

Case No 527/94

I H

IN THE SUPREME COURT OF SOUTH AFRICA**(APPELLATE DIVISION)**

In the matter between :

ERF 3183/1 LADYSMITH (PTY) LTD

First Appellant

REM 3186 LADYSMITH (PTY) LTD

Second Appellant

v

COMMISSIONER FOR INLAND REVENUE

Respondent

CORAM : HEFER, NESTADT, HOWIE, SCHUTZ JJA and
 PLEWMAN AJA

HEARD : 7 MARCH 1996

DELIVERED : 28 MARCH 1996

J U D G M E N T

HEFER JA :

This appeal in terms of s 86A(2)(b) of the Income Tax Act 58 of 1962, as amended, is against a decision of a Special Court upholding two additional assessments for normal and additional tax issued by the respondent ("the Commissioner") during 1990 in respect of income allegedly omitted from the appellants' returns for the 1985 year of assessment. Each appellant was originally assessed to normal tax towards the end of 1985 on a comparatively small amount of rent reflected in its return as its only income from the lease of a stand in Ladysmith. In the financial statements submitted in support of the respective returns each stand was reflected at cost. What was not revealed, was that a factory had since their acquisition been erected on both stands. Almost four years later, having been apprised of the true position and being of the view that the erection of the factory occurred in circumstances which brought about an accrual of income to the appellants under par (h) of the definition of "gross

income" in s 1 of the Act, the Commissioner issued the additional assessments.

In view of the first proviso to s 79(1) of the Act the appellants' initial stance was that it was no longer open to the Commissioner to issue additional assessments. They abandoned this contention in the Special Court and the main remaining issue is whether, on the facts of the case, par (h) of the definition of "gross income" is applicable. The Special Court decided this issue in the Commissioner's favour. If the decision were to be upheld, there is an end to the matter and the appeal falls to be dismissed; if not, other issues will have to be considered.

To demonstrate the relevance of par (h) it is necessary to refer briefly to the facts as related to the Special Court by appellants' witnesses, Mr H T D Drury and Mr M H E Wimble. At the relevant time the former was the auditor of the group of companies to which I am about to refer, and the

latter a director of one of the companies within the group.

During 1983 the directors of Pioneer Seed Company (Pty) Ltd ("Pioneer") and its subsidiary Pioneer Seed Holdings (Pty) Ltd ("Holdings"), decided to establish a furniture factory which Pioneer would operate in Ladysmith. Although industrial stands were apparently freely available the directors, instead of negotiating with the Town Council for the acquisition of a suitable site, approached Mr F A Krause who had at that stage already formed the appellant companies. Details of the bargain subsequently struck with him were not disclosed to the Special Court; but according to Mr Wimble, an erstwhile director of Holdings, the upshot was that Krause purchased one stand in each appellant's name acting as "nominee" of that company. Later, on a date which cannot be ascertained with certainty from the evidence, Holdings acquired the entire shareholding in both companies. (The group consisting of Pioneer, Holdings, and the

two appellants will henceforth be referred to as "the group".)

On 27 March 1984 eight separate but interrelated written agreements, comprising two practically identical sets of four, were simultaneously concluded. One set relates to the stand owned by first appellant and the other to the stand belonging to second appellant. Each set consists of the following :

(1) An agreement of lease ("the main lease") in terms of which the appellant in question lets its stand to Board of Executors Pension Fund ("the Fund") for the period 1 April 1984 to 31 July 1991. The leased premises are described as "the land and any buildings or other improvements which may be effected on the land by the lessee." Clause 7 provides that :

"7.1 The Lessee shall be entitled at its expense to erect such buildings and other improvements on the land as it may determine...

7.2 All buildings and other improvements erected on the

land by the Lessee shall become the property of the Lessor and the Lessee shall have no claim against the Lessor for compensation in respect thereof."

(2) An agreement of sub-lease in terms of which the Fund sub-lets the property to Pioneer for the period 1 August 1984 to 31 July 1991.

The leased premises are described as the land and buildings, and the buildings as "the buildings which are to be erected on the land for the purpose of accommodating the Sub-Lessee." Other relevant provisions are to the effect that the Fund will cause buildings to be constructed on the land in accordance with plans approved by it and Pioneer; and that Pioneer will pay the Fund, in addition to monthly rent, and on the date of the final completion of the buildings, a premium "in consideration for the Sub-Lessor having agreed to erect the buildings on the land and to lease the property to the Sub-Lessee".

