**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NUMBER : 16451/2010**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES ~~YES~~ / NO
(3) REVISED ✓

25/2/2014
DATE

SIGNATURE

In the matter between

**MOSCON THYME CC** Plaintiff

and

**J P KRUGERRAND DEALS CC** First Defendant

**IOANNIS SALALIDES** Second Defendant

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**JUDGMENT**

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**André Gautschi AJ :**

[1] In this matter the plaintiff as the seller sues the first defendant as the purchaser and the second defendant as surety for payment of the outstanding balance (R673 789.00) due under an agreement of sale in terms of which the plaintiff sold a number of Levi's watches to the first defendant.

[2] The plaintiff had enjoyed an exclusive distributorship licence from O.D.M. Design and Marketing Limited ("ODM"), a Hong Kong based company which holds the distributorship rights for Levi's watches in Asia and Africa, and had conducted business accordingly. The plaintiff wished to divest itself of this business, and sold its remaining stock (less "discontinued items") to the first defendant, which was to become the new distributor in the Republic of South Africa.

[3] The agreement of sale was a written one concluded on 16 October 2009. The following terms are relevant to this judgment :

3.1 The first defendant purchased "the assets" which were defined as "the goods listed in a schedule annexed hereto marked annexure "A" comprising stock and the display stands listed in annexure "B" hereto at the depreciated value". The items would be valued at cost price less an adjustment discount of 10%. The plaintiff undertook to exclude "discontinued items" to the value of approximately R100 000 from the stock to be sold (clause 2.2).

3.2 Annexure "A" to the agreement is a list of various watches described by code, and their cost prices, and distinguishes between the stock sold to the first defendant totalling R803 885.20 and the discontinued items totalling R80 781.49. From the firstmentioned figure, an amount of R80 388.52 is deducted, being the 10% discount. An amount of R64 560.78 for stands (annexure "B") is then added, and VAT is added

to the total. The grand total payable by the first defendant to the plaintiff was therefore R898 385.50.

3.3 Payment of the purchase price would be made by way of a deposit of R224 596.00 and thereafter four equal monthly instalments of R168 447.00 each, commencing on 1 November 2009 and thereafter on the first of each successive month (clauses 5.1 and 5.2)[1].

3.4 Interest would accrue on the outstanding balance from time to time at the rate of the prime lending rate as dictated by Standard Bank of South Africa Limited plus two percentage points (clause 5.3).

3.5 The plaintiff would remain the owner of all the assets sold as listed in annexures "A" and "B", and ownership of the assets would only pass to the first defendant when the full purchase price had been paid. The first defendant agreed and undertook that it would not attempt to cede, assign, sell, pledge or otherwise hypothecate the assets until such time as ownership passed to it (clause 6.1).

3.6 The agreement was subject to a suspensive condition, which I quote in full:

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1 These amounts do not add up to R898 385.50, but the difference is negligible and may be ignored.

"7 **SUSPENSIVE CONDITION**

7.1 The Seller is the sole license holder to sell the assets in the Republic of South Africa, having received the exclusive distributorship rights from O.D.M. Design and Marketing Limited.

7.2 This sale of assets is ultimately dependant on O.D.M. Design and Marketing Limited approving the Purchaser as the new distributor in the Republic of South Africa for a minimum period of two years.

7.3 Should approval as mentioned in 7.2 above not be given, then this agreement will have no force and effect and each party will have no claims against each other." (*sic*)

[4] The identity and particulars of the plaintiff, the conclusion and terms of the agreement, delivery of the watches, the payment of the deposit and the execution of the suretyship are all common cause. The only issue on the pleadings on the claim in convention is whether the condition precedent was fulfilled. This issue has the following history :

4.1 The action was instituted on 5 May 2010. In the defendant's affidavit resisting summary judgment deposed to by the second defendant on 22 July 2010 the following admission is made :

"9. After the finalising of the agreement and the fulfilment of the suspensive conditions set out in the agreement, which are, for present purposes, not relevant, the First Defendant took possession of the watches."

