to respond to the pressure put upon him to take them back upon the ship's articles.

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DAY v. YATES.

Appeal allowed. Rule nisi for prohibition made absolute with costs.

Solicitors for the applicant, *Ebsworth & Ebsworth.*

Solicitor for the respondent, *W. H. Sharwood,* Commonwealth Crown Solicitor.

J. B.

[HIGH COURT OF AUSTRALIA.]

BYRON HALL LIMITED . . . . . APPELLANT;
PLAINTIFF,

AND

HAMILTON AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 8, 9, 14.

Gavan Duffy C.J., Rich, Starke and Dixon JJ.

Agreement—Joint venture by defendants to acquire land and to build thereon—Subsequent formation of company for purpose of venture—Defendants directors of and substantially only shareholders in company—No agreement as to terms upon which land to be transferred to company—Knowledge of defendants as coadventurers and as directors of company—Representation by conduct—Inducement—Claim for relief grounded on findings of lower Court—Inconsistent with pleadings.

Three persons arranged as coadventurers to buy land and erect a building upon it, contributing services and capital unequally. After acquiring the land and commencing operations upon it, they registered a company of which two of them were to be the first directors. No shares were allotted beyond single shares subscribed for in the memorandum of association, and they did not qualify as directors. No express contract to transfer the land to the

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company was made with the company and no formality was observed in connection with the company, the corporate character of which was ignored. Nevertheless, the coadventurers raised money in the company's name on overdraft secured by their personal guarantee and by a mortgage given by them of the land the title to which they had acquired. The money so raised was applied towards erecting the building, and the work of construction was done in the company's name.

Held, that no contract had been made with the company and no equitable duty to the company had been incurred to transfer the land to it and the company was not entitled to obtain a transfer or other relief on the ground of estoppel or otherwise. The three coadventurers who beneficially owned the land and controlled the company occupied a position in which they were entitled to deal as they chose in relation to the company. They were at liberty to deal as they chose with the credit of the company, if it had any, and to use its name for their own purposes. In doing so, they were not adopting any false assumption upon its behalf. They intended *in futuro* to transfer the undertaking to the company, and in erecting the building they simply used the company's name and independent personality in the manner which they found convenient. The company was their creature, and they could and did make it act as they desired.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by Byron Hall Ltd. against Claud Hamilton, William Henry James and Irene Beatrice Gibson in which the statement of claim, as amended, was substantially as follows:—

1. The plaintiff is a company which was on 12th January 1927 duly incorporated under the *Companies Act* 1899 and the Acts amending the same as a company limited by shares.

2. Amongst the objects for which the plaintiff was incorporated were to carry on business as proprietors of flats and to let on lease or otherwise apartments therein and to purchase or otherwise acquire any land, buildings, easements, rights, works and other property which might be convenient to be acquired for the purposes of the Company, and also to erect or construct any buildings or works which might from time to time be required for the Company and to maintain and from time to time alter and add to any buildings, works and plant to be acquired or constructed by the Company.

3. The defendants Hamilton and James are and were at all material times the registered proprietors under the *Real Property*

Act 1900 in fee simple as tenants in common of certain land situated at the corner of Macleay and Hughes Streets, Darlinghurst, in the city of Sydney, upon which is now erected a block of residential flats known as "Byron Hall."

4. The said defendants were promoters of the plaintiff Company and from the time of its incorporation acted as the only directors thereof for a long period.

5. In 1927 and while the said defendants were acting as such only directors and were in possession of the said land, and prior to the erection of the said block of flats it was duly agreed between the plaintiff and the three defendants that the plaintiff should cause to be erected on the said land the said block of residential flats, and should out of its moneys and by borrowing moneys pay for the erection of the same, that the defendants should cause the said land to be transferred to and vested in the plaintiff, that for any moneys of the respective defendants previously expended by any of them respectively for the purchase of the said land fully paid shares in the plaintiff Company of equivaluent face value should be allotted by the plaintiff to them respectively, and that the defendants respectively should have the right to take up and pay for at par certain other shares in the plaintiff Company so as to make their total respective holdings of shares in the plaintiff Company as follows, namely, that of the defendant Hamilton 20,000, that of the defendant James 26,000 and that of the defendant Miss Gibson 4,000. It was a further term of the said agreement that payment for the shares which should be taken up as aforesaid by the defendant James should be made by setting off the amount of the face value thereof against any sums which might be advanced by such defendant to the plaintiff. It was also provided by the said agreement that the defendant James should arrange the finance and so far as necessary advance moneys to the plaintiff for the erection of the said flats, and that the defendant Hamilton should manage the erection and do the architectural and supervision work in connection with such erection without making any charge therefor.