(3) A building contract between the Fund and Terwell

Investments (Pty) Ltd ("the contractor") providing for the construction of a factory on each stand. The completion date is 31 July 1984.

(4) A variation agreement between the relevant appellant and the Fund. Clause 3 reads as follows :

"3.1 ...

3.2 The Lessee's liability to the Lessor in respect of rent due in terms of the lease for the period 1st April 1984 to 31st July 1984 shall be discharged only from rent accruing to the Lessee in terms of the sub-lease.

3.3 To the extent necessary to give effect to this agreement the Lessor waives its right to recover rent due in terms of the lease for the period 1st April 1984 to 31st July 1984 from the Lessee."

(The lease and sub-lease referred to are stated to be those listed in (1) and (2) *supra*.)

These agreements, as will presently appear, are the source of the dispute. Before I deal with the conflicting contentions it is necessary to revert to the facts.

I referred earlier to the uncertainty about the precise date on which Holdings acquired the shares in the appellants. Appellants' attorney conceded, however, that the question of the applicability of par (h) must be decided on the basis that his clients were subsidiaries of Holdings at the time of the conclusion of the agreements. Since the land on which the factory was to be erected thus belonged to the group (I speak in practical terms), one is immediately struck by the cumbrous arrangements for its construction. Affiliated companies are of course at liberty to structure their mutual relationships in whatever legal way their directors may prefer; but when, for no apparent commercial reason, a third party is interposed in what might equally well have been an arrangement between affiliates, it is not unnatural to seek the motive elsewhere.

When the appellants' witnesses were questioned in this regard it came to light that the agreements were concluded pursuant to a scheme first

mooted by the group's banker and subsequently devised on the advice of a tax consultant by the directors and auditors of Pioneer and Holdings. Its aim, so both witnesses claimed, was to procure the benefit of a deduction under s 11(f) of the Act for Pioneer. (In terms of s 11(f) a deduction from gross income is allowed "in respect of any premium or consideration in the nature of a premium paid by a taxpayer for ... the right of use or occupation of land or buildings used or occupied for the production of income or from which income is derived".)

This was plainly not the only result sought to be achieved. The problem facing the directors after the stands had been acquired, was that a factory to accommodate Pioneer had to be constructed at considerable cost on land which, in practical terms, belonged to two of its subsidiaries. What the situation called for was an arrangement regulating the rights and obligations of the companies *inter se*. To achieve this various options were

available. An obvious solution would have been a lease between the appellants and Pioneer providing for the construction of the buildings by the latter for its own account. Another would have been a lease between the same parties with a provision imposing the obligation to erect the factory on the appellants. Each of these courses - and other conceivable ones - required careful consideration because, apart from other matters, there was the ever present problem of tax. It was in this connection that the group's banker put forward the possibility of the interposition of a third party as the appellants' lessee and Pioneer's sub-lessor. Expert advice was taken and the outcome was that the inter-company relationship was formalised along the lines of the agreements with which we are now concerned. In context the agreements must therefore be regarded as the formal arrangement of the affairs of three of the companies within the group.

It bears mentioning at this stage that a tax benefit to Pioneer by way of a deduction under s 11(f) could in any event not have been the major consideration. Had the directors been motivated merely by the benefit of a deduction, the need for the introduction of a third party would not have arisen : the appellants could simply have let the stands to Pioneer; such a lease could equally well have provided for the erection of the factory by the appellants and the payment of a premium by Pioneer; and in that event Pioneer would still have been entitled to claim the deduction. What appellants' witnesses did not admit because they were not fully cross-examined but is nevertheless perfectly obvious, is that the *appellants'* tax liability must have been the dominant consideration. For, had the premium been paid to them, it would have become part of their taxable income and there would have been no benefit to the group.

Be that as it may the enquiry must proceed, as appellants' attorney

conceded, on the basis that the sub-leases were intended to serve the single purpose of ensuring that there would be no accrual of income to the appellants as recipients of the premium.