4.2 In its initial plea, dated 28 September 2010, the defendants admitted that :

"ODM Design and Marketing Limited approved the First Defendant as a distributor of its products in South Africa for a minimum period of two years."

4.3 In December 2012 the defendants gave notice of their intention to amend their plea and counterclaim. There was no objection to the amendment, and the amended pages were duly filed. The effect of the amendment was *inter alia* a withdrawal of the admission that the condition had been fulfilled, a fact which it seems went unnoticed at the time by the plaintiff's legal representatives.

4.4 Because of the withdrawal of the admission, the fulfilment of the condition was now in issue on the pleadings. The plaintiff replicated to the plea, and in January 2013 and again in September 2013 sought to amend the replication by introducing an estoppel in regard to the fulfilment of the suspensive condition. This amendment was opposed, and led to an opposed application before my brother Monama J. On 20 January 2014 he granted the amendment.

[5] Mr Pincus, who appeared with Mr Rudolph for the plaintiff, sought to persuade me that there was in reality no dispute concerning the fulfilment of the condition. He took me through documents in the plaintiff's trial bundle (the status of which had been agreed at the pre-trial and which I shall deal with presently) which indicated that prior to the agreement being signed by the parties, ODM had in fact approved the first defendant as the new distributor, and the first defendant thereafter acted as distributor for a period of some three years. Thus, submitted Mr Pincus, there was no dispute on this aspect, it would not require evidence, and I should rule accordingly.

[6] Mr Kaplan for the defendants thereupon explained that there was indeed still a dispute on this aspect, the ambit of which was that, although the first defendant had been appointed as a distributor, it had not been appointed for a minimum period of two years.

[7] It seemed to me, and I advised counsel of my views during the course of argument, that the question of fulfilment of the condition precedent was an issue on the pleadings and had to be dealt with accordingly. I declined to make the ruling sought by Mr Pincus.

[8] Mr Pincus thereupon called Ms Mandy-Anne Berridge as the plaintiff's only witness. The upshot of her evidence was the following :

8.1 She is employed by Levi Strauss South Africa ("LSSA") and had at the relevant time been responsible for its non-apparel business.

8.2 ODM was LSSA's official licensing partner for the watch business. ODM appointed distributors, and only appointed one distributor at a time in a given region.

8.3 The invoices in the plaintiff's trial bundle, which showed sales by ODM to the first defendant over the period July 2009 to October 2012, indicated to her that the first defendant had been appointed as ODM's distributor in South Africa for that whole period. As far as she knew no-one else had been appointed in that period.

8.4 She had never seen any formal documentation regarding the appointment, but she referred to email correspondence of which she was either the initiator or the recipient. In one, dated 9 September 2009, she referred to a meeting with Mr Rob Pagan of the first respondent, and looked forward to an update in regard to "the discussions between yourselves and ODM".

8.5 On 2 October 2009 Ms Berridge was advised in an email by Mr Martin Ko of ODM that they had been in touch with Mr Robert Pagan since end August 2009 and that full sets of catalogues, commercial and marketing materials about Levi's watches had been sent to "them" for study and evaluation in early September 2009. It was clear that there were ongoing negotiations between the first defendant and ODM. She had been given this information in response to an email from her asking for an update on the distribution business going forward.

8.6 On 7 October 2009 Ms Berridge received an email from Ms Cindy Ho of ODM indicating that "our watches licensee would like to appoint JP Krugerrand Deals CC as their SA distributor", and asking "if it's OK with LSSA and if you have any concerns." Ms Berridge responded on 8 October 2009 that LSSA did not have any objection.

8.7 On 6 November 2009 one Stacy Struthers, who was a non-apparel coordinator with LSSA and reported to Ms Berridge, addressed an email to various LSSA employees, and copied Ms Berridge and Mr

Pagan. In the email she says :

> "This note serves to inform you that as of 01st November 2009, JP Krugerrand Deals CC has been appointed by the regional licensee ODM in conjunction with LSSA as the new Levi's® watch distributor for South Africa.
>
> Rob Pagan will be leading the JP Krugerrand team in the new watch business and we look forward to building this category in conjunction with JP Krugerrand going forward."

