[2024] JMCC Comm 35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. CD2018/00216

BETWEEN	**MARCIA BELLEGARDE (Executrix, Estate Lloyd Winston Wilson deceased)**	**CLAIMANT**
AND	**DONOVAN LEWIS**	**1ST DEFENDANT**
AND	**IDEAL BETTING COMPANY LIMITED**	**2ND DEFENDANT**

IN OPEN COURT

Mesdames Tana'ania Small Davis KC, Kathryn Williams & Kerri-Ann Allen Morgan instructed by Livingston, Alexander & Levy for the Claimant

Mr. B. St. Michael Hylton KC, Mr. Jerome Spencer and Ms Daynia Allen instructed by Hylton Powell for the Defendants

Heard June 28, 29, July 3,4,7, 27, 2023 & September 19, 2024

Company Law – Oppression – Breach of Reasonable Expectation –– Fraud – Directors' duties – Breaches of Articles of Association and Companies Act – Shareholders' remedies

Companies Act, 1965, Section 213A Companies Act, 2004

WINT- BLAIR J

[1] At the outset, I wish to respectfully state that having read and considered all of the evidence and the submissions presented by both sides, if no specific mention of an item of evidence or point raised in submissions is reproduced here, it is no indication of a failure to appreciate or a decision to ignore it, rather the entire case has been given due consideration and this decision attempts instead to be issue-based.

The Parties

[2] The claimant is the executrix in the estate of Lloyd Winston Wilson, deceased ("Mr. Wilson"), being so named in his last Will and Testament dated May 7, 1989. She received a grant of Probate on January 12, 2016. Lloyd Wilson who died on the 29th of November 1994, was her father, a shareholder as well as a director of the 1st defendant ("the company").

[3] The company is a limited liability company incorporated in December 1970 under the laws of Jamaica. It carries on business as a bookmaker and is a betting service licensed to take bets and wagers on any lawful sporting activity. The 2nd defendant ("Mr. Lewis") is one of the directors and the majority shareholder of the company.

[4] This claim concerns many pages of documentary evidence and the oral evidence of witnesses.[1] The court bears in mind the passage of time in its assessment of the credibility and reliability of the evidence presented.

[5] The claimant claims against the defendants:

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[1] **The documentary evidence in this trial has been very helpfully agreed by King's Counsel on either side and is contained in marked agreed bundles. Documents 29 and 30 have been removed from bundle 4.**

a) **A declaration that the 1st defendant and/ or the 2nd defendant acted in a manner which was oppressive, unfairly prejudicial to and/ or showed unfair disregard of the interests of Lloyd Wilson (deceased), the claimant and/or any other representative of the Estate of Lloyd Wilson.**

b) **An Order that the share register of the 1st defendant be rectified by:**

   i. **Fixing the authorised share capital of the Company at 100,000 ordinary shares of nominal value of $1 each.**

   ii. **Striking out the name of Eulalee Huie as ever being a shareholder and reducing the 2nd Defendant's shareholdings by a corresponding amount to reverse the purported acquisition of said shares by the 2nd defendant from Eulalee Huie.**

   iii. **Striking out the number of shares held by the 2nd defendant and substituting in lieu thereof the number of shares, as determined by this Honourable Court; and**

   iv. **Inserting the name of the Estate of Lloyd Wilson as the holder of 22,000 shares representing 22% of the company's share capital.**

c) **An Order directing the defendants to provide an account, including dividends and payments made to each shareholder of the 1st defendant from incorporation to the present.**

d) **An Order that the shares of the 1st defendant be valued by a valuator agreed by the parties, failing which by a valuator appointed by this Honourable Court.**

e) **An Order directing the 1st defendant and/or the 2nd defendant to purchase the shareholding in the 1st defendant found to be properly held in the name of the claimant on such terms and/or conditions as is ordered and/or determined by this Honourable Court.**

f) An injunction prohibiting and/or restraining the defendant from interfering, making changes, additions and/or interlineations to the shares register of the 1st defendant until the determination of this claim or further order.

g) Damages for fraud.

h) General Damages.

i) Interest at a commercial rate of 15% per annum for such period to be determined by this Honourable Court.

j) Such further and other relief as this Honourable Court deems fit.

k) Costs

The Background

[6] Ideal Betting was incorporated in December 1970. The company had an authorised share capital of $20,000 ordinary shares, each valued at $1.00. Reginald Wilson, Lloyd Wilson, and Donovan Lewis were each issued one share.

[7] After the company was incorporated, Reginald Wilson, Lloyd Wilson and Donovan Lewis were each issued 799 shares, 3,999 shares, and 10,599 shares, respectively. Noel Huie, K.R. Abrahams and Delores Scott were also issued 1,600, 1,600 and 1,400 shares respectively. All 20,000 shares were issued and held as follows:

Donovan Lewis	53%	10,600 shares
Lloyd Wilson	20%	4,000 shares
Noel Huie	8%	1,600 shares
KR Abrahams	8%	1,600 shares
Delores Scott	7%	1,400 shares
Reginald Wilson	4%	800 shares

TOTAL 100% 20,000 shares

[8] The company increased its share capital in 1989 to $500,000 by the creation of 400,000 ordinary shares valued at $1.00. and again in 1995 from $500,000 to $1,500,000. Between 1970 and 1995, Mr Lewis' shareholding in the company increased on the following four occasions:

1. **In 1984, Mr Lewis purchased 1000 shares held by the estate of KR Abrahams.**

2. **In 1989 Mr Lewis took up the offering to buy an additional 400,000, shares newly created on November 17, 1989. The claimant takes issue with this allotment.**

3. **In 1994, Mr Lewis purchased 4000 shares held by Reginald Wilson. The claimant takes issue with this allotment.**

4. **In 1994, Mr Lewis purchased 22,000 shares held by Lloyd Wilson, now deceased. The claimant claims that there was never an agreement for the sale of these shares and they were acquired by fraudulent means.**

5. **In 2003, Mr Lewis acquired the 12,800 shares held by Eulalee Huie. The claimant seeks an order striking out the name of Eulalee Huie as ever being a shareholder and reducing the shareholding of Mr Lewis by a corresponding amount to reverse the purported acquisition of said shares from Eulalee Huie.**

[9] The evidence presented by Mrs Small-Davis, KC for the claimant was that Mr Lewis was in total control of Ideal Betting Company Limited. He did not share control, he ran a tight ship, and things had to be done his way. Mr. Lewis was its director, chairman, secretary and eventually its majority shareholder. He chaired the meetings and drafted and signed all minutes of meetings. He signed all the financial statements and all the annual returns. When they were not signed by him, Mr Lewis allowed non-directors to sign company documents. Mr Wilson on the

other hand, was no more than a passive investor who left the running of the company up to Mr Lewis who was an accountant by profession.

[10] The claimant submits that breaches of the Companies Act and the articles of association are clearly made out on the evidence as, the increase in share capital and the 400,000 additional shares created in November 1989 were not authorised at a properly convened general meeting.

[11] These newly issued shares were not offered to the shareholders prior to being allotted to Mr. Lewis. Alternatively, even if they were offered, the shareholders did not receive the minimum period of 28 days over which to make their election for the allotment in breach of article 7 of the articles of association. This would render the allotment of shares to Mr Lewis invalid. Additionally, the company and/or Mr Lewis caused and/or permitted increases in the share capital and the allotment of shares contrary to the articles and the Companies Act without the knowledge or consent of Lloyd Wilson. This allotment of 400,000 additional shares to Donovan Lewis in November 1989 reduced Lloyd Wilson's interest in the company from 22% to 4.4%.

[12] The claimant contends that Mr Lewis fraudulently procured the removal of Lloyd Wilson's name from the register of shares by purportedly transferring twenty-two thousand (22,000) shares from Lloyd Wilson to himself.

[13] Additionally, the claimant argues that Donovan Lewis conducted the business or affairs of the company in a manner that was oppressive, unfairly prejudicial to, or which unfairly disregarded the interests of Lloyd Wilson and/or his estate.

[14] The defendants deny these allegations arguing that the action is statute barred. They contend that the claimant is estopped from bringing the suit and argue for the application of the doctrine of laches as Lloyd Wilson being a director of the company participated in its management and governance and had knowledge of all decisions made by Mr Lewis.