Relying on the principle that : "[e]very man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be" (per Lord Tomlin in *The Commissioners of Inland Revenue v The Duke of Westminster* 1936 AC 1 at 19), appellants' attorney argued that effect must be given to the agreements according to their tenor despite their underlying purpose. He submitted that, whatever their purpose might have been, a right as envisaged in par (h) of the definition of "gross income" in s 1 of the Act did not accrue to the appellants in terms of the main leases.

The relevant part of par (h) is to the effect that a taxpayer's gross income for any year or period of assessment includes

"in the case of any person to whom, in terms of any agreement relating to the grant to any other person of the right of use or occupation of land or buildings, ...there has accrued in any such year or period the right to have improvements effected on the land or to the buildings by any other person-

(i) the amount stipulated in the agreement as the value of the improvements or as the amount to be expended on the improvements ..."

Appellants' attorney correctly pointed out that par (h) does not deal with the benefit accruing to the owner of land as a result of the improvement of his property as such, but with the accrual of a *right to have improvements effected*. The general principle of the Act is expressed in the opening words of the definition of "gross income" to the effect that a taxpayer is taxed (subject to specified exclusions and deductions) on the total amount in cash or otherwise received by or accrued to him or in his favour during any period of assessment. In as much as par (h) deals with the accrual of a right it is but a discrete application of this principle. But, whereas accrued rights capable of being valued in money are thus generally

included (cf *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A) at 365 C-D), par (h) deals specifically with the right to have improvements effected on land or to buildings. It deals, moreover, with a right deriving from a particular source : it must accrue to the taxpayer in terms of an agreement; and the agreement must be of a particular kind *viz* an agreement relating to the grant to any other person of the right to the use or occupation of land or buildings.

The keystone of the contention that such a right did not accrue to the appellants is clause 7.1 of the main leases which *entitles* but does not *oblige* the Fund to erect buildings on the leased property. The Fund, so the argument goes, was indeed obliged to erect the buildings but that obligation stemmed from the terms of the sub-leases and was enforceable by Pioneer - not by the appellants. The nub of the contention is that, in the absence of an *obligation* enforceable by the appellants, a *right* to have the buildings

erected did not accrue to them. As a matter of pure logic and law the argument is undoubtedly sound if the enquiry is confined to the four corners of the written agreements. However, the Commissioner's case is that the documents do not reflect the real intention of the contracting parties; because the entire purpose of the transaction was to evade tax, the agreements were concluded in a form which conceals the fact that the appellants did acquire the right to have the buildings erected. For this contention the Commissioner relies on the terms of the agreements considered as a whole in the light of the facts deposed to by the appellants' own witnesses.

The argument on both sides focused largely on the application of two well-known legal principles. The first is the one expounded in *The Duke of Westminster's* case (*supra*). It was adopted by Centlivres CJ in his minority judgment in *Commissioner for Inland Revenue v Estate Kohler*

and Others 1953 (2) SA 584 (A) at 591E-592H and affirmed in subsequent judgments of this court. (See eg *Secretary for Inland Revenue v Hartzenberg* 1966 (1) SA 405 (A) at 408 *in fin*; 409C-D; *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 494G.) In effect it involves the application of the more general principle, recognised eg in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 548 and *Van Heerden v Pienaar* 1987 (1) SA 96 (A) at 107E-F, which permits parties to arrange their affairs so as to remain outside the provisions of a particular statute. Of course, in every case in which this principle is invoked, it is for the court to decide whether the party concerned has succeeded in achieving that result. The outcome may depend entirely on the facts (*Elandsheuwel Farming (Edms) Bpk v Sekretaris van Binnelandse Inkomste* 1978 (1) SA 101 (A) at 113F-H) or on the application of the law to the facts (as in the *Hartzenberg* case). It

is in this regard that the second principle comes into play. Succinctly stated it is to the effect that :

" Courts of law will not be deceived by the form of a transaction : it will rend aside the veil in which the transaction is wrapped and examine its true nature and substance."

(Per Wessels ACJ in *Kilburn v Estate Kilburn* 1931 AD 501 at 507.)

The application of these principles is usually not a matter of great difficulty in cases where only one of them is invoked. But certain remarks in some of the English cases on the subject would seem to suggest that they are mutually exclusive and accordingly incapable of application in one and the same case. In *The Duke of Westminster's* case Lord Tomlin observed eg (at 20) :

"This so-called doctrine of 'the substance' seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable."