Ms Berridge said that Mr Pagan had never denied the correctness of the contents of this email.

8.8 Ms Berridge was unable to say for what period the first defendant had initially been appointed as distributor.

[9] The plaintiff thereafter closed its case, and the defendants closed their case without leading any evidence.

[10] Mr Kaplan submitted that the plaintiff's evidence did not establish *prima facie* that the condition, and more particularly whether the appointment had been for a minimum period of two years as required by clause 7.2, had been fulfilled. I do not agree. The plaintiff's *prima facie* case in my view is established by the following evidence :

10.1 The admission made in the affidavit resisting summary judgment :

10.1.1 Apart from being an affidavit in an interlocutory proceeding in the same matter which proves itself[2], it is contained in the plaintiff's trial bundle, in respect of which the parties reached the following agreement at the pre-trial conference :

> "16 **STATUS OF DOCUMENTS**
>
> 16.1 Once the bundle has been finalised, the documents or copies thereof to be used at the trial will, without further proof, serve as evidence of what they purport to be, unless challenged and without any admission as to the content thereof.
>
> 16.2 In the event of any party challenging a specific document, such party will be required to notify the other side of its challenge by no later than 15 January 2014."

(I was advised that there had been no challenge to any documents in the plaintiff's trial bundle.) The effect of this agreement is that documents in the plaintiff's trial bundle are taken to be authentic and may be referred to in evidence without further proof, but are not proof of the truth of their contents. Applying this to the admission in the affidavit resisting summary judgment, and leaving aside that it is an affidavit in an interlocutory proceeding in the same matter, it is proof that the second defendant made the admission under

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2 Howard & Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa 1971 (3) SA 937 (T) at 940E-G

oath, but is not proof that the admission is true. (The same effect is achieved by the fact that it is contained in an affidavit in an interlocutory application in the same matter.) The admission made in the affidavit resisting summary judgment may therefore on two bases be referred to in evidence without further proof, and the plaintiff is entitled to rely thereon.

10.1.2 An admission is the confirmation of an unfavourable fact or a statement made by a party adverse to its case. Formal admissions made in pleadings or in court serve to reduce issues and bind the maker. The admission in question was not a formal admission. Rather it was an informal admission, which is usually made out of court but could also be made in court without intending to reduce the facts in issue. It is an item of evidence which contributes to proof of the facts in issue and it can be contradicted or explained away[3]. It is controversial whether an informal admission is an exception to the rule against hearsay, or is not hearsay evidence at all[4], but it is unnecessary that I concern myself with this

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3 See generally Schwikkard & van der Merwe, Principles of Evidence, 2nd ed, page 287; Schmidt & Rademeyer, Law of Evidence, 7-3, 19-3

4 Zeffert *et al*, The South African Law of Evidence, 429

controversy; it is sufficient for the purposes of this judgment that the admission is admissible.

10.1.3 The admission contained in the affidavit resisting summary judgment is therefore before me as evidence, and is admissible as an admission made by the first defendant.

10.1.4 The admission alone, in my view, would give the plaintiff a *prima facie* case on the question of fulfilment of the suspensive condition.

10.2 Mr Pincus sought to make something of the fact that an admission had been made in the pleadings and later withdrawn. The difficulty with that in my view is precisely that the admission was withdrawn, and no longer exists. It therefore no longer has the status of an admission. It has been contradicted by a denial. It is no doubt for that reason that withdrawals of admissions by way of amendment require special explanation when challenged. I do not believe that I can rely on this admission.

10.3 Ms Berridge's evidence, read with the documents in the trial bundle which enjoy the status set out above, establishes that the first defendant was in fact appointed as a distributor and acted as such for more than three years. Whilst the documentation does not indicate the length of the initial appointment, and Ms Berridge was unable to cast

light on this aspect, such documentation read together with an allegation in a letter by plaintiff's erstwhile attorney that the condition had been fulfilled which was not denied in subsequent correspondence, leads to the probable inference that the appointment had been for a minimum period of two years.