6. In pursuance of the said agreement and on the faith thereof the plaintiff with the knowledge and consent of the defendants entered into possession of the said land and caused the said block

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of flats to be erected thereon, and out of its moneys and by borrowing moneys paid for the erection of the same.

7. The defendants James and Miss Gibson are and have at all times been ready and willing to carry out the said agreement so far as they are and have been able, but the defendant Hamilton has neglected and refused to cause the said land to be transferred to or vested in the plaintiff or to perform the said agreement on his part, and has wholly repudiated the said agreement and now claims that the plaintiff has no interest in the said land or the said block of flats.

8. The plaintiff has performed the said agreement on its part so far as the same has fallen to be performed by it, and has always been and still is ready and willing and hereby offers to perform the said agreement in all respects on its part so far as the same remains to be performed by it.

9. By reason of the conduct of the defendant Hamilton hereinbefore mentioned the plaintiff has suffered serious loss and damage.

10. The plaintiff alternatively charges and the facts are that after the registration of the said plaintiff Company and before the expenditure hereinafter referred to and whilst the defendants James and Hamilton were still acting in the capacity of directors of the plaintiff Company, and in a fiduciary capacity in respect of the said Company, the plaintiff with the licence and authority of the defendants and each of them entered into possession of the said land and commenced to erect and completed the erection of certain flats known as "Byron Hall" thereon and expended out of its own moneys large sums of money upon the erection of the said flats, and became indebted to the defendant James and the Commonwealth Bank of Australia and other companies, corporations and persons in large sums of money in respect of the erection of the said flats, and was induced to enter into such possession as aforesaid and to carry out such erection as aforesaid and expend such moneys as aforesaid and to incur such liabilities as aforesaid by the representations of the defendants and each of them that, if the plaintiff Company entered into possession of the said land and carried out such erection and expended such moneys and incurred such liabilities as aforesaid and recouped them and each of them in respect of certain moneys

paid by them respectively for the purchase of the said land and in connection with the erection of the said flats, the defendants James and Hamilton would transfer to the plaintiff Company the fee simple of the said land, and the plaintiff has always been and still is ready and willing and hereby offers to recoup the defendants as aforesaid but the defendant Hamilton has refused and still refuses to join with the defendant James in making such transfer, and claims that the plaintiff has no interest in the said land whatsoever.

11. As a further alternative the plaintiff Company says that, prior to the incorporation of the Company and about the time when the defendants contracted to purchase the land mentioned in par. 3 hereof, it was agreed by and between the defendants that a block of flats should be erected on the said land and that a Company should be formed with a capital of £50,000 in 50,000 shares of £1 each to take over the said land and to erect the said block of flats thereon, and that for any moneys of the respective defendants expended by any of them respectively for the purchase of the said land fully paid shares in the Company should be allotted by the Company to them respectively, and that the defendants respectively should have the right to take up and pay for at par certain other shares in the Company so as to make their total respective holdings of shares in the Company as follows, namely, that of the defendant Hamilton 20,000, that of the defendant James 26,000 and that of the defendant Miss Gibson 4,000, and that the defendant James should arrange the finance and so far as necessary advance moneys to the Company for the erection of the said flats and that the defendant Hamilton should without charge manage the erecting and do the architectural and supervision work in connection with such erection, and that payment for the shares which should be taken up as aforesaid by the defendant James should be made by setting off the amount of the face value thereof against any sums which might be advanced by such defendant to the Company, and the plaintiff Company was formed accordingly with such capital as aforesaid, and the said agreement was communicated to it by the defendants and the defendants requested and encouraged the plaintiff Company to act in accordance with the said agreement and to adopt the same, and