[15] **It is the defendants' case that Lloyd Wilson acted as a director and played an active role in the management and operations of the company from its incorporation in 1972 until his death in December 1994. He participated in and agreed with the decisions to increase the company's share capital and to make allotments. He also signed the annual returns made up to December 27, 1989. The defendant argues that the claimant is estopped from challenging the increase in share capital and allotment of shares to Mr Lewis because Mr Wilson's signature on the Annual Returns made up to December 27, 1989, signified knowledge and acceptance of the decision. Both Lloyd Wilson and Donovan Lewis signed the company's Audited Financial Statements for the year ended February 28, 1993.**

[16] **The defendants contend that Lloyd Wilson voluntarily transferred 22,000 shares to Mr Wilson for valuable consideration and signed the instrument of transfer to effect that transfer. The company was operated in keeping with its articles of association and all applicable laws, and not in a manner that was oppressive or unfairly prejudicial to Lloyd Wilson. They maintain that Donovan Lewis did not act fraudulently nor did he breach his fiduciary duty.**

[17] **The defendants' position is that all the increases in the company's share, capital and allotments were done in accordance with the company's articles of association. The company filed the relevant notices at the office of the Registrar of Companies regarding any respective increases and allotments.**

[18] **Both sides agree that Lloyd Wilson was a shareholder, director and the representative of the company at meetings of the Jamaica Bookmakers Association. It is agreed that he was a signatory on the company's bank accounts.**

[19] **With respect to record keeping, the evidence is that Mr Lewis was both chairman and secretary. He signed the minutes of all Board meetings. The minutes of meetings between 1971 and 1995 are identical in form and content for what they record as well as what they fail to capture.**

[20] **The allotment of the 400,000 shares on November 17, 1989, was undisputedly a significant share increase and Mr Lewis acquired those additional shares. This issue gives rise to a determination of the role played by Mr Wilson in the company.**

Issues

[21] **Among the issues to be determined are:**

1) **Whether Lloyd Wilson was a passive investor or active shareholder.**

2) **Whether there was a fraudulent transfer of 22,000 shares from Lloyd Wilson to Donovan Lewis.**

3) **Whether the claimant has proven fraud.**

4) **Whether the claimant has established oppression, unfair prejudice or unfair disregard on the part of the company and/or Mr. Lewis with regard to the estate of Lloyd Wilson.**

5) **Whether this claim is statute barred.**

6) **Whether the doctrine of laches applies to this claim.**

The Approach of the Court

[22] **In order to do my duty as the trial judge, I have adopted the approach formed over time, that in assessing the credibility of a witness, demeanour is but one of the many factors to be considered. There is also the substance of the evidence which is generally to be approached with reason, logic and common sense. The court will consider the evidence of each witness against the backdrop of the documentary evidence adduced at trial.**

[23] I find support for this approach in the dictum of Robert Goff LJ in Armagas Ltd v Mundogas SA (The Ocean Frost)[2] which states that:

> **"… I have found it essential when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."**

[24] The evidence before the court was partly oral and partly documentary. The assessment of the witnesses will fall under the issues as identified by the court. The documents presented at trial are items of real evidence, it is for the court to determine the weight to be attached to them.

[25] The applicable legislation is the Companies Act, 1965 as well as its amendments in 2004 ("the Act".)

Issue 1: Whether Lloyd Wilson was a passive investor or active shareholder

[26] Both sides raise the role played by Mr Wilson as an issue for determination. The claimant argues that he was a passive investor, the defendants argue that he was an active participant in the affairs of the company.

[27] It is agreed that Mr Wilson was a director of the company. The claimant adduced evidence that Mr Wilson was a man engaged in many businesses. He had his

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[2] **[1988] 1 Lloyd's Rep 1, 57 cited in Charles Villeneuve, Kyoto Securities Limited v Joel Gaillard and anor [2011] UKPC 1 at para 67**

own design company called Design-O-Rama which was his full-time focus. He had no formal education nor business training and became a very successful self-made businessman. He attended periodic meetings of the company which Mr Lewis solely managed. The claimant said that at the time of the allotment of the 400,000 shares, her father had invested in excess of $600,000.00 to fund plans concerning Ideal Resort Limited and the development of a hotel in Negril. She said that her father was a mere passive investor who left the running of the company to Mr Lewis. The pair were friends and Mr Wilson trusted Mr Lewis.

[28] The claimant said she found the minutes of a meeting on November 17, 1989 at which there was an ordinary resolution increasing the company's share capital among her father's papers. Her father, Mr Lewis and Eulalee Huie were identified as directors in the company's register of directors and were purportedly present at the meeting. It was not a general meeting of the company as was required by article 47[3], but a directors meeting.

[29] Rather importantly was the uncontested evidence of Dieter Wilson, son of Lloyd Wilson. He said that Mr Lewis used the death certificate of Lloyd Wilson to claim on a keyman life insurance policy that the company had taken out on his father's life. He stated that his father took meticulous notes of the meetings he went to and that his father was a successful businessman whose estate had considerable assets. The following exchange between Mr Hylton, KC and Dieter Wilson was noted:

> **"Suggestion: The company had keyman insurance on your father for the very reason that he was an active director, he was a key man**
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> **A: agree**

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[3] **Alteration of Capital: The company may from time to time in general meeting by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.**

Suggestion: The company did not have keyman insurance on the other investors who were truly passive investors

A: don't know"

[30] The idea of a key man insurance policy is to secure protection against major losses. It is a life insurance policy taken out by the company on an essential or valuable person within the company, with the company as beneficiary.[4]

[31] On the evidence of Dieter Wilson, his father Lloyd Wilson was essential or valuable to the company and not merely a passive investor and when this was put to Dieter Wilson he agreed with the suggestion. His evidence was that his father discussed all his business affairs with him and that he had worked with his father from an early age. This undisputed evidence of a keyman policy lends itself to the inference that Mr Wilson knew about the keyman policy and would have had to have participated in its inception, as a company acts through its officers. Evidently, Dieter Wilson, himself knew about the policy as he registered neither alarm nor surprise at its existence. The fact that Mr Wilson was a key man and important to the company is therefore agreed as between the evidence of Mr Dieter Wilson and Mr Lewis.

[32] It is the evidence of Marcia Bellegarde and Dieter Wilson that Mr Wilson relied on Mr Lewis to run the company as he was busy running his own successful company and had other business interests. They based their conclusion that Mr Lewis ran Ideal Betting and Mr Wilson was a mere investor on this evidence.

[33] In addition, the meticulous notes of meetings taken by Mr Wilson suggests that he was an avid record-keeper. These actions do not suggest that Mr Wilson was not concerned with the affairs or management of the company, otherwise what need was there to take notes at all, seeing as the minutes were being prepared by Mr

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[4] Key person assurance: An assurance policy on the life of a key employee, especially a senior executive in a small company, whose death would be a serious loss to the organization. In the event of the key person dying the benefit is paid to the company: Oxford Dictionary of Business and Management, 6th ed., 2016.

Lewis. The claimant indicated in her witness statement that after his death, when reviewing Mr Wilson's papers, she noted the absence of notes made by her father relating to the minutes of meeting she found for the meeting of November 17, 1989. This was against the backdrop of handwritten notes of matters discussed in meetings of the company which she said were found among her father's papers.

[34] Note-taking in my view means that Mr Wilson wanted to have a medium by which he could keep independent records, he was not relying on what was recorded in the minutes as his only point of reference as to what happened in company meetings. These notes to my mind would have formed the basis for questions or concerns and this is exactly what the claimant said in her witness statement: "In review of my father's notes, I have found lists of questions that he had for Mr Lewis. I do not see any answers."

[35] It was also put to the claimant, though in not so many words, that Mr Wilson was a key man in the company, albeit that exact phrase was not suggested to her by Mr Hylton, KC. The claimant disagreed. This is a divergence from the evidence of Dieter Wilson on the same point which weakens the claimant's case.

[36] It does not seem to me that Mr Wilson would have acted against his own best interests given his considerable holdings, his own successful company and other businesses by leaving the running of the company entirely up to Mr Lewis while simultaneously attending meetings and taking copious notes, chairing some board meetings and representing the company at the Jamaica Bookmakers Association. While the claimant did not agree that her father was a keyman, the evidence of his conduct does not lend itself to the sole inference that Mr Wilson was a mere passive investor, rather there is also the inference that could be drawn that he was an actively involved participant in the affairs of the company.

