advise him.

Tuesday P.M. 14.2.78

2. Called again to check - hadn't phoned in - was left they would contact us with his instrus. when he did.

Thursday A.M. 16.2.78

3. As nothing received - phoned again - another Sec. said Mr. Owen had phoned in - on our point - said he did not order goods - they didn't bother advising us.

4. Spoke to Mrs. Miles p.m. Thursday advising her position - In view of circumstances she instructed us to write Interplan recorded delivery advising them that any arrangements verbal or written were cancelled and to ask them to pay for the samples sent on Inv No. 1 or return them.

5. Done. C"

There are a number of telephone numbers at the top of the memorandum which Mr. Cunningham said were probably written after he had completed the memorandum, which, he said was probably done when he had finished his work for the 16th and 17th February. It had been compiled from rough notes. The notes in the diary were there to jog his memory and were put on the file. Mr. Cunningham, a former N.C.O., gave us the impression of being unflappable and also he was, of course, a person of considerable managerial experience. We think it highly unlikely that he would be as agitated as suggested by Mrs. Miles; on the contrary, we think

that she would be the one more likely to become upset at the news of the difficulties with Interplan. We think also that she wrote the letter of the 16th February, 1978, before the telephone call; the written amendments then fall into place as there is no reference to the telephone conversation in the text of the letter. As for Mr. Miles' evidence he told us that he was working in a large room and was getting on with his own affairs. We think he was not paying particular attention to his wife's conversation. Accordingly, on this point we have preferred the evidence of Mr. Cunningham. Even if by his action, or rather inaction, Mr. Owen could be said to have acquiesced in the premature arrangements of Mr. Miles for shipping hot stones to Interplan so that there was some sort of enforceable agreement between them upon which we do not have to decide, we are satisfied that Mr. Cunningham did no more than carry out Mrs. Miles' express instructions when he wrote the letter of the 20th February, 1978.

We are supported in our view that Mr. Cunningham's evidence should be preferred by his letter to Interplan of the 20th March, 1978 with which he enclosed a copy of his letter of the 20th February. Ten days before the 20th March there had been a meeting between the plaintiff and his wife and Mr. Gough, who had taken over his affairs at Turquands Barton Mayhew & Co. Mr. Miles had lost his voice, and Mrs. Miles had to speak for him. He was shown a copy of the letter of the 20th February which had been sent to him in Portugal. He did not countermand it, but Mrs. Miles said that Mr. Gough did not tell them that the letter had been written on her instructions. If the plaintiff went to Mr. Gough, as he said he did, in a state of anger and puzzlement, to find out what was going on, i.e. why there had been such a delay in his affairs, it is strange that he did not press Mr. Gough for an explanation of the letter and at least repudiate its second paragraph.

On the other hand, Mr. Gough was sure that Mr. Miles did not query the letter. Also Mr. Gough remembered seeing the memorandum of Mr. Cunningham, in its entirety on the 16th February. He had added an addition in manuscript which referred to the transfer of goods to the non-sterling area. Mr. Cunningham, he said, had been sure that he had received instructions to cancel the agreement. If Mr. Miles had repudiated the second paragraph of the letter of the 20th February at the meeting with Mr. Gough why then did Mr. Cunningham send a copy of it on the 20th March to Interplan? That would have been in flat contradiction to Mr. Miles' express instructions. We are satisfied, therefore, that no such instructions were given to Mr. Gough, and that we may infer that Mr. Miles accepted the terms of the second paragraph of the letter.

We turn now to heads 1 and 2 of the claim, which we have mentioned earlier, namely that the defendants gave wrong advice to the plaintiff, and as a result of such wrong advice were guilty of professional negligence to the client which manifested itself in an inordinate delay.