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at such request and under such encouragement and on the faith of the said agreement the plaintiff Company went into possession of the said land and caused to be erected and completed thereon a block of flats, being the block of flats mentioned in par. 3 hereof, and for this purpose borrowed and expended very large sums of money and expended much time and trouble but, though the defendants James and Miss Gibson have always been and now are ready and willing to transfer the said land to the plaintiff Company, and though the said defendants and the plaintiff Company have fully carried out the said agreement so far as it has fallen to be performed by them, and have always been and still are ready and willing to carry out the said agreement in all respects on their part so far as it may remain to be performed by them, and the plaintiff Company hereby offers so to do, yet the defendant Hamilton has refused and still refuses so to transfer the said land or to carry out the said agreement and claims that the plaintiff Company has no interest in the said land whatsoever.

The plaintiff claimed :—(1) That it be declared that the said agreement mentioned in par. 5 of this statement of claim should be specifically performed and carried into execution and that the same be decreed accordingly : (2) that it be declared that the defendants Hamilton and James are trustees for the plaintiff of the said land in fee simple : (3) that upon the plaintiff allotting to the respective defendants shares in the plaintiff Company of face value equivalent to the amount of any moneys of the respective defendants expended by any of them respectively previously to the said agreement for the purchase of the said land the defendants Hamilton and James be ordered to transfer to the plaintiff the said land in fee simple : (4) that in addition to specific performance of the said agreement the defendant Claud Hamilton be ordered to pay to the plaintiff the damages sustained by it by reason of his refusal and neglect to perform the said agreement and that it be referred to the Master-in-Equity to inquire what is the amount of such damages ; (*a*) alternatively that the defendants James and Hamilton be decreed to transfer to the plaintiff Company the fee simple of the said land upon the plaintiff Company recouping the defendants and each of them in respect of the moneys paid or expended by them respectively

for the purchase of the said land and/or in connection with the erection of the said flats; (*b*) as a further alternative, that the defendant Hamilton be ordered, upon the plaintiff Company allotting to him the shares to which he is entitled under the agreement mentioned in par. 11 of this amended statement of claim, to join with the defendant James in transferring the said land to the plaintiff Company; (*c*) as a further alternative, that it be declared that the plaintiff Company is entitled to a lien on the said land for the amount of the expenditure incurred by it or on its behalf thereon and that if necessary the said land be ordered to be sold by way of enforcing such lien: (5) that all necessary and proper directions be given, inquiries held and accounts taken: (6) that the defendant Hamilton be ordered to pay the costs of the plaintiff of this suit: (7) that the plaintiff should have such further and other relief as the nature of the case required.

The defendants James and Miss Gibson entered an appearance to the suit and submitted to such decree or order as the Court thought fit to make.

In an amended statement of defence filed by the defendant Hamilton, he denied the allegations contained in pars. 5, 6 and 7 of the statement of claim, and stated that he did not know and therefore could not admit the matters set out in par. 9 of the statement of claim and the readiness and willingness of the defendants James and Gibson to transfer the land as alleged in par. 11 thereof. He denied all other material allegations except the following, which he admitted: (1) in answer to par. 10 of the statement of claim, that the plaintiff Company expended out of moneys borrowed by it on the security of the personal covenants and the mortgage of the defendant James and himself large sums of money upon the erection of the flats in question and that it became indebted to the Commonwealth Bank of Australia in large sums of money; (2) in answer to par. 11 of the statement of claim, that prior to the incorporation of the Company and about the time that the defendant James and himself contracted to purchase the land mentioned in par. 3 of the statement of claim it was agreed by and between himself and his co-defendants that a block of flats should be erected on such land, and it was later agreed that a

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company should be formed with a capital of £50,000 in 50,000 shares of £1 each with a view to its taking over the said land, and that the defendant James should so far as necessary advance moneys for the erection of the said flats, and that after the formation of the plaintiff Company it borrowed and expended moneys as admitted above. Hamilton disputed the right of the Company to have a transfer of the lands upon any terms whatsoever, and submitted that if a transfer was decreed by the Court it would only be on such terms as to do complete justice between the parties. He offered (1) to transfer his interest in the land to the Company upon payment to him of moneys expended by him in connection with the purchase thereof and the erection thereon of the flats, together with reasonable remuneration for his services as an architect; (2) to consent to a decree for a lien in favour of the Company for the moneys expended by it towards the erection of the flats. It was alleged by Hamilton that such moneys were borrowed and expended by the Company as the agent of the defendant James and himself pending the making of an agreement between the Company and the defendants as to the terms upon which the Company should acquire the land. As regards the alleged agreement as to the acquisition of the subject land Hamilton craved the benefit of the Statute of Frauds.