[37] The evidence below points to Mr Wilson's direct interest and involvement in the financial affairs of the company:

a. the evidence of Mr Wilson's background as a "bootstrapper" is more consistent with his involvement in the company to ensure its success rather than investing his hard-earned money in a company over which he had relinquished all control.

b. The evidence from the claimant is that Mr Wilson was investing even more money, this time in Ideal Resorts, which concerned a hotel in Negril.

c. He attended meetings and took meticulous notes by hand.[5]

d. Lists of questions for Mr Lewis were handwritten and kept with his papers. Mr Wilson did not have questions which he wanted to forget about; he created an aide memoire for his concerns.

e. He kept company records and minutes of meetings to include the original share certificate and the minutes of the meeting of November 17, 1989 at which 400,000 additional shares were created and allotted to Mr Lewis. These documents were in Mr Wilson's possession up to the time of his death.

f. He signed the company's annual returns made up to December 1989.

g. He had to have been involved in the institution of the keyman policy.

h. He maintained his stake in the company right up until his death.

Issue 2: Whether there was a fraudulent transfer of 22,000 shares from Lloyd Wilson to Donovan Lewis.

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[5] Witness statement of Dieter Wilson at paragraph 16

[38] Allegations of fraud in civil proceedings cannot be made in general terms and must be "precisely alleged and strictly proved" (Donovan Crawford and Others v Financial Institutions Services Ltd.[6]

> **"It is well settled that actual fraud must be precisely alleged and strictly proved. But a serious breach of fiduciary duty, in which the fiduciary deliberately prefers his own interests to those whose interests it is his duty to protect, amounts to equitable fraud. It occupies an intermediate position between actual fraud and mere negligence. The classic exposition is in the speech of Lord Haldane LC in Nocton v Ashburton [1914] AC 932, 945-958. Its effect has been summarised by Millett LJ in Armitage v Nurse [1998] Ch 241, [1997] 2 All ER 705, 250-251,"**

[39] In Armitage v Nurse[7] an action for breach of trust by the beneficiary of a settlement against the trustees the court stated the law in this way:

> **"The general principle is well known. Fraud must be distinctly alleged and as distinctly proved: Davy v Garrett (1877) 7 Ch D 473 at 489 per Thesiger LJ. It is not necessary to use the word 'fraud' or 'dishonesty' if the facts which make the conduct complained of fraudulent are pleaded; but if the facts pleaded are consistent with innocence, then it is not open to the court to find fraud. As Buckley LJ said in Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] 1 All ER 118 at 130–131, [1979] Ch 250 at 268:**
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> > **'An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised**

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[6] **[2005] UKPC 40**

[7] **[1997] 2 All ER 705 at 715-716**

> **rule of practice. This does not import that the word "fraud" or the word "dishonesty" must be necessarily used … The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent on the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.'**

That case is authority for the proposition that an allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud. It is not treated as making two alternative allegations, i.e. an allegation (i) that the defendant actually knew with an alternative allegation (ii) that he ought to have known; but rather a single allegation that he ought to have known (and may even have known—though it is not necessary to allege this).

Before turning to the pleadings I would add one thing more. In order to allege fraud it is not sufficient to sprinkle a pleading with words like 'wilfully' and 'recklessly' (but not 'fraudulently' or 'dishonestly'). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint.

[40] In Three Rivers District Council and others v Bank of England[8], Lord Millet made the following statement:

> **"[184] It is well established that fraud or dishonesty… must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised;**

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[8] **(No 3) [2001] 2 All ER 513 ('Three Rivers (No 3)')**

and that it is not sufficiently particularised if the facts pleaded are consistent with innocence... . This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

[185] It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal...

[186] The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded and will not do so in a case of fraud.

It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

[41] **In Harley Corporation Guarantee Investment Co Ltd v Estate Rudolph Daley and others[9] ('Harley Corporation'), Harris JA, in discussing the interplay between the specific rules applicable to fraud cases, and rule 8.9(1) of the CPR, stated at paras. [53] and [57]:**

> **"[53] In placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud. …**
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> **[57] The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. However, rule 8.9(1) prescribes that the facts upon which a claimant relies must be particularized. It follows that to raise fraud, the pleading must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud."**

[42] **The fundamental reason that the courts have imposed more onerous requirements for pleadings on the issue of fraud was summarised by Lord Hope of Craighead in Three Rivers (No 3), at para. 51: "...as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegations. This is especially so where the allegation being made is of bad faith or dishonesty.**

[43] **In Halsbury Laws of England Volume 12 (2009) 5th Edition paragraphs 1109 –1836 the standard of proof for fraud was explained as follows:**

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[9] **[2010] JMCA Civ 46**

"...it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged: the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

Issue 3: Whether the claimant has proven fraud

The Pleadings on the issue of Fraud

[44] On the issue of fraud, the particulars of claim in the case at bar state:

"49. Further and/or in the alternative, the 2nd Defendant fraudulently and without the knowledge and consent of Lloyd Wilson deceased, the Claimant or any other representative of the Estate of Lloyd Wilson obtained an additional 936,000 shares pursuant to the increases of share capital and the subsequent allotment of shares to himself.

PARTICULARS OF FRAUD OF THE 2ND DEFENDANT

I. Preparing and filing (fictitious) Resolutions and Minutes of Meetings which he alone signed off on to the exclusion of the other director(s), being Lloyd Wilson(deceased);

II. Fraudulently representing in an Annual Report made up to 29 December 1994 and filed with the Registrar of Companies on 24 January 1996, that the shares previously held by Lloyd Wilson and Reginald Wilson were transferred to him on 25 November 1994;

III. If a transfer was in fact executed purporting to transfer the shares of Lloyd Wilson to the 2nd Defendant, this was done fraudulently as Lloyd Wilson never executed such a transfer;

IV. Filing the 1st Defendant's Annual Return made up to 27 December 1989 bearing signatures purporting to be that of Lloyd Wilson (deceased) knowing that the signatures are not authentic.

V. Deliberately and/or dishonestly failing to notify Lloyd Wilson or the Claimant as to the availability of shares created pursuant to the said above outlined increases in share capital.

VI. Concealing the true state of affairs of the 1st Defendant Company from Lloyd Wilson (deceased) and subsequently his personal representatives, including the Claimant."

[45] On an examination of the pleadings, the word fraudulently is being used to mean dishonestly, although the word "dishonestly" has not actually been used. The law is that it is not necessary to use the words 'fraud' or 'dishonesty' if the facts which make the conduct complained of fraudulent are pleaded. The language used must be unequivocal. Language which raises doubt in the mind of the tribunal as to whether the pleadings are in fact relying on the alleged dishonesty of the transaction, will be fatal. The language used in the pleadings must be clear.

[46] Particulars of claim which are consistent with honesty are not sufficient. Pleadings are only one part of the matter, there is also the substance of the evidence. The defendant is entitled to know the case he has to meet. Dishonesty is usually a matter of inference from primary facts, this involves proof of knowledge that someone is alleged to have acted dishonestly, as well as adducing the primary facts which will be relied upon to justify the inference.

Minutes of Meeting

[47] It is the claimant's position that Mr Lewis prepared and filed fictitious Resolutions and minutes of meetings, which he alone signed off on to the exclusion of the other director(s), and in particular, Lloyd Wilson.

[48] **The allotment of the 400,000 newly created shares was by way of resolution passed at a meeting on November 17, 1989. The principle established by case law is that, in the absence of special circumstances, every director ought to have sufficient notice of any board meeting. Unless a notice of a board meeting is given to all directors or at any rate to all who could possibly attend, then the meeting will not be deemed to have been duly convened,[10] and in the absence of all the directors agreeing to dispense with notice,[11] no board meeting business can be transacted. This is so even if it can be shown that a particular director's presence would have made no difference to the passing or rejection of any particular resolution, since the absent director might have persuaded the others to change their minds.[12]**

[49] **It is also submitted by the claimant that Mr Lewis deliberately and/or dishonestly failed to notify Lloyd Wilson or the claimant as to the availability of shares created pursuant to the said increases in share capital outlined above.**

[50] **If Mr Wilson did not have the opportunity to subscribe for any of the newly created shares then there would have been a breach of article 7.[13] The 400,000 shares**

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[10] Smyth v Darley (1849) 2 HL Cas 789; Re Homer District Consolidated Gold Mines, ex p Smith (1888) 39 Ch D 546, 9 ER 1293, CA

[11] Barron v Potter; Potter v Berry [1914] 1 Ch 895, 83 LJ Ch 646

[12] Young v Ladies' Imperial Club Ltd [1920] 2 KB 523, 89 LJKB 563, CA; Re East Norfolk Tramways Co, Barber's Case (1877) 5 Ch D 963 at 968, CA per Jessel MR.