Since this was written sixty years ago the interaction between the two principles has become a contentious matter in the English courts. (See eg *W T Ramsay v Inland Revenue Commissioners* [1981] 1 All ER 865 (HL); *Furniss (Inspector of Taxes) v Dawson and related appeals* [1984] 1 All ER 530 (HL); *Craven (Inspector of Taxes) v White and related appeal* [1988] 3 All ER 495 (HL); *Fitzwilliam v Inland Revenue Commissioners and related appeals* [1993] 3 All ER 184 (HL).) For present purposes it is not necessary to get involved in the dispute. In his judgment in *The Duke of Westminster's case* at 25 Lord Russell of Killowen said :

"If all that is meant by the doctrine is that having once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights, well and good ... If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of the rights and liabilities of the parties being different from what in law they are, then I entirely dissent from such a doctrine."

The South African approach has always been substantially in accordance with the first possibility mentioned by Lord Russell. In

Dadoo's case at 547 Innes CJ said :

"a transaction is *in fraudem legis* when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions. Thus stated, the rule is merely a branch of the fundamental doctrine that the law regards the substance rather than the form of things, - a doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim *plus valet quod agitur quam quod simulate concipitur*."

Provided that each of them is confined to its recognised bounds there is no reason why both principles cannot be applied in the same case. I have indicated that the court only becomes concerned with the substance rather than the form of a transaction when it has to decide whether the party concerned has succeeded in avoiding the application of a statute by an effective arrangement of his affairs. Thus applied, the two principles do not conflict.

The *locus classicus* on the subject of simulated transactions is Innes

J's judgment in *Zandberg v Van Zyl* 1910 AD 302 at 309 where the following appears :

"Not frequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, *intended not to express but to disguise its true nature*. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be ... But the words of the rule indicate its limitations. *The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances, that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be*. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down."

The thrust of the passage lies in the italicised lines and the factual enquiry referred to in the last sentence is thus to ascertain the actual

intention of the contracting parties. As explained in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 at 395 - 396

"[a] transaction is not necessarily a disguised one because it is devised for the purpose of evading the prohibition in the Act or avoiding liability for the tax imposed by it. A transaction devised for that purpose, if the parties honestly intend it to have effect according to its tenor, is interpreted by the Court according to its tenor, and then the only question is whether, so interpreted, it falls within or without the prohibition or tax.

A disguised transaction in the sense in which the words are used above is something different. In essence it is a dishonest transaction : dishonest, in as much as the parties to it do not really intend it to have, *inter partes*, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties. The parties wish to hide the fact that their real agreement or transaction falls within the prohibition or is subject to the tax, and so they dress it up in a guise which conveys the impression that it is outside of the prohibition or not subject to the tax. Such a transaction is said to be *in fraudem legis*, and is interpreted by the Courts in accordance with what is found to be the real agreement or transaction between the parties.

Of course, before the Court can find that a transaction is *in fraudem legis* in the above sense, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties." (Cf *Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd* 1982 (2) SA 710 (A) at 733B-E, 736A-C; *Du Plessis v Joubert* 1968 (1) SA 585 (A) at 598A-599F.)

I have quoted the relevant passages from the leading cases in full in order to reveal the fundamental flaw in a submission which tinged the entire argument for the appellants. It is to the effect that, once it is found that the parties to the present agreements actually intended to structure their arrangement in the form of a lease coupled with a sub-lease and a building contract, there is really an end to the matter, because in that event effect must be given to each agreement according to its tenor. This is plainly not so. That the parties did indeed deliberately cast their arrangement in the form mentioned, must of course be accepted; that, after all, is what they had been advised to do. The real question is, however, whether they

actually intended that each agreement would *inter partes* have effect according to its tenor. If not, effect must be given to what the transaction really is. I must also point out that, by virtue of the provisions of s 82 of the Act, the burden to prove that any amount is exempt from tax and the duty to show that the Commissioner's decision to disallow their objection to the assessments was wrong, rest on the appellants. (Cf *Ochberg v Commissioner for Inland Revenue* 1931 AD 215 at 220-221; *Reliance Land & Investment Company (Pty) Ltd v Commissioner for Inland Revenue* 1946 WLD 171 at 176-177, 181.) Therefore, unless the appellants have shown on a preponderance of probability that the agreements do indeed reflect the actual intention of the parties thereto, the Commissioner's decision cannot be disturbed. Apart from the agreements themselves the only evidence placed before the Special Court on this part of the case was that of the two witnesses referred to earlier. The question is whether this

is sufficient to discharge the onus.