Harvey C.J. in Eq. held that the Company was not entitled to any relief in the suit. In the course of his judgment his Honor said :— " The strict legal position which is disclosed by the facts in this case, in my opinion, is that there never was in fact any agreement between the Company and the three defendants as to the terms on which they were to convey the land with the building to the Company in consideration of shares or for any other consideration, nor is there any ground on which one can apply the equitable principles of the cases of *Ramsden* v. *Dyson* (1) or *Plimmer* v. *Mayor &c. of Wellington* (2). There never was any ignorance on the part of the directorate of the Company as to the true facts of the case. Under the articles of association Mr. James and Mr. Hamilton were the two directors with full power to act, and they were aware of the whole of the circumstances of the case from beginning to end. No meeting of the Company—that is, of the seven shareholders—was ever called

(1) (1866) L.R. 1 H.L. 129. (2) (1884) 9 App. Cas. 699.

before building commenced at which any express representation was made as to the ownership of the land, nor was the Company in general meeting ever asked to enter into any arrangement or to alter its position in any way on the footing that the land belonged to the Company or that the defendants were trustees for the Company of the land; the defendants Hamilton and James in fact used the Company as their apparent agent to construct the building. This they were able to do because of their powers as directors of the Company. The Company was an agent for undisclosed principals put forward to erect in its own name the building on their behalf, just as they might have employed some private individual, putting him forward as the contracting party, they themselves remaining undisclosed in the background."

From that decision the plaintiff now appealed to the High Court.

Other material facts are stated in the judgment hereunder.

Bonney K.C. (with him *Hooton*), for the appellant. The partnership which previously existed amongst the defendants to this suit was converted into a company limited by shares so that the partnership should be relieved of the whole of the undertaking, and also to secure the very material benefits which are enjoyed under the company laws and which do not apply to partnerships. Although there was no agreement in writing between the Company and the defendants with regard to the transfer by the defendants to the Company of the subject property, the conduct of the defendants as disclosed by the evidence clearly indicates that they recognized the Company was a real company and a separate entity, and that such a transfer was contemplated by the parties. The Company was induced to enter into possession of the property and to expend large sums of money on the erection of the building on the subject land by reason of representations made to it by the defendants. It is immaterial that the Company had no legal title to the land in question, it acted through its two directors, the male defendants. The trial Judge was in error in finding that there was no agreement between the parties for the transfer of the land to the Company, as the documentary evidence before the Court consisting of balance-sheets and insurance proposals of the Company, signed by the

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male defendants, ledgers, &c., refer in unmistakable terms to the subject property as being the property of the Company. The evidence also shows that a similar representation was made by the male defendants to a bank when seeking financial assistance for the Company. Such evidence is inconsistent with the theory that the defendants held the property on their own behalf. The defendants acted in such a way that it would be inequitable for them to retain the property. The Company was induced and encouraged to erect the building on the property and to incur liabilities on the representations of the defendants, and having erected the building and incurred expense the Company is entitled to certain rights in the building. This right is a right to a transfer of the land. The trial Judge took a wrong view of the facts. Even if the Company did not have a legal title to the land, it certainly understood that it had an equitable title to such property. Not only are the parties to this suit involved but third parties also are affected as a result of the representations made by the defendants. There may be special circumstances giving rise to an equity. The Court will grant relief, subject to conditions or otherwise, in respect of an agreement unenforceable as such but by reason of which money has been expended (*Ramsden* v. *Dyson* (1)). The right to equitable relief is primarily founded on acts done, including the expenditure of money, and the agreement and all transactions must be looked at when it is endeavoured to mould the equity as between the parties (*Dillwyn* v. *Llewelyn* (2)). In *Plimmer's Case* (3) there was no contract between the parties, and that case is an example of the elasticity of the principle and of the varying circumstances and different kinds of facts to which it will be applied : it is not confined to an agreement but extends to an expectation. The principle was applied by the Privy Council in *Michaud* v. *Montreal (City)* (4). The finding of the trial Judge that the defendants contemplated that sooner or later, and at all events when the building had been erected, the property should be transferred to the Company as consideration for shares in the Company, is sufficient to bring the case within the principles laid down in *Plimmer's Case*. All the elements