[13] Article 7: Before any shares (whether forming part of its original capital or any increase of capital or any increase of capital of the Company) are issued in any other manner, each class of such new shares shall first be offered to the holders for the time being of the corresponding class of shares pro rata to the number of shares of that class held by each of them respectively and such offer shall be made by notice specifying the number of shares to which each shareholder is entitled and limiting the time (not being less than twenty eight days) after which if not accepted will be deemed to have been declined. Unless such shares are issued by virtue of the following provision of this Article within six months of the expiry of the time limit for the acceptance of such offers, such of the time as shall not have been taken

were newly created and had not been issued prior to November 17, 1989. These unissued shares were all allotted to Mr Lewis on that same date. The authors of Words and Phrases Legally Defined, 3rd Ed. defines a share as:

> **…a right to a specified amount of the share capital of a company, carrying with it certain rights and liabilities while the company is a going concern and in its winding up. The shares or other interest of any member in a company are personal estate, transferable in the manner provided by its articles...**

[51] In Commonwealth Caribbean Company Law[14], the learned author states:

> **An 'issue' is something different and distinct from an 'allotment'. An allotment in respect of shares has been equated with the forming of an enforceable contract for the issue of shares. Put another way, an allotment creates an enforceable contract for the issue of shares. An issue, on the other hand, occurs after an application to the company has been followed by an allotment and notification to the purchaser and the title to the shares completed by registration on the register of shareholders."**

[52] In the case of National Westminster Bank plc. v. IRC. the House of Lords answered this question:

> **"The question in the present case is when is a share issued? A company may invite applications for unissued share capital. If an offer for shares is made, a binding contract to issue shares comes into existence when the applicant is informed that shares have been allotted to him. The applicant is neither a member nor a shareholder while his rights rest in contract and**

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up shall again be offered to the holders for the time being offered or issued pursuant to the following provision of this Article. In so far as the same are not taken up pursuant to such offers, the Directors may dispose of the same in such manner as they think most beneficial to the Company.

[14]By Andrew Burgess, JA, 2013 at page 136

> **until the issue of the shares has been completed by registration. Every company must maintain a register of members. The register must contain, inter alia, the names of the shareholders, an indication of the shares to which each shareholder is entitled, a statement of the amount paid up on the shares and the date when the entry was made. No notice of any trust, express, implied or constructive, is to be entered on the register. The register is open to inspection by the public. In my opinion shares are issued when an application has been followed by allotment and notification and completed by entry on the register. Once the shares have been issued, the shareholder is entitled to a share certificate. The certificate declares to all the world that the person who is named in it is the registered holder of certain shares in the company and that the shares are paid up to the extent therein mentioned.[15]**

[53] **Under article 3, Ideal Betting is a private company. As such, the issuance of shares under Article 7, safeguards the pre-emption rights of shareholders. Article 7 triggers the release of a notice informing each shareholder of their share entitlement and provides a minimum period of twenty-eight days to accept any share offer. If the offer is not accepted within this period, the shareholder is considered to have declined it. The offer of shares set out in Article 7 was proposed on the date of the meeting.**

[54] **The evidence of Mr Lewis was that he had sent a notice of the meeting of November 17, 1989, to Mr Wilson. He said all shareholders are entitled under the articles to receive notice of their entitlement to these shares. All the shareholders agreed they would not take up any of the shares, and he could not recall whether the estate of Noel Huie, Reginald Wilson or Delores Scott declined to take up the shares. Mr Wilson attended and voted in favour of the resolutions that were**

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[15][1995]1 AC. 119 Eng. HL.

passed at the meeting to increase the authorized share capital. Shares were offered to the shareholders of the company including Mr. Wilson but only he (Mr Lewis) was able to take up the offering. Mr. Lewis relied on the Minutes of the Extra Ordinary General Meeting, Ordinary Resolution and Statement of Increase in Nominal Capital and Notice of Increase in Nominal Capital in support of this evidence. The undisputed evidence of Canute Sadler, called by the claimant, was that he did not receive a notice under article 7.

[55] Mrs Small-Davis, KC in cross- examination showed a pattern of conduct and past dealings by Mr Lewis to make the inductive argument that it is probable that this notice to Mr Wilson did not exist and the meeting was not held which means the minutes are a work of fiction.

[56] Mr Wilson was not around to testify and there were no witnesses to fact, save Mr Lewis. Mr Lewis was taxed as to his detailed record keeping as secretary of the Jamaica Bookmakers Association and against the paucity of his record keeping as secretary of the company. It was suggested to him that the minutes said what he wanted them to say, as he was the custodian of the company's records, and the person who created and kept all the minutes of all meetings.

[57] It was submitted that there was an expectation on the part of the shareholders that the minutes would be kept according to the Companies Act and that notices would be sent to them according to the articles. Finally, Mr Lewis was pressed under oath to produce the notice he said in evidence that he had sent to Mr Wilson or to give the court some information about it. He could not.

[58] From these primary facts, King's Counsel asked the court to draw the inference that there was no notice to Mr Wilson as it did not exist. The claimant had to prove that Mr Lewis sent no notice to Mr Wilson who as a consequence, would have had no knowledge that a meeting was to be held, in order to prove the truth of the assertion that Mr Wilson had no knowledge of the increase in share capital and the allotment of the additional shares.

[59] **The claimant argued by these means, that acts of misconduct on the part of Mr Lewis had been proven and dishonesty established. The defendants argued that Mr Lewis had been sent the requisite notices so that the resolution passed to increase the share capital and to issue and allot the additional shares were valid acts done in the presence of and with the assent of Mr Wilson.**

[60] **The claimant gave evidence that she found among her father's papers, the minutes of the Extraordinary General meeting held on November 17, 1989, which recorded that a resolution was unanimously carried by Messrs Lewis and Wilson and Ms Eulalee Huie to increase the capital of the company to $500,000 by the creation of 400,000 ordinary shares of $1.00 each to rank pari passu with the existing shares of the company. The minutes state that the chairman called the meeting to order and the notice convening the meeting was taken as read.**

[61] **The claimant in her witness statement expressed a refusal to accept that there had been a meeting on November 17, 1989 as was reflected in the minutes of meeting she had found. The evidence taken from her witness statement was that if this meeting did in fact occur, it was a directors' meeting conducted in breach of Article 47, which mandates the holding of a general meeting.**

[62] **In cross- examination, the claimant conceded that the words Extraordinary General Meeting at the top of the minutes meant that a general meeting had been held and not a directors meeting. It also emerged that the witness did not understand that though only directors had been present at the meeting, that did not transform the meeting into a directors' meeting. The claimant maintained that the minutes are fictitious as Mr Wilson did not attend any such meeting if one was held at all.**

[63] **The defendants argue that the meeting did take place and Mr Wilson was present because the minutes say that he was and the matters recorded in the minutes took place more than four years before the death of Mr Wilson as was recorded in the company's financial statements and annual reports. Even if he had not been offered the opportunity to participate, which was not being admitted, Mr Wilson would have become aware of his reduced shareholding from 22% to 4.4%.**

[64] **The defendant argued that the minutes were accepted as authentic as the claimant had agreed to these documents. There is no dispute that the minutes existed, the challenge is as to whether they accurately stated all that they should have recorded and the purpose for which they had been created.**

[65] **It is undisputed that in relation to record keeping, the evidence is that Mr Lewis was both chairman and secretary of the company. He signed minutes of all board meetings. Matters such as the allotment of shares are not recorded in the minutes. The minutes of meetings between 1971 and 1995 are identical in form and content.**

[66] **The minutes of meeting of November 17, 1989 do not record discussions among the directors for the increase in share capital or for the allotment of four hundred thousand (400,000) additional shares. Mr Lewis agreed that the minutes should have reflected that the shares were offered and that the shareholders declined to take up the offer but that they did not. The witness agreed that in the minutes of meeting of November 17, 1989 there was no record of Lloyd Wilson or Eulalee Huie declining to take up any of the 400,000 additional shares and agreed that the record ought to have so stated. Mr Lewis agreed that there is no record that he was interested in taking up any of the 400,000 shares even though he kept all of the minutes himself. He agreed that as the record did not indicate that any shareholder declined to take up the offer of additional shares then it meant that they had not declined their allotment. He could not recall if any of the shares that were said to have been declined by the shareholders were offered to other shareholders in accordance with the articles.**

[67] **The court reviewed many pages of minutes. These are all identical in form and conspicuous for the absence of detail. Minutes of proceedings are defined by the Companies Act, 1965, section 140:**

> **"140—(1) Every company shall cause minutes of all proceedings of general meetings, all proceedings at meetings of its directors and, where there are managers, all proceedings at meetings of its managers, to be entered in books kept for the purpose.**

(2) Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Where minutes have been made in accordance with the provisions of this section of the proceedings at any general meeting of the company or meeting of directors or managers, then, until the contrary is proved, the meeting shall be deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators, shall be deemed to be valid.