[11] In the face of the aforegoing, the defendants elected not to give evidence. That elevates the *prima facie* case to a conclusive one[5]. Had the initial distributorship been for less than two years, it would have been an easy matter for the defendants to have placed that evidence before me, but they elected not to do so. This is of greater importance when the facts are peculiarly within the knowledge of the defendants, when less evidence will suffice to establish a *prima facie* case[6]. Mr Kaplan submitted that the facts were not peculiarly within the knowledge of the defendants because they were also within the knowledge of ODM. However, in my view, peculiarly in this context means that the facts are within the knowledge of only one of the litigating parties, and not that the defendants are the sole repositories of the information, as opposed to the first defendant's other contracting party, ODM, which is not a litigating party.

[12] Mr Kaplan urged upon me to draw an adverse inference for the failure by the

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5 Ex parte Minister of Justice : In re R v Jacobson and Levy 1931 AD 466 at 478

6 Union Government (Minister of Railways) v Sykes 1913 AD 156 at 173/4

plaintiff to have called a witness from ODM. I have already indicated that ODM is a Hong Kong based company. A party who wishes to have a court draw an adverse inference for the failure by the other party to call a witness, must show that the witness is available[7]. Such availability means that the witness's testimony could have been procured by the party against whom it is sought to draw an adverse inference[8]. Where the witness is out of the country and therefore not compellable, it is in my view necessary not only to show that the witness is available in the sense described above, but also willing to give evidence.

[13] The defendants did nothing to show me that anyone from ODM was either available or willing to give evidence in South Africa. In my view, no adverse inference can be drawn against the plaintiff. In addition, Mr Pincus pointed out that the contractual relationship between the plaintiff and ODM had ceased in 2009, and that thereafter there had been a contractual relationship between the first defendant and ODM until 2012. Therefore, if anyone had access to ODM and could persuade someone from ODM to give evidence, it was more

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7 Elgin Fireclays Limited v Webb 1947 (4) SA 744 (A) at 749/750 ("... the inference is only a proper one if the evidence is available .... Moreover, the position with regard to the herd [the witness] was not investigated; he may not have been available as a witness ..."); R v Phiri 1958 (3) SA 161 (A) at 165 ("... none of the questions approached closely to the issue whether to the appellant's knowledge the witnesses were available at the time of the trial. Since that issue was not properly investigated and it was not proved that the witnesses were then available no adverse inference to the appellant should have been drawn from the fact that his two friends were not called as witnesses."); Kock v S.K.F. Laboratories (Pty) Ltd 1962 (3) SA 764 (E) at 766A-C ("The prerequisite for the drawing of an inference adverse to a party is that the witness must be available.")

8 Kock v S.K.F. Laboratories *supra* at 766B-C

probably the first defendant. In any event, once a *prima facie* case is established, the adverse inference would not assist the defendants.

[14] I am accordingly of the view that the plaintiff has proved that the condition precedent was fulfilled. That being the case, it is unnecessary to deal with the estoppel, which has in any event not been proved. The plaintiff is entitled to judgment on the claim in convention. The interest rates have been agreed (albeit with convenient end-of-month change-over dates) and I shall reflect the agreed interest rates in the order which I set out at the end of this judgment.