(1) (1866) L.R. 1 H.L. 129.
(2) (1862) 4 DeG. F. & J. 517 ; 45 E.R. 1285.
(3) (1884) 9 App. Cas. 699.
(4) (1923) 92 L.J. P.C. 161 ; 129 L.T. 417 (P.C.).

necessary to satisfy the doctrine in that case are present in this case, that is to say, as to possession, expenditure and inducement. The circumstances under which the Company entered into possession, erected the building and incurred obligations were within the common knowledge of the male defendants because they were also the directors of the Company. This is a stronger case than where the expectation or representation was held out or made by ordinary individuals. With the full assent, acquiescence and knowledge of the defendants, who, being the promoters of the Company, had a duty cast upon them of making full and complete disclosures to each other and to the other members of the Company, the property was treated as being the Company's property. There is no evidence to support the finding of the trial Judge that the Company was an agent for the defendants as undisclosed principals put forward to erect, in its own name, the building on their behalf. Where possession has been taken and money expended on the faith of representations made by the defendants, the Court will do its utmost to grant relief to the person to whom such representations were made, even though such grant be made subject to conditions. This suit is not an attempt on the part of the Company to obtain the benefit of the services of the defendant Hamilton as an architect without payment therefor; such a position is met by the case of *Salomon* v. *Salomon & Co.* (1). In matters of this nature the Court attaches great importance to possession, and part performance, e.g., expenditure of money (*Fry* on *Specific Performance*, 6th ed., sec. 335). The Court will grant relief to a plaintiff in a case where he fails to establish the facts alleged but on the facts proved by the defendant relief ought to be granted (*Fry*, 6th ed., sec. 635). Relief will be granted by the Court in a case where such a grant would avoid multiplicity of actions (*Fry*, 6th ed., sec. 636). Although the cases cited in *Fry* are in respect of contracts they can and ought to be applied where the aid of the Court is invoked under the principles laid down in *Plimmer's Case* (2). The principles on which the Court acts are not confined to cases which depend on the construction of a written agreement. If the facts have been found on which relief can be given, then the Court will give that relief

(1) (1897) A.C. 22.

(2) (1884) 9 App. Cas. 699.

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(*Berners* v. *Fleming* (1)). Even though the facts are vague and uncertain, there is no reason why relief in the nature of specific performance should be denied to the plaintiff. The appellant is entitled to a decree declaring the defendants trustees of the Company, and ordering them to execute a memorandum of agreement for registration under sec. 55 of the *Companies Act* (the form to be settled by the Master-in-Equity if necessary) for the allotment of the requisite number of fully paid-up shares in consideration of the transfer of the property by the defendants to the Company. Such relief is within the terms of the statement of claim, and the appellant submits to such conditions as the Court thinks proper.

Maughan K.C. (with him *Spender*), for the respondent Hamilton. The attitude now adopted by the appellant is quite different from the attitude adopted by it in the Court below, and it should be bound by its attitude in that Court. The appellant now asks for relief under the prayer for general relief: in the Court below, however, it not only did not ask for such relief but actually refused it. There has never been any agreement between the respondent and the Company as to the transfer of the land, nor any agreement as to the taking by the respondent of shares in the Company. Even according to the representations alleged in the statement of claim the duty to transfer was not to arise until all of several things had been done by the Company, and the trial Judge found against the Company on the facts as regards the representations, and also as regards the performance by the Company of the conditions attaching thereto; therefore the appellant has no right to relief in respect thereof. No equity arises in this case sufficient to found a right to relief under the principles laid down in *Ramsden* v. *Dyson* (2) and *Plimmer's Case* (3) and other cases cited on this point on behalf of the appellant. The parties at no time endeavoured to define what was to be the position or arrangement between them. The Company at all times had full knowledge of the true position through its directors, who are the defendants.

(1) (1925) Ch. 264.
(2) (1866) L.R. 1 H.L. 129.
(3) (1884) 9 App. Cas. 699.