(4) If a company fails to comply with subsection (1), the company and every officer of the company who is in default shall be liable to a fine not exceeding one hundred pounds."

[68] **The ordinary meaning of "proceedings" is "a complete written record of what is said or done during a meeting."[16] The word "complete" adds texture to the word "record" in this definition and gives an interpretation to the word "proceedings." The reason for a complete written record is for the preservation of the contemporaneous official actions of the board. The minutes should reflect accurately what goes on in meetings. Minutes which fail to be a complete written record would not meet the statutory definition. Why the minutes of the company do not record how votes were taken and what was discussed at board meetings has not been explained by their maker, Mr Lewis. The paucity of the minutes indicates the state of the company's records, this also was not addressed in evidence by him as the keeper of those records.**

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[16]Cambridge Dictionary

[69] **The minutes are items of real evidence and speak for themselves, they will be construed against their maker. I rely on the following statement of the law from Phipson on Evidence, 12th edition, which states: -**

> **"Documents which are or have been, in the possession of a party will be admissible against him as original evidence to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate and are receivable against him as admissions to prove the contents if he has in any way recognized, adopted or acted upon them."**

[70] **It was not put to Mr Lewis in cross- examination that Mr Wilson was absent from the meeting. Further, the evidence that the claimant found the minutes of meeting among her father's papers after his passing means that a meeting took place, at which minutes were recorded and a copy of those minutes had been given to Mr Wilson which he kept up to the time of his death. The minutes were in Mr Wilson's possession. This is evidence that there is a record of the meeting of November 17, 1989, of which Mr Wilson had knowledge and at which his presence was recorded and of which a purportedly contemporaneous record had been created which he had kept.**

[71] **The claimant's attack was three fold, first, the meeting did not take place, however if it did take place, second, Mr Wilson was absent from said meeting and third any minutes are fictitious. However, there was no demur from Mr Wilson himself during his lifetime about these minutes which record his presence at that meeting. It is unchallenged that the claimant found the minutes of the meeting of November 17, 1989 among her father's papers after his passing. It was similarly unchallenged that he was a meticulous note-taker and avid record keeper. This behaviour is suggestive of an organized mind with a structured system of document management and retention of information. The presence of the minutes among Mr Wilson's papers, to my mind, means that it is open to the court to find firstly that the meeting of November 17, 1989, was held, secondly, that Mr Wilson had knowledge of the meeting and thirdly, that Mr Wilson had knowledge of the**

resolution passed unanimously to issue the 400,000 additional shares. This was not likely to be the conduct of a shareholder who has no clue what is going on with the company nor that of a passive investor who was uninvolved in the affairs of the company.

[72] I find that Mr Wilson was recorded in the minutes as being present at the meeting, he was recorded as having voted for the resolution as the vote was unanimous, and most importantly, he had kept a copy of the minutes of meeting of November 17, 1989. These minutes are in the claimant's possession. It cannot be said that the acts done at the meeting were done without the knowledge and assent of Mr Wilson as he did not complain of any misconduct taking place at that meeting during his lifetime. It is therefore difficult to understand the claimant now making the assertion that there was no meeting and that the resolution and minutes are fictitious when Mr Wilson made no complaint of any unfairness to himself or to the company by these actions during his lifetime. I find that the claimant though arguing that the minutes are fictitious, has not adduced sufficient primary evidence from which the court may draw the inference that Mr Wilson was not notified of the meeting of November 17, 1989 as was required by the articles.

[73] The allotment of 400,000 shares to Mr Lewis took place on the date of the meeting in 1989, it was argued and I agree that it was done with Mr Wilson's actual knowledge and consent, or alternatively, with his acquiescence. There was no evidence of anything done by Mr Wilson himself, actual or perceived, to remedy any unfairness to himself as a shareholder or to the company.

[74] What is also plain is that the return of allotment which was dated and filed on November 17,1989 by Paul Goldson & Co. would have disclosed any fraudulent representations (which is denied by the defendants), as they were discoverable

and always available to the Mr Wilson from the date of delivery and filing with the Registrar of Companies.[17]

[75] Lloyd Wilson was in possession of the minutes of this meeting at which the share capital was increased and the shares issued. He did not address his mind to the increase in share capital and the issuance of the shares for he had knowledge of it. Lloyd Wilson would have known of and done nothing about the "dilution" in his shareholding.

[76] The claimant has not given evidence related to ratification, meanwhile, the defendant attacked this dilatory stance on the part of the claimant under the doctrine of laches which will be dealt with later.

[77] There was no evidence of any corrections to the minutes, any meetings called by Mr Wilson or any other director in respect of this increase in share capital, no correspondence to Mr Lewis or document in Mr Wilson's papers to demonstrate his disapproval.

[78] In fact, there is no evidence from either the claimant or Dieter Wilson that in the conversations he had with his father, he had ever complained about the increases in share capital or the issuance of additional shares. This is made by the evidence of the claimant that the family trusted Mr Lewis.

[79] In light of that, the court cannot use speculation or suspicion to arrive at a finding that the minutes were false in their entirety or to state that on a balance of probabilities, Mr Wilson was absent. I find that the minutes of meeting of November 17, 1989, have not been proven to be fictitious and that there was no proof that the meeting did not take place.

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[17] The Lindsay Petroleum Co. v. Hurd (1874) LR 5 PC 221 and Erlanger v New Sombrero Phosphate Co. (1878) 3 App. Cas 1218 (H.L.).

The allotment

[80] In order to determine the validity of the allotment of shares, as for all the evidence presented to the court, I will assess the evidence on this issue against the documentary evidence and the case in its entirety to determine what weight, if any, should be given to the evidence of Mr. Lewis, the primary witness to fact.

[81] I find that on November 17, 1989, there was a meeting and the issued and authorised share capital of the company was increased by $400,000, all 400,000 shares were issued to Donovan Lewis. The result of this was that Mr Lewis' shareholdings moved from 59% to 91.8% and Mr Wilson's shareholdings went from 22% to 4.4%.

[82] The evidence of the allotment of all 400,000 of the unissued shares to Mr Lewis is found in the return of allotment, which was both dated and lodged on November 17, 1989, by Paul Goldson & Co. ("Goldsons") at the Companies Office. This document shows that cash was paid for the shares. This was reflected in the company's first annual return made up to December 27, 1989, after the allotment. It was signed by Mr Wilson as director and Mr Lewis as company secretary. Mr Lewis agreed that it was inappropriate for the person taking the full allotment to sign the return. This was the last annual return signed by Mr Wilson.

[83] The claimant gave evidence that Lloyd Wilson was more than able to purchase his portion of the additional shares which would have been for the sum of $88,000.00 as Mr Wilson had multiple commercial and residential properties from which he collected rent in addition to Design-O-Rama, his primary business and a concrete business Supa-Mix. Therefore, Mr Lewis is lying when he says that he was the only one able to take up the offer of the additional shares.

[84] The evidence from Mr Lewis was that he used his personal funds to acquire the additional 400,000 shares. Mr Kingsley Sadler, called by the claimant, gave evidence of being asked to withhold certain funds in order to make a deposit in the bank account of the company. Mr Lewis denied telling Kingsley Sadler that he

would issue the 400,000 shares and the other shareholders would not have to pay for them. He further denied telling Mr Sadler to withhold money over a period of time from the betting shop accounts to pay for the shares. There is no nexus between the funds used by Mr Lewis to purchase the shares and the funds withheld and deposited in that bank account. I find that Mr Saddler did not give credible evidence on this point.