There is no doubt that the principal factor in this part of the case was the meeting between the plaintiff and Mr. Monument on the 14th February, 1977. Were clear instructions given by Mr. Miles as to his wishes at that time (and repeated later the same day to Advocate Wheeler)? If so, was proper advice tendered to him by Mr. Monument? While a professional man cannot be expected to have the gift of foresight if the client does not provide him with proper information, at the same time he must take reasonable steps to find out what the client wishes to do; if in doubt, he must probe sufficiently to acquaint himself with the exact nature of the client's wishes. If he does not do this, and if the client has made himself reasonably clear from his point of view, the professional adviser may not have fulfilled the duty of care which he owes to his client as a professional

man. Before the meeting Mr. Monument had the opportunity to look at the previous correspondence, which started with a memorandum from Mr. Tyrer to Mr. Monument on the 20th March, 1973. It was as follows:-

"I should be grateful if you could help me in connection with a client here in London, Derek Miles. He is an inventor and, as far as I can tell, quite a good one, having just sold the patent of one invention for £30,000 plus a consultancy fee depending on sales over the next six years, which could amount to as much as £6,000 a year.

Mr. Miles last November went out to live in Portugal and intends to live there permanently, at least for the foreseeable future. He also intends to continue his activities as an inventor from Portugal. Mr. Miles has asked me to advise him whether there would be any advantage in channelling his invention activities through a Jersey company.

The initial reason for suggesting this or the alternative of a Swiss based company which I am also investigating was that he would not be able to obtain relief against Portuguese tax for the development costs of his inventions. I am not at all certain that there would in fact be any benefit in this arrangement as there is no double tax agreement between Portugal and Jersey. In addition I would have thought that his invention activities would still be liable to tax in Portugal as all the business activity would be carried out there, and the Jersey company would presumably be one managed and controlled outside Jersey.

A further problem arises in that I am not at all clear how he intends to deal with future inventions. At the

moment he appears to favour an outright sale rather than a royalty agreement, but I think both possibilities must be considered.

The one obvious advantage in channelling things through a Jersey company would be the estate duty advantage of any U.K. patents owned at death not being liable to U.K. estate duty. However, Mr. Miles is fairly young, say late thirties early forties, and therefore I would not have thought estate duty sufficient reason on its own for him to take this course of action.

I should be grateful if you could let me have your views on this, and please contact me if you need any further information.

With best wishes."

Three matters may be mentioned arising from that memorandum: first the way in which Mr. Miles was to exploit his inventions was to be flexible; second, in addition to this, he wished to obtain as much relief from Portuguese tax as possible, and third, the principal way in which he was to exploit his inventions was by the taking out of patents in the United Kingdom. Manufacturing of goods in the United Kingdom, based on the patents, was not included specifically. The emphasis on the sale of patents and receiving monies from royalties is stressed throughout the subsequent correspondence, except that in a further memorandum to Mr. Monument from Mr. Tyrer of the 19th November, 1973, there occurs the following paragraph:

"Mr. Miles is not entirely sure how he will deal with inventions from now on. It would seem from a Portuguese tax point of view sensible for him to sell any existing patents to the new Jersey company. That company could then either sell them on or licence them out for a royalty. I think this could have certain

attractions from a Portuguese tax point of view as the sale of a patent outside Portugal is not subject to Portuguese tax. Consequently, if the money were left on loan account with the Jersey company, the loan repayments could be remitted to Portugal as capital and should give rise to no Portuguese tax problems". That memo also asked how long it would take to form a Jersey company. Mr. Pirouet from T.B.M. replied on behalf of Mr. Monument, and said that it would take approximately six to eight weeks, of which one month would be accounted for by the application to the Bank of England. Mr. Miles was told this in a letter from Mr. Tyrer.

When Mr. Monument met Mr. Miles, therefore, he knew that while the exploitation of Mr. Miles' inventions through United Kingdom patents was the principal object in forming a Jersey company, he knew also that some measure of flexibility was required. Both he and Mr. Miles knew how long it ought to take to form such a company with the Bank of England's permission. Further, Mr. Monument was aware that one company alone with external status could not trade within the Scheduled Territories, and that if Mr. Miles wanted to do so, he would have to have a two-tier system of companies. The meeting lasted about an hour. Both the plaintiff and Mr. Monument made notes. Afterwards the plaintiff and Mr. Monument lunched with Advocate Wheeler at a well-known restaurant.The only reference in Mr. Monument's notes to the activities of the Jersey company is contained in note 9, which reads: "Exchange Control References to come? Check re. external status for any U.K. deals? Export earner". In addition there are a reference to patents and the name of a United Kingdom Patent Agent. Mr. Miles' notes tally with those of Mr. Monument insofar as both sets do not mention the setting up of two companies, but refer only to Polymead Limited.