[15] There is also a counterclaim by the first defendant. In its final form, it alleges that the agreement had been induced by fraudulent misrepresentations by the plaintiff's representatives that the wrist watches constituted new stock and were fashionable and saleable to the retail market as opposed to "dead" stock which the plaintiff had been unable to sell for a period in excess of six months. The first defendant claimed that as a result of the fraudulent misrepresentations it had suffered damages (as finally amended) of R83 106.00, alleged to have been made up as follows :

| | | |
|---|---|---|
| "3.7.1 | Amount First Defendant would have realised on the resale of the wrist watches had they been as represented | 1 654 920,00 |
| 3.7.2 | Less contract price | 898 385,00 |
| 3.7.3 | Less balance of contract price remaining unpaid | 673 429,00 |
| | Total | 83 106,00" |

[16] Mr Pincus indicated at the outset of the hearing that he wished to argue that

the measure of damages, and therefore the cause of action, in the counterclaim were not sustainable in law. I ruled that this issue was to be separated in terms of rule 33(4) and heard before any other issues in the counterclaim. I accordingly heard argument on this aspect, and both parties submitted supplementary heads.

[17] The first defendant's counterclaim is for damages arising out of a misrepresentation inducing the agreement. In such a situation, the contract is voidable and not void, and the first defendant has a choice between resiling from the contract and claiming damages, alternatively enforcing the contract and claiming damages[9]. In this case the first defendant chose not to resile from the contract, but rather to enforce it and claim damages. However, in terms of the pleaded counterclaim, the first defendant alleged that it was induced by the representation to enter into the agreement and to effect payment of the deposit, "whereas had First Defendant known the true facts it would not have done so." The pleaded case is accordingly that the first defendant would not have entered into the agreement at all had it known the truth. That is known as causal fraud (*dolus dans in contractum*) as opposed to incidental fraud (*dolus incidens in contractum*)[10]. In the former case, the measure of damages is the difference between the value of the first

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9 Frost v Leslie 1923 AD 276.

10 LAWSA, 2nd ed, Vol 7, para 65

defendant's performance and the value of the plaintiff's performance[11]. In the case of incidental fraud, that is where, had the first defendant known of the misrepresentation, it would still have entered into the agreement but on more favourable terms, the measure of damages is the difference between the price actually paid and the price the first defendant would have paid and which the plaintiff would have accepted had the misrepresentation not been made[12].

[18] Translating the principles into the present pleaded case : The first defendant paid or should have paid R898 385.00 for the watches. Let us assume that the true value of the watches (i.e. their true cost price less 10%, and not what they could have been sold for) was R700 000. The first defendant would then be entitled to the difference between those two amounts, namely R198 385.00.

[19] Mr Kaplan relied on Hunt v Van der Westhuizen[13]. Although Seligson AJ in that matter expressed the view that there should be flexibility in determining damages, the facts of that matter are aligned with the allegations in the present matter, and the measure of damages there awarded accords with the principles I have set out above. In that case the plaintiff alleged that she would not have purchased a property for R140 000 (as she did) but would have paid

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11 Trotman and Another v Edwick 1951 (1) SA 443 (A)

12 See for example Scheepers v Handley 1960 (3) SA 54 (A) at 59H; De Jager v Grunder 1964 (1) SA 446 (A) at 457-462

13 1990 (3) SA 357 (C)

R11 500 less because the swimming pool, unbeknown to her, had been constructed of brick and not gunite, and it would have cost R11 500 to gunite the pool. She was awarded damages of R11 500. This case therefore supports the plaintiff's contentions.

[20] The case of Mayes and Another v Noordhof[14], also relied on by Mr Kaplan, likewise does not assist the first defendant. The court there subscribed to the principle that the method by which patrimonial loss is to be proved is a factual question which could vary from case to case. The damages awarded was the difference between the market value of the property with the squatter camp next to it (which had not been disclosed to the purchaser) and the value thereof without the squatter camp next to it. The same applies to Ranger v Wykerd and Another[15], where the cost of repairs of the undisclosed defect to a swimming pool was taken to be the measure of damages, even though such costs might also have represented the amount of a contractual claim based on a breach of warranty. The effect was therefore that the damages awarded were the appellant's (plaintiff's) loss of patrimony caused by the delict which coincidentally happened to be the cost of repairs[16].

[21] In none of the cases referred to me by Mr Kaplan was the innocent party

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14 1992 (4) SA 233 (C)

15 1977 (2) SA 976 (A)

16 See at 994H-995B

allowed to claim the profit he would have made had the *merx* been as represented.