Regarded separately and without reference to the others, there is nothing unusual about the terms of the main leases or of any of the other documents except for one remarkable feature. Since the same signatories signed the main leases, the sub-leases and the building contracts simultaneously on behalf of the appellants, the Fund, Pioneer and the contractor respectively, we must infer that they signed each agreement with full knowledge of the terms of the others which were either awaiting their signatures or had already been signed. In view of the terms of the variation agreements the signatories must have known full well that the main leases did not correctly reflect the arrangement in respect of the payment of rent for the period 1 April to 31 July 1984. Yet they signed them. The witnesses did not explain why the relevant terms had to be amended or why there had to be separate documents. I am unable to accept the suggestion

put forward by appellants' attorney that the variation agreements might have been prepared simply to correct a mistake by the draughtsman. There is no reason to assume in appellants' favour that a mistake had been made and it is in any event highly unlikely that additional documents, replete with definitions and recitals and running into three pages each, would have been prepared instead of redrafting a few lines in the leases. It is significant that payment of rent was in effect suspended in the variation agreements until 1 August 1984 which was the date on which the sub-leases would commence and the day after the buildings were expected to be completed under the building contract. But this only becomes clear once all the agreements are read together : a reader who was not aware of the existence of the variation agreements would not know that the Fund would not be paying rent for the first four months. This he would only discover upon being shown the variation agreements; and even then he would be unaware

that the reason for the apparent indulgence was that the buildings would only be completed at the end of the fourth month. The impression is irresistible that the parties sought to give to each agreement a semblance of self-sufficiency which it did not in reality possess. (I will revert to this at a later stage.)

Be that as it may, the agreements cannot be regarded separately: they were all signed simultaneously and were plainly interdependent to the extent that none of them would have been concluded unless all the others were also signed; as appellants' attorney conceded, each one must be considered in the context of all the others in order to discover their total effect.

So regarded there is a distinct air of unreality about the agreements. Clause 6 of the main leases is to the effect that the Fund would not be entitled to assign the leases or sub-let the premises "without the prior

consent of the Lessor which shall not be unreasonably withheld". Bearing in mind that the sub-leases were also on the table for signature or might even have been signed already, such a provision was entirely illusory. Bearing in mind further that it was never contemplated that the Fund would occupy the premises, the same goes for clauses 5.2, 11 and 12. (Clause 5.2 is to the effect that the Fund would pay "all ... municipal charges relating to its use and occupation of the premises"; clause 11 is to the effect that the Fund was precluded *inter alia* from doing or permitting any act "which may become a nuisance or shall cause any annoyance or discomfort to the Lessor or to any other occupier of the property" and in clause 12 the Fund indemnified the appellants against all claims for damages "in respect of the use of the premises by the Lessee.") Clause 8 provides that the Fund would "at its own expense maintain the land and all buildings and other improvements erected on the land, both interior and exterior in a good and

proper state of repair and in a neat and tidy condition"; but in point of fact the duty to maintain rested with Pioneer in terms of clause 8.1 of the sub-leases. Finally there is clause 7.1 which has already been quoted. When the parties signed the main leases they knew full well that the Fund would in actual fact not be entitled to erect "such buildings and other improvements on the land as it may determine" but was, on the contrary, obliged in terms of the sub-leases to erect buildings to accommodate Pioneer in accordance with plans which had already been approved by the latter and were in fact annexed to the building contracts.

These anomalies are consistent with a wider, unexpressed agreement or tacit understanding the terms of which have not been divulged. As such they bear significantly on the question whether the accrual to the appellants of a right to the erection of the buildings has been concealed. Of course, as appellants' attorney stressed, the documents clearly distinguish between

the Fund's rights and obligations *vis-à-vis* the appellants (deriving from the main leases) and its rights and obligations *vis-à-vis* Pioneer (deriving from the sub-leases). But this in fact confirms the impression of a deliberate attempt to give to each agreement a semblance of self-sufficiency which it did not have. The reason for such an attempt is readily discernible. When the parties' representatives sat down to sign the documents they knew precisely what the purpose of the exercise was. The Fund, which had plainly not been kept in the dark, was not interested in hiring the stands as an ordinary tenant and was prepared to enter into a lease merely because the land would immediately be sub-let. From its point of view there would have been no commercial objection to such an arrangement particularly since, under s 10(1)(d) of the Act, the Fund was exempt from tax. But the fact remains that it was obvious to all concerned that this was no ordinary transaction. It is in this light that we must view the provisions of the

agreements to the effect that the right to have the buildings erected vested in the sub-lessee and not in the owners of the land.