With the knowledge that he had of the need for two companies if trade in the Scheduled Territories was envisaged, Mr. Monument believed, as he told us, that apart from the registration and exploitation of patents (which could, of course, include out-right sales of patent rights, notwithstanding that he had been told by Mr. Tyrer that Mr. Miles preferred to take out royalties) no other form of trade with or in the Scheduled Territories was envisaged at that time. Indeed the bulk of both sets of notes indicates that most of the time at the meeting was taken up discussing Mr. Miles' best way legally to pay the minimum of income tax both here and in Portugal. However in a letter from Mr. Miles to Mr. Monument of 10th March, 1977, is the following paragraph:

> "The objects of the company will be the commercial development of inventions and designs of practically any type, and any activity associated with this."

Mr Monument sent a copy of the letter to Advocate Wheeler on the 17th March, 1977, with the comment that it was self-explanatory and asked Mr. Wheeler to form a discretionary trust (for the avoidance of Portuguese income tax) as well as the Company itself. To the extent that we have had to decide what took place at the meeting in February we were helped in some measure by the evidence about a second meeting on the 23rd June, between Mr. and Mrs. Miles and Mr. Monument to which we shall refer later.

As might be expected, the evidence of the plaintiff and Mr. Monument, the latter supported as far as concerns the discussions over lunch by Advocate Wheeler, diverge on the issue whether Mr. Miles made it clear to Mr. Monument that he wanted to use the Jersey company for trade in the United Kingdom and whether Mr. Miles was told that an externally resident company could not do this. Mr. Miles said that, apart from a general discussion about the Portuguese situation, they talked about what he had been doing previously and in particular his work on heat

exchange equipment, solar energy, air conditioning and kitchen ware. He had already sold patents rights for radiators for production by a United Kingdom company and they discussed how he could exploit his patents in the United Kingdom. He required flexibility as whenever possible he would manufacture the product. He did not say where and in what specific country the manufacture of his products was to take place. He told Mr. Monument that his father-in-law had settled in Portugal with them and he was therefore surprised when later on he read in Mr. Monument's letter to Mr. Wheeler of the 17th March, 1977, that Mr. Monument appeared not to remember this.

Mr. Monument's impression of the meeting was that, basically the Scheduled Territories would not be concerned and that Mr. Miles wanted a company to market his inventions on the continent or in the United States of America. He was satisfied in his own mind that Mr. Miles knew that an external company such as he had in mind could not trade within the Scheduled Territories. Part of his note No. 9 however, to which we have referred, "Check re. External status for any U.K. deals?" shows that his mind must have been alerted by something which Mr. Miles had said concerning trading in the United Kingdom for him to use the words "U.K. deals". This wording in our opinion, would embrace not just the selling or acquisition of patents in the United Kingdom but other activities such as the manufacture and sale of the goods themselves. And Advocate Wheeler himself said that the Memorandum of Association of Polymead had been drawn wide enough so that the power to exploit the plaintiff's inventions included marketing.

It is clear that Mr. Miles did not understand the distinction between the objects of a Jersey company and the conditions which had to be complied with to meet the requirements of the Bank of England's Exchange Control Regulations about non resident companies.

Certainly he was never told that the objects of a Jersey company as set down in its memorandum, could not, with certain exceptions, be changed once the company had been registered. He told us that he made it clear to Mr. Monument what his established methods of trading had been in the United Kingdom. It was true that,so far,he had not actually sold patents in his own name in the United Kingdom which we understood he could have done direct from Portugal. He said that Mr. Monument did not ask him specific questions on these points although he had expected him to do so. We have no doubt that Mr. Miles wished to be able to trade in the United Kingdom through his Jersey company and that that trade might well take the form of selling manufactured products. But did he make this clear to Mr. Monument-or if he did not, then ought Mr. Monument from the general conversation and from what he was told, have asked more specific questions? We think that his mind was directed more to the question of trusts and tax. However, both he and Advocate Wheeler thought that the Advocate explained over luncheon the impossibility of a non-resident company getting permission from the Bank of England to trade in the United Kingdom. At the restaurant before lunch, possibly in the lounge bar, Mr. Monument told Mr. Wheeler what Mr. Miles wanted to do. Mr. Miles did not demur but the words used by Mr. Wheeler to us were that Mr. Monument explained that Mr. Miles was an inventor who wanted to exploit his talents in order to "market his inventions." To us the word "market" includes the possibility of the sale of the patents and even the manufacture and sale of goods arising from the patents. Mr. Wheeler was, as we have said, an authorised depositary and as such fully aware of the obligations that such persons had to the Bank of England when undertakings were given by them on behalf of clients for whom they were seeking specific consents to transactions such as the setting up of a non-resident Jersey company. Where a client required a Jersey registered company with external status an