[22] The true measure of damages still remains as enunciated in Trotman and Another v Edwick[17], in which it was held that :

> "A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him."

In that case the amount of damages awarded to the plaintiff was the difference between what he had been induced to pay for the *merx* and what it was in fact worth. Furthermore, in that case the suggestion that the correct measure of damages was the difference between the price paid and the value of the putative *merx* if the false representations were true together with any consequential damages was dismissed by saying that "The results of the application of the suggested rule would be startling"[18].

[23] In the pleaded counterclaim, the first defendant is not claiming compensation for an alleged patrimonial loss. It is attempting to claim the value by which its patrimony would have increased if the alleged misrepresentations had been true. This measure of damages as pleaded is not permissible and enjoys no

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17 *Supra* at 449B-C

18 At page 449H-foot

authority in support of it.

[24] In Transnet Ltd v Sechaba Photoscan (Pty) Ltd[19] the Supreme Court of Appeal allowed damages in the form of a loss of prospective profit which the victim had expected to earn, but been deprived of by a fraudulent tender process. However, in that case the fraud had prevented a contract, which would have been profitable, from being concluded. That is distinguishable from the present case, in which the alleged fraudulent misrepresentation induced the contract and did not prevent it.

[25] The counterclaim as formulated claims the contractual measure of damages, which is, on the authorities referred to above, inapposite and impermissible. In my view, the counterclaim is therefore not sustainable, and falls to be dismissed.

[26] Mr Pincus asked for punitive costs in the event of the plaintiff being successful. In the light of the history surrounding the fulfilment of the condition as an issue, a believe that a punitive costs order is warranted. What was admitted to be due fulfilment of the condition, and on the strength of which the defendants kept and sold most of the watches, and continued as a distributor for ODM for more than three years, was thereafter denied, but nevertheless proved. If that issue had remained admitted, the plaintiff would not have been kept out of its

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19 2005 (1) SA 299 (SCA)

money for almost four years after issue of summons. Conduct by a party in litigation which has the effect of being vexatious, even if not intended to be vexatious, may deserve a punitive costs order[20]. I shall accordingly award costs on the attorney and client scale in respect of the claim in convention. However, in respect of the counterclaim, even though misconceived, I cannot find that it is either intentionally or in effect vexatious, and I shall accordingly not award punitive costs in regard thereto. In the light of the allegation of fraud, the employment of two counsel by the plaintiff was warranted.

[27] I make the following order :

"1. The first and second defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay to the plaintiff :

1.1 The sum of R673 789,00.

1.2 Interest on that amount at the following interest rates (being simple interest) :

(a) from 1 February 2010 to 30 March 2010 at 12.5% per annum;

(b) from 31 March 2010 to 29 September 2010 at 12% per annum;

(c) from 30 September 2010 to 29 November 2010 at 11.5% per annum;

(d) from 30 November 2010 to 30 July 2012 at 11% per annum;

(e) from 31 July 2012 to 30 January 2014 at 10.5% per annum;

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20 In re Alluvial Creek Ltd 1929 CPD 532 at 535

(f) from 31 January 2014 to date of payment at 11% per annum.

1.3 Costs of the claim in convention on the attorney and client scale, such costs to include the costs of two counsel.

2. The first defendant's claim in reconvention is dismissed with costs, such costs to include the costs of two counsel."

**ANDRÉ GAUTSCHI**
**ACTING JUDGE OF THE HIGH COURT**

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| **Date of hearing** | : | 4 and 5 February 2014 |
| **Date of judgment** | : | 25 February 2014 |
| **Counsel for the plaintiff** | : | B K Pincus S.C.<br>E Rudolph |
| **Instructed by** | : | Witz & Isakov Attorneys<br>(Mr J Isakov) |
| **Counsel for the defendants** | : | J L Kaplan |
| **Instructed by** | : | Hirshowitz Flionis Attorneys<br>(Mr A Flionis) |

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