[DIXON J. referred to *In re Northumberland Avenue Hotel Co.* (1) and *Howard* v. *Patent Ivory Manufacturing Co.*; *In re Patent Ivory Manufacturing Co.* (2).]

The case that the appellant now seeks to set up is inconsistent with the pleadings and is not open to him. The ground of appeal relied upon was negatived by the findings of the trial Judge. The Court cannot compel the respondent to enter into a contract.

Bonney K.C., in reply. The case of *In re Northumberland Avenue Hotel Co.* (1) is distinguishable, as in that case the acts of the company were all referable to an agreement which was in existence between the trustee for the company and the vendor, which is not the position in this case. As to whether a contract can be deduced from the acts of the parties, see *McLeod* v. *Cardiff Colliery Co.* (3). No difficulty arises in the matter of imposing terms as a Court of equity is vested with full power to compel parties to execute documents and, if a party is obdurate, the Master-in-Equity can be appointed for the purpose.

Cur. adv. vult.

April 14.

THE COURT delivered the following written judgment:—

This is an appeal from a decree of *Harvey* C.J. in Eq. dismissing a suit by a company against an architect named Claud Hamilton, with whom two other persons were joined as defendants, namely William Henry James and Irene Beatrice Gibson.

The defendants James, Miss Gibson and Hamilton became coadventurers upon terms which, according to the evidence of the defendant Hamilton, whom the trial Judge believed, appear to have been, in effect, these:—They were to sell a parcel of land owned by them as tenants in common in unequal shares, upon which a building stood called "Tennyson Hall" or "House." The purchase-money of which the defendant Hamilton's share amounted, in the event, to £8,500, was to be applied in a new enterprise. They were to purchase a piece of land for £11,250 and upon it erect a building

(1) (1886) 33 Ch. D. 16. (2) (1888) 38 Ch. D. 156.
(4) (1925) V.L.R. 1; 46 A.L.T. 114.

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to be called "Byron Hall." This building was to be designed by the defendant Hamilton for an estimated cost of £42,000 or £45,000, and erected by day labour under his supervision. The balance of the expenditure required was to be met by borrowing upon the security of the land as large a sum as possible and the defendant James was to supply the rest as a contribution of capital. The parties were to share in capital and profits in the fixed proportion of two-fifths for Hamilton and three-fifths for James and Miss Gibson jointly.

If the building had cost no more than £45,000, and £30,000 had been borrowed as was anticipated, the result would have been that James and Miss Gibson would have acquired their three-fifths by a contribution of £17,750 and Hamilton, his two-fifths by a contribution of £8,500 cash and of his services, the value of which he estimated at current rates to be ten per cent of £45,000, or £4,500. But whilst the amount of the contribution of Hamilton was fixed, the amount which James and Miss Gibson would be required to contribute would depend upon the cost of the building and the amount borrowed. The greater the cost of the building the greater would be their contribution, but the greater the amount borrowed the less would be their contribution.

After Tennyson Hall was sold and the site of Byron Hall was bought, James, Miss Gibson and Hamilton agreed to register a company for the purpose of carrying through the joint adventure. The capital was to be 50,000 shares of £1 each, and James and Miss Gibson were to take 30,000 shares fully paid and Hamilton 20,000 fully paid. The Company was registered accordingly on 12th January 1927. Seven persons signed the memorandum of association in respect of one share each. Three or four of these were nominees of James, and the remaining three were the defendants James, Miss Gibson and Hamilton. James and Hamilton were named in the articles as the first directors, but were required to obtain a share qualification within one month, which they failed to do. Nevertheless, they opened a bank account in the Company's name, obtained an overdraft by giving their personal guarantee and undertaking to give, and later giving, a mortgage of the land, which in the meantime had been transferred to them, and paid for the

erection of the building by overdrawing this account by means of the Company's cheques.