Authorised Depositary would be required to give an undertaking, if he obtained the Bank of England's consent, that the Bank's conditions would be adhered to. Mr. Wheeler said that it was his usual practice to tell clients about the Bank of England requirements. He said he had a vague recollection however of what Mr. Miles wanted to do, i.e. to exploit his inventions concerning solar energy, and it is true that the power to deal in solar energy systems was put into the objects clause of Polymead's memorandum. Some additions to that clause were requested by Mr. Miles which were passed on to Mr. Wheeler by Mr. Monument but they were omitted when the company was registered on the 16th August, 1977. In considering what weight to attach to Mr. Wheeler's evidence about the meeting with Mr. Miles at the restaurant on the 14th February, 1977, we have had to look at how he carried out his instructions about Polymead. Those concerning the trust were relatively minor except as regards of course the avoidance of Portuguese taxation, and we have not felt it necessary to examine them in detail. First, we have already mentioned that some additional objects requested by Mr. Miles were omitted from the memorandum of the company. Second, in submitting the application to the Bank of England on the 1st June, 1977, Mr. Wheeler wrote as follows in the relevant paragraph:

> "This letter is intended as an application for Mr. Frederick James Trevithick as Trustee of a Settlement to form a non resident company which would engage in the development and exploitation of solar energy systems in Portugal. The expertise in inventing and developing such systems would be supplied by Mr. D. Miles and it is not anticipated that recourse would have to be had to residents of the Scheduled Territories. Mr. Miles understands that if there were ever any need for trade with residents of or in the Scheduled Territories then a separate resident

company would be required if non resident status is granted to the company which is the subject of the present application."

The plaintiff denied the truth of the last assertion. Upon what, therefore, was it based? Partly on what Mr. Monument had told Mr. Wheeler and partly upon his own recollection of what Mr. Miles had told him over luncheon. However he agreed in cross-examination that he had not taken any notes of his meeting with Mr. Miles, either then or when he returned to his chambers, where a large amount of correspondence required his immediate attention. It is to be noted that nowhere in the previous correspondence was the exploitation of the patents limited to Portugal. Third, when Mr. Wheeler sent the company registration with the other relevant documents to Mr. Monument on the 22nd August, 1977, together with the Bank of England consent, Mr. Monument replied on the 30th August as follows:

"Thank you for your letter of 22nd August and I acknowledge receipt of all the company documentation detailed therein.

With regard to the Bank of England consent dated 9th August, 1977, I see under paragraph (2) that the company's activities will be "limited to development and exploitation in Portugal of Solar energy systems "
I am not sure that this is entirely correct because in the copy letter from Mr. Miles, dated 10th March, which I enclosed with my letter to you of 17th March, on the second page, the pre-penultimate paragraph, you will see that the objects of the company are clearly defined as the commercial development of inventions and designs of practically any type.

I know that Mr. Miles is interested in solar energy systems, but in addition he does do a good deal of

inventions in relation to kitchen equipment and I believe he has several ideas waiting to be patented in this field at the moment. His activities cover a wide range and are certainly not limited to just solar energy.

I should be grateful, therefore, if you could go back to the Bank of England to obtain a more general consent of invention work being carried out by Derek Miles. I believe also that a lot of his patents will be taken out in the U.K. and elsewhere and perhaps this matter should also be cleared with the Bank of England.

Finally, are you now in a position to let me have the engrossment of the trust following the amendments set out in my letter to you of 27th May?"

Mr. Wheeler said that that was the first time he had heard that kitchen equipment was to be included in the objects for which the company had been formed. When in turn the plaintiff received some of the same documents he wrote to Mr. Wheeler on the 9th September, 1977, as follows:

"I have received a letter from Mr. Monument enclosing copies of the Bank of England letters of 29th June and 9th August. Since he is on holiday I am writing to you direct.