I find it difficult to accept that so startling a result, could have been actually intended. On the argument for the appellants they were precluded from enforcing compliance with the terms of the sub-leases relating to the erection of the buildings. Taking into account the substantial benefit to them which the erection of the buildings would entail and that they would part with their land for seven years in return for what was no more than a nominal monthly rental, it is obvious that they had a very real interest in the sub-leases and every reason to exact compliance with the relevant terms. Indeed, had they not been Pioneer's subsidiaries, I have no doubt that they would have insisted on some mechanism to be provided enabling them to do so; and their position cannot be regarded in a different light merely by reason of their membership of the group.

A problem facing the appellants is that there is a paucity of evidence relating to the events after the acquisition of the land. We know that the groups' banker put forward the suggestion of a sub-lease and we know about the advice subsequently taken; but we know practically nothing about the events which must have preceded the bank's suggestion. I mentioned earlier that the agreements cannot merely be regarded as a device aimed at the reduction and avoidance of tax but that they must be viewed in the broader context of an arrangement of the affairs of the companies *inter se*. There is no evidence of actual negotiations involving the appellants but it is hardly likely, in view of Pioneer's dominant position, that any negotiations in the real sense of the word, were ever conducted. What is more likely and may validly be inferred, is that the decisions which eventually led to the conclusion of the agreements of 27 March 1984 were taken by Pioneer's board either alone or jointly with the board of Holdings

(as was the case, according to Mr Wimble, when the establishment of the factory was initially decided upon). We must further assume, because appellants' attorney repeatedly pressed upon us their *bona fides* in devising the scheme, that the directors acted in accordance with Centlivres CJ's remarks in *Rex v Milne and Erleigh* (7) 1951 (1) SA 791 (A) at 828A while dealing with the control of the directors over the mutual interests of affiliated companies, namely that :

" [t]hose interests must be adjusted by the controllers as honest boards would agree to do if there were no group, i.e. on fair and reasonable lines, having regard to the circumstances of each transaction."

Can it in these circumstances be said, particularly taking account of what I have said about the appellants' interest in the terms of the sub-leases relating to the erection of the buildings, that as a matter of probability the directors intended to confer the sole right to have the buildings erected on Pioneer, thereby precluding the appellants from taking steps to enforce

compliance with the relevant terms? In my view not. I have no doubt that the directors were aware of the need for the appellants to protect their own interests themselves. There is a real likelihood that there was an unexpressed agreement or tacit understanding between the appellants and Pioneer that the appellants would be entitled if need be to enforce compliance with the relevant terms of the sub-leases, either against Pioneer or possibly against Pioneer and the Fund jointly. Of this the Fund could not have been unaware : as stated earlier, it could not have been kept in the dark about the purpose of its intervention; indeed, on the available evidence, there is reason to believe that the Fund was not unaccustomed to the role it was required to play in this kind of transaction. On this basis the Fund too could well have been a party to the agreement or understanding referred to. The evidence does not exclude what is thus a real likelihood that the written agreements do not reflect the true or full

intention of the parties. Appellants' entire case rests on the provisions of clause 7.1 of the main leases. However, it is those very provisions that, on the foregoing analysis, bear the stamp of simulation. The purpose could well have been to conceal the real or complete terms of what the parties truly intended but chose not to express.

It follows that the appellants have not shown that a right to have improvements effected as envisaged in par (h) did not accrue to them. In view of this conclusion it is not necessary to deal with the other issues which were argued including the applicability of s 103(1) of the Act on which the Commissioner relied as an alternative.

The appeal is dismissed with costs, including the costs of two counsel.



JJF HEFER

CONCURRED : NESTADT JA
 HOWIE JA
 SCHUTZ JA
 PLEWMAN AJA