The work of constructing the building was done under the Company's name, and in that name all insurances were effected, and the building was generally described as the Company's. But no formal contract was entered into between the Company and the three defendants, nor was the land transferred to it, nor, before suit, were any shares allotted to the defendants. No formal meetings of directors took place, and among the co-adventurers themselves the Company was ignored. Unfortunately for the peaceable fulfilment of the vague, ill-considered and unexpressed but doubtless good intentions of the parties, the building cost a great deal more than the estimated £42,000 or £45,000, and, according to the assertion of James, his and Miss Gibson's contribution amounted in the end to some £32,000. This led him to deny that Hamilton was entitled to a two-fifths interest in the venture and to contrive that this suit should be brought in order to compel a transfer to the Company of the land with the building upon it, on terms much less favourable to Hamilton.

With the aid of his three or four nominee shareholders of one share each, he constituted a board of directors, allotted 10,000 shares to himself and 10,000 to each of two nominees, and caused the Company to file a statement of claim in this suit in Equity against Hamilton, himself and Miss Gibson. He and she submitted to a decree and the suit proceeded against Hamilton.

The statement of claim sought to fix Hamilton with an agreement between himself, James and Miss Gibson on the one side and the Company on the other in effect to transfer land and buildings in exchange for shares to the extent of their actual cash contributions paid to the vendors of the land or the Company direct, not exceeding £20,000 and £30,000 respectively. Alternatively the pleading alleged that the Company was induced to build Byron Hall upon the land by representations that the three defendants would transfer the land to it upon the Company recouping them what they had expended in purchasing the land and towards erecting the building. A third cause of action alleged in the alternative was that the Company had been induced and encouraged to build Byron Hall

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upon the faith of the three defendants carrying out a contract *inter se* to transfer to the Company upon the terms set up in the first alternative.

Harvey C.J. in Eq. dismissed the suit. He considered that the three defendants had made no contract with the Company, and that the arrangement between the three defendants did not consist of the terms that Hamilton was to receive shares commensurate only with his money contribution. The learned Judge found that Hamilton was to receive an interest of two-fifths in consideration of £8,500 cash and of his services. Such an interest consisted of 20,000 £1 shares in the Company.

We agree with these conclusions. The arrangement between the three defendants was the subject of conflicting oral testimony upon which *Harvey* C.J. in Eq. was in a better position than we are to form a judgment, but, apart from this, the probabilities as disclosed by the printed evidence are strongly in favour of his view.

But, in any case, the three defendants who beneficially owned the land and controlled the Company occupied a position in which they were entitled to deal as they chose in relation to the Company, and while they of course intended to invest the Company with property in the undertaking, they took no step to do so. Their mutual intention to clothe the Company with title and to put all the assets of the venture in its ownership, creates no legal relationship with the Company as an independent legal person, and the fact that they caused the Company as their automaton to act as if their intention had already been carried out cannot advance the matter. The truth is that the actual establishment of proprietary and legal relations with the Company was and continued to be a matter *in fieri*.

The other causes of action set up in the alternative by the statement of claim assert equities which do not arise from the facts.

The Company was not misled by representations or otherwise into making and acting upon any assumption which Hamilton must make good in its favour or from which he may not depart.

The defendants as coadventurers owned the land and such of the capital of the Company as was issued. They were at liberty to deal as they chose with the credit of the Company, if it had any,

and to use its name for their own purposes. In doing so they were not adopting any false assumption upon its behalf. They intended *in futuro* to transfer the undertaking to the Company and, in erecting the building, they simply used the Company's name and independent personality in the manner which they found convenient.

The Company was their creature and they could and did make it act as they desired. The attempt, in the absence of contract, to find some other obligation or relationship requiring the fulfilment of intentions *de futuro* must fail as most attempts of that nature do.

By its notice of appeal the plaintiff Company sought a decree compelling the transfer of the land upon the terms which *Harvey* C.J. in Eq. thought had in fact been arranged among the coadventurers. This entirely deserts the plaintiff's pleading and such a case could not now be entertained both for this reason and because the question whether the Company has disabled itself from performance of such a contract, or has otherwise disentitled itself to relief, was never investigated or considered. But, apart from this, if the question were open, it is plain that the reasons we have already given for the conclusion that the defendants made no contract with the Company and incurred no equitable duty to the Company to transfer the land to it apply whether the terms be those stated in the pleadings or those in the notice of appeal.

The appeal will be dismissed with costs.

Appeal dismissed accordingly.

Solicitors for the appellants, *Rowley, Roseby & Co.*

Solicitor for the respondent Hamilton, *D. Lynton Williams.*

J. B.