I am at a complete loss to understand why the activities of the Company should be so limited when my letter of 10th March and my letter of 19th April about the Objects of the Company, as in the Articles and Memorandum, were quite explicit.

We now have a number of inventions ready and more in preparation in diverse fields. Some of these could benefit the U.K. economy in terms of production and export - but not with the prescribed limitations on

our activities. In fact with such absurd conditions the formation of the Company would be pointless.

I would also say that such limitations are contrary to the intentions and beyond the authority of Memorandum EC 2794 Part I (h), as I understand it.

I am leaving for England this weekend for negotiations over some of our inventions. It is therefore essential that the conditions for the Company are corrected without delay.

Also I do not understand the reason of the issue of only 12 shares to the Trustee. My proposals were for the Trustee to hold 60% of the shares and a nominal capital of 1000 U.S. dollars."

To some extent this letter supports his evidence, which we have previously mentioned, that he had not appreciated the distinction between the powers of a Jersey company and the limitation of the exercise of those powers by the Bank of England. Mr. Wheeler's reaction to that letter was prompt, but revealing. He wrote to the Bank of England on the 14th September, 1977, as follows:

"Polymead Limited

On the 9th August 1977 you gave consent for the formation of the above Company and imposed a condition that the Company's activities would be limited to the development and exploitation of solar energy systems in Portugal. The condition which you imposed resulted from information given to you in our letter of the 1st June. We regret that we have misunderstood our instructions to the extent that although the Company is required for the activity to which we referred, it was intended to exploit other inventions of Mr. D. Miles whom we are now informed is a prolific inventor. It is

intended also that other inventions which particularly relate to kitchen equipment should be exploited by the new Jersey Company.

We have also been informed that although no business will be carried on in, or with residents of, the Scheduled Territories it is intended that the Jersey Company should take out patents in the United Kingdom as well as in other countries.

We will be grateful if you will consider the contents of this letter and, if possible, revise the consent that you have given for the incorporation of the Company so that its activities can become more general."

Mr. Monument was aware at least of Mr. Miles' intention to register his patents in the United Kingdom. If he had explained this to Mr. Wheeler at the restaurant, why did not Mr. Wheeler include this in his original application to the Bank of England? His reply to Mr. Miles' letter of the 9th September, 1977, is rather bland, and when writing to Mr. Monument on the same 14th September Mr. Wheeler, in referring to the trust deed, says "I have a vague recollection that I handed you one of our standard settlement deed probably without any details typed in." In cross-examination Mr. Wheeler agreed that the bar of a well patronised restaurant was not perhaps the best place to explain intricate Bank of England requirements, but he had not relied on Mr. Monument having explained the matter previously to the client since Mr. Monument was not as conversant with the requirements of the Bank of England as he was. That was indeed true as during further cross-examination Mr. Wheeler showed a very good knowledge of the regulations and workings of the Bank of England on Exchange Control matters. Since no mention was made in the letter of instructions to Mr. Monument by Mr. Miles of the 10th March, 1977, about specific Bank of England

requirements this omission likewise supports the plaintiff's evidence that the two tier system (or rather the Bank of England's refusal to allow non-resident companies to trade within the United Kingdom) was not explained to him either at the meeting with Mr. Monument alone or at the subsequent luncheon party. Mr. Wheeler did not have any written instructions on what he was to obtain from the Bank of England but relied rather on his recollections. He said that he could not recall receiving amended instructions from Mr. Monument for the Memorandum of Association of the company but that it was possible he had. He had based his letter to the Bank of England of the 1st June, 1977, upon the discussions in the restaurant. Accordingly, Mr. Monument's corrective letter to him of the 30th August, 1977, had come as a surprise. He did not usually submit conditional Bank of England's letters, which he had received in this case on the 29th June, to his principals. He agreed that it took six to eight weeks (or twelve weeks if there was a lot of "toing and froing") to obtain the Bank of England's consent for a non-resident company. In this respect Mr. Wheeler's evidence supports Mr. Pirouet's assessment of the necessary time of between six to eight weeks which he gave to Mr. Tyrer in his letter of the 27th November, 1973. All in all we have come to the conclusion that notwithstanding Mr. Wheeler's patent honesty of his testimony of his recollection of the events in the restaurant his evidence points to the fact that he did not remember clearly what his instructions were and that he did not, as he should have done, either seek the approval of Mr. Miles, through Mr. Monument, to the form of the Bank of England's consent or obtain more specific instructions in writing. To put it specifically when he told us that he explained to Mr. Miles the limits of the workings of a non resident company his recollection seemed to us to be founded on an erroneous supposition.