[85] Kingsley Sadler said he was totally unaware of the offer of shares and that if the shares had been offered to the other shareholders, he is sure they would have taken it up. This is of course a matter of opinion and of little weight. I find that Mr Kingsley Saddler was an unreliable witness. He was shaken in cross-examination as the several inconsistencies and omissions from his evidence were conclusively brought out by Mr Spencer.

[86] Mr. Canute Sadler, brother of Kingsley Sadler, said that in 2012, Mr. Lewis expressed an interest in buying his shares. They had discussions but the transaction fell apart. This led him to initiate a full investigation into Ideal Betting's affairs, starting with the documents at the Companies Office and ending with a review of the audited financial statements. Mr. Canute Sadler said he shared the results of his investigations with the Wilson family, and said he was very surprised to see a dilution of all shareholdings except for Mr. Lewis', as a result of an increase in share capital and the allotment of all 400,000 shares to Mr. Lewis alone.

[87] Mr Canute Sadler and Mrs Delores Scott-Carlington had previously filed suit against Ideal Betting and Donovan Lewis claiming minority shareholder remedies for Mr. Lewis' oppressive conduct of the company's affairs. The court adjudged that the allotment of shares without proper notice was not in accordance with the articles of association and was therefore invalid. The court ordered that shares were to be transferred from Donovan Lewis' shareholding to bring Mrs. Scott-Carlington's interest back up to 7% of the current issued share capital. This judgment of Sykes, J(as he then was) is Exhibit 3.

[88] **The claimant has tendered in evidence the judgment of a previous court in the Scott-Carlington case and relied on certain findings made by that court. This court accepts the holding of that court, and the legal principles espoused in the judgment of Sykes, J (as he then was), however, it cannot rely on any findings of fact made in that case in order to make a similar finding in this one. The evidence in each case is different, and each trial judge can only make findings of fact based on the evidence adduced in the trial over which he/she presides.**

[89] **The claimant has to prove that which she asserts in respect of Mr Wilson. There has been no proof on a balance of probabilities that the allotment of shares to Mr Lewis was made without the knowledge or approval of Mr Wilson given his possession of the minutes of meeting, and the absence of complaint as indicated earlier. In respect of Mr Wilson there is no breach of the articles of association on this aspect. The allotment is valid and I so find.**

The share transfer from Lloyd Wilson and the Annual Return made up to December 27, 1989

[90] **The claimant argued that if a transfer was in fact executed purporting to transfer the shares of Lloyd Wilson to Mr Lewis, this was done fraudulently as Lloyd Wilson never executed any such transfer. The claimant contends in proof of fraud that Lloyd Wilson could not have transferred 22,000 shares in the company to Mr. Lewis in 1994 as he was not in the island on the date of the purported transfer. She submits that the evidence of the handwriting expert adduced by the defendants, failed to confirm the signature of the transferor on the transfer instrument dated November 25, 1994 as being that of Lloyd Wilson.**

[91] **The claimant submits that Mr. Lewis knew that Lloyd Wilson had not sold him 22,000 shares and in making this representation in the 1989 Annual Returns, Mr Lewis acted fraudulently. The claimant asks the court to find that the signatures on the Annual Return were forged, the documents declared fraudulent, and to order the rectification of the company's share register.**

[92] **The claimant further alleges that Mr Lewis failed to notify and concealed the true state of affairs of the company from Lloyd Wilson. In support of these allegations of fraud, the claimant relies on her evidence and that of her brother that Lloyd Wilson was a passive shareholder/investor,[18] that he left the management of the company to Mr Lewis,[19] that he would not have sold any shares or property without telling Dieter Wilson,[20] and that several key documents that suggest otherwise are fictitious.**

[93] **The defendants submit that while the claimant contends that the annual return made up to December 27, 1989, and the financial statements for the year ending February 28, 1993, and the instrument of transfer were fraudulently created, both documents were signed by Mr Wilson and both have formed part of the company's records for decades.**

[94] **It is submitted by the defendants that the court's approach to the standard of proof is not the same in all civil proceedings. The authorities have clearly established that the more serious the allegations, the more cogent the evidence needs to be to prove them, particularly where there are allegations of fraud or other criminality. In the present case, the claimant is accusing Mr Lewis of forgery or at the very least, of uttering forged documents. These are criminal offences and the claimant must provide proof to a very high degree.**

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[18] B2, P.6, p20 and B2, P18. p31 and p32

[19] B2 P.6 p20 and B2, P15, p13, p16, P18, p31

[20] B2,P.14,p10-12

[95] **The defendants cited the cases of Paul Duncanson v Derrick Sharpe,[21] Halsbury Laws of England Volume 12 (2009) 5th Edition paragraphs 1109 –1836 and Bent (Linel) v Eleanor Evans et Al[22] to show the standard of proof required.**

[96] **The defendants refute the claimant's allegation that Mr Lewis failed to notify Lloyd Wilson and concealed the company's true state of affairs from him as it is also not supported by the documentary evidence. Mr Wilson is reflected in the minutes as being present for every meeting of the company that was held between its incorporation and his death.[23] Particularly, the minutes of meeting of November 17, 1989[24] where the share capital of the company was increased. Additionally, Mr Wilson signed all the company's annual returns between 1978 and 1989.[25] The documents suggest that Mr Wilson was present and aware of the company's affairs and the claimant has failed to put forward any evidence, beyond that which appears merely suspicious.**

[97] **There are a number of sub-issues which arise for consideration before a finding can be made under the head of fraud. The claimant alleged but called no evidence to support the assertion that the annual return made up to December 27, 1989 was not signed by Lloyd Wilson as claimed in paragraphs 23 and 49-IV of the Particulars of Claim. The claimant submitted that it is for the defendant to prove that the signature is that of Mr Wilson. This submission reverses the burden of proof, as the legal burden of proof to establish fraud to the requisite standard lies squarely on the claimant to prove, whether the instrument of transfer was not signed by Mr Wilson as it purported to transfer 22,000 shares belonging to Mr Wilson to Mr Lewis. Also, whether the annual return does not bear his signature.**

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[21] [2023] JMSC. Civ 34

[22] Suit CL 1993/B115 delivered on February 27, 2009 (unreported)

[23] B3D, P1129-1137, 1139-1150 and B4, P1-3. 5-7
[24] B4, P3
[25] B3D, P1005-1085 and B3C P827-842

[98] By way of background, the evidence of the claimant is that there was no transfer of shares from Lloyd Wilson to Donovan Lewis and that the instrument of transfer is not authentic, in other words it is a forgery. The claimant relies on the evidence that the purported record of transfer of Mr. Wilson's shares to Mr. Lewis only came to light in 2013, when another shareholder, Mr. Canute Sadler fell out with Mr. Lewis over his own shareholding and he began an investigation into the company's records at the Companies Office.

[99] It is the evidence of the claimant that the share certificate was in the family's possession and that Mr Wilson had not said anything to anyone in his family about selling his shares. Mr Lewis' claim that Mr Wilson sold his shares because he needed money for a construction project was flatly rejected by the claimant. Mr Dieter Wilson's evidence was that the last construction project that his father did was in the 1980s with the building of a house for his brother Michael.

[100] When questioned in cross-examination, Mr Lewis said Mr Wilson offered him the shares in 1992 or 1993 and he could not recall whether it was Mr Wilson who asked Mr McGann to come to Goldsons to witness Mr Wilson's signature, neither could he recall whether it was he who gave Goldsons the instructions for the transfer or Mr Wilson. He said the transfer was signed in 1993. The date of transfer, November 25, 1994, was inserted sometime after by Goldsons. He was aware that an instrument of transfer submitted more than 30 days after signing, attracts a penalty. The price of the 22,000 shares was determined by the net asset value of the shares based on the 1993 financial statement for which Goldsons had issued an audit report. Mr Lewis said he knew what sum was to be paid to Mr. Wilson but he could not say why that sum was not correctly stated at "Consideration" on the instrument of transfer. He admitted that it was Goldsons who prepared the transfer and inserted $22,000 at "Consideration" which was the nominal value of the shares but not the sale price.