We pass now to Mr. Miles' second meeting with Mr. Monument on the 23rd June, 1977. Mr. Miles had come to Jersey as he had three patents pending for filing in the United Kingdom Register of Patents. He produced three receipts from the Patent Register dated the 27th June, 1977. He said that when he was able, because Mr. Monument kept leaving the room, he told him he had patented, or was going to patent, certain mouldings and the tools for producing them and wished if possible to produce the tools in the United Kingdom. He mentioned hot stones and said that he was ready to patent them and look for an opportunity to sell these or exploit them in the United Kingdom. As far as the tools were concerned he wished to modify these for production and run. As far as hot stones were concerned he said that, having patented these or filed his application for a patent, he would then look for business opportunities in the United Kingdom. Mr. Monument said that the plaintiff's company (Polymead) should be formed very soon in early July. This would correspond to what he told Mr. Miles by letter of the 9th June, 1977, that the Bank of England's consent, or formal reply, should be received in "perhaps early July". Mrs. Miles' recollection however of this meeting is not so precise because at that time she wanted to get out of business in order to start a family. She does remember however some talk about patents and general marketing. Neither Mr. Miles nor Mr. Monument took any notes of that meeting. Mr. Monument did not remember any discussion about patents or, more importantly, selling goods in the United Kingdom. The three receipts from the English Patent Registry were only received by him, he said, towards the end of August.

Mr. Monument, Mr. Wheeler and Mr. A. Spencer-Nairn, an accountant called by the plaintiff and to whom he had transferred his business from T.B.M., agreed that it was important in transactions such as those envisaged by Mr. Miles for a professional advisor, be he an Advocate or an Accountant, to obtain the full t

information from the client; indeed he had a duty to do so as the Bank of England required precise details of any proposals concerning non-resident companies. We have come to the conclusion that even if Mr. Monument was not aware of Mr. Miles' intention to trade in the United Kingdom through, originally, Polymead at the meeting in February, 1977, but we think that he was, he had a further opportunity to question him in June. That double omission was attributable to his failure to probe sufficiently deeply into what Mr. Miles wanted to do. The failure to provide Mr. Miles with a competent vehicle for the work that he wanted to do was not remedied until the 22nd February, 1978, with the registration of Unimead. Whether there was further delay after Mr. Gough took over Mr. Miles' affairs in September, 1977, is not important. Accepting that at the outside twelve weeks should be sufficient to obtain the Bank of England's consent and set up the two companies with the attendant trust, and allowing for Mr. Miles' own delay at the start in giving final details of the trust to Mr. Monument, we think that the competent structure should have been available to Mr. Miles by the end of July or at the beginning of August. We have made also a small allowance for summer leave taken at about that time by Bank of England officials. It is true that Mr. Gough did attempt to rescue affairs by his clear proposals in a comprehensive and careful letter to Mr. Miles of the 6th October, 1977. That letter produced the equivocal letter, which we have already mentioned, to Mr. Owen from Mr. Miles a few days later and which confirmed Mr. Owen's belief that his company would receive proposals for a formal contract from Mr. Miles or one of his companies. By the time the mistake, for so it was, of the defendants had been put right at the end of February, 1978, it was too late. The hopes that the plaintiff had for exploiting the Hot Stones in the United Kingdom through Interplan had collapsed. We make

no finding as to whether had the two tier company structure been functioning at the proper time Interplan would have been capable of fulfilling its obligations notwithstanding that we had evidence from Mr. Owen that it would have been in a position to do so. However, we are not called upon to pronounce on this aspect of the action but only to decide whether the defendants, through Mr. Monument, had fulfilled their duty of care they owed to the plaintiff. We have found that they did not and accordingly on the issue of liability judgment will be given in favour of the plaintiff. The defendants will pay the plaintiff's costs.