[101] Mr Lewis admitted that the articles require the share certificate to be presented to the directors to effect a transfer. He could not recall whether he had asked Mr

Wilson for the share certificate. Mr Lewis similarly could not recall when he paid Mr Wilson for the shares. Mr Lewis denied that he had ever claimed that he and Mr Wilson had signed the transfer in Marcia Bellegarde's presence.

Mrs Bellegarde's presence at the time of execution

[102] The claimant submits that in his witness statement and in his oral evidence, Mr Lewis maintained that she was not present when Mr Wilson signed the instrument of transfer. However, in separate proceedings Mr Lewis had stated in an affidavit that she was present. The defendants argue that that statement was plainly incorrect, and that while it is an error, the court is entitled to consider it when assessing credibility, it is not determinative of the issue and is not proof of fraud.

[103] When the evidence of Mr Lewis is taken as a whole on this point, I find that the claimant could not have been present or both Mr McGann and Mr Lewis ought to have recorded her presence in their minds and in their evidence but did not. The inconsistency in the evidence of what Mr Lewis has said or deposed on other occasions with his current testimony was demonstrated by the evidence that Marcia Bellegarde had not witnessed the execution of the instrument of transfer by her father when in other evidence at another time he said that she had.

Consideration

[104] There are three sub-issues for consideration on the transfer of shares:

i. **What was the consideration paid for the shares.**

ii. **The date on which the instrument of transfer was purportedly signed.**

iii. **Whether Lloyd Wilson actually signed the instrument of transfer and annual return.**

[105] Mr. Dieter Wilson gave unchallenged evidence that the last construction that his father had been involved with was completed in the late 1980s and he did not need money for that purpose. Mrs Bellegarde's evidence is that they reviewed all of Mr

Wilson's bank statements and found no deposit corresponding to the sum Mr Lewis claimed to have paid for the shares.

[106] Mr. Lewis gave evidence that "sometime in the 1990s" Mr. Wilson offered to sell 22,000 shares to him as he was doing some construction and needed to dispose of those shares for cash. Mr Lewis said he accepted the offer and purchased the shares for $534,840.00. The agreement reached was that the price of the shares would be the net asset value derived from the 1993 audited accounts.

[107] The defendants submitted that though the instrument of transfer stated the consideration as $22,000, the figure, "$543,840", handwritten at the top of the instrument, was the true consideration. The transfer document was lodged with the Stamp Office with the typed in consideration of $22,000.00. The Stamp Office used a consideration of $543,840.00 to calculate the taxes payable.

[108] The defendants contend that the assessment of the Stamp Commissioner was the same as the price agreed between Mr Wilson and Mr Lewis as they both relied on the most recent financial statements of the company.

[109] The court sees as an obvious question, why would the parties have signed a document which states a "Consideration" of $22,000.00 which was not the agreed purchase price? The claimant says that the defendant belatedly tried to assert that the purchase price was the same as the assessment. There is no evidence that the directors had been asked to fix the fair value of the shares or that the directors had advised Mr Wilson what they considered to be the fair value for the 22,000 shares. In addition, there was no evidence that Mr Wilson sought to ascertain the fair value of the shares by way of valuation pursuant to the articles.

[110] The defendants asked the court to consider two things: First, $22,000.00 was not an arbitrary figure. Mr Wilson held 22,000 shares and their nominal or "par" value was $1 each. The figure stated as the consideration was the nominal value of the shares. Second, the independent and unchallenged evidence is that it was the practice of the then auditors to insert the nominal value, send the document for

assessment by the Stamp Office and pay stamp duty and transfer tax based on that assessment. That independent evidence is in the form of two other transfers. The transfers from Eulalee Huie and Reginald Wilson[26] which like the transfer at issue also reflected the nominal share value of the shares. There is no dispute in relation to those transactions, and no suggestion that they were in any way fraudulent.

[111] The defendants accept that this was not the proper way to complete the transfer forms and to present the information to the Stamp Commissioner. However, the defendants submit that it does not contradict Mr Lewis' version of events and the correct stamp duty and transfer tax were paid.

[112] Further, the fact that the Stamp Commissioner assessed the value of the shares for the purposes of transfer tax and stamp duty as has been submitted does not at all suggest that the parties did not agree on the sale price. The Stamp Commissioner's assessment has nothing to do with whether consideration passed between the parties. This claimant who has to adduce evidence that consideration did not pass and could not do so.

The Date

[113] The company's records show that Lloyd Wilson's shares were acquired by Mr. Lewis pursuant to an instrument of transfer dated November 25, 1994. Mr Wilson left Jamaica on November 22, 1994 and died suddenly in Miami, Florida on November 29, 1994. The claimant gave evidence that the original share certificates were in the family's possession then. Mr Canute Sadler was surprised to see that Mr Wilson had transferred all his shares to Mr. Lewis and that Mr Wilson

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[26] On pages 45 and 46 of Bundle 4

had sold out of the company because he knew that Mr. Wilson had died sometime around the date of the transfer. This evidence was uncontested.

[114] Mr Lewis' evidence is that he and Mr Wilson signed the transfer document sometime in 1993. They left it with the auditors Goldsons and that someone in that firm inserted the date of November 25, 1994. Paul Goldson & Co subsequently merged with Crowe Howarth, and he obtained a copy of the transfer instrument from them. The fact that it was left with the auditors is supported by independent evidence, namely a letter[27] from the auditors' successors sending the transfer instrument and two other transfers to Mr Lewis at his request.

The Stamp Commissioner

[115] There was no witness from the Stamp Office in this trial. The evidence explaining what transpired in that office was from Ms Buddington and what I will term commercial realities.

[116] Ms. Buddington, who was an ordinary witness for the claimant, explained that on the instrument of transfer dated November 25, 1994, the Stamp Commissioner assessed the transfer tax and stamp duty payable based on the financial statements presented by the company and made a notation of that at the top of the instrument of transfer, that sum was in handwritten figure "$543, 840.00" which constituted the assessed sum due for taxes.

[117] The Stamp Commissioner assessed the relevant taxes to be paid by the parties on the instrument of transfer. Consideration was said to have been determined by an oral agreement between the parties whose signature is purportedly reflected on the instrument of transfer. The defendants ask the court to make a finding that the figure, $543,840.00, handwritten at the top of the transfer document rather than

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[27] Bundle 3C, page 820

what is written in the box which says "Consideration" is the price Mr Lewis paid for the shares.

[118] The oral evidence of Mr Lewis on this point has to be viewed against the transfer document itself and the return of allotment dated and filed at the Companies Office on November 17, 1989 which states that consideration was paid in cash.[28]

[119] The consideration for the 22,000 shares was said to have been agreed between Messrs Lewis and Wilson in 1993 and to have been based on the net asset value of the shares indicated on the 1993 financial statement for which the auditors had issued an audit report.

[120] Mr Lewis said that he knew the sum he was paying Mr. Wilson was $543,840 and not the sum of $22,000. That latter figure was not the consideration, it represented the nominal value of the shares. He did not know why the transfer document did not say what the agreed consideration was, however, he signed it anyway, qualifying his answer by saying that it was the auditors who had prepared the transfer and inserted "Consideration" as $22,000.

[121] Mr Lewis said that he had paid Mr Wilson the consideration as agreed, he did not recall when he paid over the cash for the shares and the claimant asserts that the bank statements of Mr Wilson did not reflect a corresponding deposit of $543,840.00. The claimant contended that the original share certificate was in her father's safe, there was no copy of the instrument of transfer among her father's papers, no receipt for the sale of the shares and Mr Wilson had never told anyone in his family that he was selling his shares.

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[28] Core bundle p. 60

[122] In assessing the evidence of Mr Lewis the agreed sale price would have awaited the audit report which contained the financial statement for the year ending February 28, 1993. That audit report is dated May 2, 1994.

[123] The evidence in Mr Lewis' witness statement is that execution took place at the offices of Goldsons on a date he could not recall, sometime before November 1994. In cross- examination, the witness said execution of the transfer document took place in the first half of 1993. It was left with the auditors for stamp duty and taxes to be paid.

[124] The date of November 25, 1994 was evidently not the date of execution and had been inserted after the transfer document had been signed. This means that the evidence that the net asset value as the sum agreed for consideration was not known by either Mr Wilson or Mr Lewis until the audit report had been completed on or about May 21, 1994. The stated consideration of $22,000 would not have been signed off on otherwise, as both gentleman would have agreed and signed to a consideration of $543,840.

[125] The claimant's submission that Mr. Wilson did not need to sell his shares to get money for construction is logical and well-founded as there was no way for Mr Wilson to have known when he would be paid for the shares. If the court is to accept that he first waited for the net asset value to become known to ascertain the sale price and then to be paid, he did not get the cash in any expedited manner. The agreement as to a consideration of $543,840 was not before the instrument was lodged or even in 1993 based on the evidence. In any event, there is no evidence as to when, if ever, Mr Wilson was paid for the shares.

[126] Mr Lewis said it was the auditors who put in the figure at "Consideration." If I am to accept his evidence on this point, it means there are two figures on the same transfer document which represent consideration. One was typed in by the auditors in the sum of $22,000 explained as the nominal share value and the other, the sum of $543,840 which was in handwriting. This handwriting could not have been on the transfer document on the date it was purportedly signed in 1993, as it

was the defendants' case that it was the Stamp Commissioner who wrote that figure in as the assessment. What is even more striking is that the Stamp Commissioner's assessment did not come about until December 29, 1994, and could not have been known to the parties or to Goldsons on November 25, 1994, or on a date in 1993 when the document was purportedly signed and I so find.

[127] On the issue of the transfer of 22,000 shares from Lloyd Wilson to Mr Lewis, I find that the defendants correctly accept that a false statement was made to the Stamp Commissioner as the evidence from Mr Lewis was that the instrument of transfer was signed in the "first part" of 1993 and lodged on November 25, 1994.

[128] In all the circumstances, I find that the evidence of Mr Lewis cannot be believed in respect of the circumstances surrounding the preparation of, the date of execution and the consideration agreed and paid for the shares as set out in the instrument of transfer. I find that there is no credible or reliable evidence that any consideration passed between Mr Lewis and Mr Wilson in respect of the transfer of 22,000 shares as belonging to Mr Wilson.

Burden of proof on the issue of the signature of Lloyd Wilson

[129] A consideration of the evidential and legal burden on this issue necessitates another look at the pleadings. The claimant did not allege that Mr Lewis forged or caused Mr Lewis's signature to be forged on the instrument of transfer. Rather, it was pleaded that if the transfer document was in fact executed, it was not Lloyd Wilson who executed it. It is the claimant who bears both the legal and evidential burden to prove the positive assertions in her particulars of claim as is set out in the law governing the burden of proof in civil cases.

[130] That Mr Wilson did not execute the instrument of transfer is a positive pleading, the necessary implication of which, is that insofar as there is an instrument of transfer purportedly bearing his signature, that signature was forged. Implicit in this averment is the assertion that Mr Lewis is complicit in the signature of Mr Wilson being placed on that document and that the transfer to Mr Lewis based on

the transfer document was fraudulent. Even though the claimant did not use the word "forged," in her particulars of claim, the gravamen of her statement of case is that the signature of her father on the instrument of transfer by which the shares were transferred was forged.

[131] It is an established principle of law that a person who purportedly signs a document is bound by his signature appearing on that document unless he proves otherwise. Having regard to leading authorities on fraud and forgery in civil claims, the proper approach to the burden of proof is that where a share transfer has been registered, the defendant need not prove anything to establish legal title to the shares, as the burden falls on the claimant to prove that the purported transfer is invalid.

[132] Despite the irregularities on the face of the transfer document and the date of execution being uncertain, it is the claimant who bears the burden of proof to satisfy the court with cogent and reliable evidence that Mr Wilson did not sign it. The claimant called no expert witness to support her assertion that the signature of Mr. Wilson was forged.

[133] In terms of the circumstances surrounding the execution of the instrument of transfer, Mr McGann was called as a witness to corroborate Mr Lewis' evidence that he had witnessed Mr Wilson sign "a document dealing with his shares in the company." Mr McGann said Mr Lewis called him at Ideal Betting's office and asked him to come to Goldsons he did not say what for. When he arrived there, he was told to witness Mr. Wilson's signature. When challenged on the veracity of his evidence, there was this exchange:

> **Q: Thank you. So, Mr. McGann, just to clarify: Mr. Wilson was not the one who asked you to witness his signature?**
>
> **A: Mr. Lewis asked me to look, Mr. Wilson is about to sign, Mr. Wilson signed and I then witnessed Mr. Wilson's signature.**

Q: Thank you Mr. McGann. I put it to you Mr. McGann, that Lloyd Wilson never signed any Instrument of transfer in your presence.

A: I am putting it to you ma'am, that I would never witness a blank paper like that.

[134] It was submitted by Mrs Small-Davis, KC that based on the answers given above, it is more than passing strange that Mr. McGann had not been asked about signing a blank paper yet he responded in the way that he had. Further, given that the execution of the transfer was to take place at Goldsons, Mr. Lewis arranged for Mr McGann from Ideal Betting to witness Mr Wilson's signature when there ought to have been persons at Goldsons who could have done so. Mr. Lewis' signature was witnessed by Ms Davis, one of Goldson's employees. Why was it necessary to have a different person witness Mr. Wilson's signature? And even if they wanted a different witness for each person's signature, why wasn't another Goldson employee on- site satisfactory?

[135] It was submitted by the claimant that the circumstances surrounding the purported transfer are questionable and the defendant's own handwriting expert failed to establish that the transfer they produced was signed by Lloyd Wilson. The claimant contends that the court should find that it is not satisfied that Mr. Wilson executed the instrument of transfer or that he sold his shares to Mr. Lewis.

[136] The defendants put the claimant to proof, arguing that it is the claimant who needs to satisfy the court with cogent and indisputable evidence that Mr Wilson did not sign the transfer document and that Mr Lewis forged or caused someone to forge the signature of Mr Wilson. Questionable or suspicious circumstances are not enough. As McDonald JA pointed out in Simpson (Maureen) and anor v

Simpson (Ronald) and anor[29], "Suspicious events, by themselves, do not prove fraud".

[137] It was submitted by Mr Hylton, KC that although the burden of proof is on the claimant to establish this alleged forgery, the defendants called two witnesses who gave sworn evidence that Mr Wilson signed the transfer document. Mr Lewis testified in court that he was present when Mr Wilson signed the instrument of transfer and that it was prepared pursuant to an agreement, they had both reached. Mr Michael McGann testified that he was present when Mr Wilson signed the document and that he witnessed the execution of the transfer document. The defendants submit that the most that can be said is that the procedure for witnessing the signature of Mr Wilson was curious but did not rise to evidence of fraud.

The defendants submit that Mr Lewis had an interest to serve, and that applies equally to the claimant and her brother whose mother would be the beneficiary of the windfall that would come to their father's estate if the claim succeeds. However, the matter did not end there. The defendants elected to prove that the instrument had actually been signed by Mr Wilson and called an expert witness in support of this assertion.

The Handwriting Expert

[138] The defendants called Mr William Smiley, a Certified Document Examiner and Retired Deputy Superintendent of Police. Mr Smiley could not definitively state that Mr Wilson had signed the instrument of transfer. He stated frankly that he was unable to arrive at a "conclusive opinion." In his oral evidence, Mr. Smiley acknowledged that the reason he had not been placed in a position to give a conclusive opinion on whether the questioned signature was the writing of Lloyd

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[29] [2021] JMCA Civ 31

Wilson was that he had received neither original known signatures, original questioned documents, nor certified copies of either known or questioned writing. This meant that he could not study, analyse and identify Mr. Wilson's writing pattern in order to determine whether the questioned document was signed by him.

[139] Based on the report before the court and his oral evidence, Mr Smiley could not say whether the signature was that of Lloyd Wilson. His report and oral evidence support the view that on either party's case, there is no reliable evidence to establish that Mr Wilson signed the instrument of transfer.

[140] The claimant, on the other hand, produced no direct evidence to support her case that Mr Wilson did not sign the transfer document. The allegation that the execution of the transfer form was fraudulently brought about is without any compelling evidence from the claimant to discharge the burden of proof that that the signature on the transfer document is not that of Mr Wilson.

[141] In order for the court in its own assessment, to make a finding as to whether Lloyd Wilson did or did not sign the instrument of transfer having looked at the entire factual matrix surrounding the date and manner of execution, its preparation, the assessment of the Stamp Commissioner, the consideration, I will now move to the credibility of Mr Lewis.

Credibility of Donovan Lewis

[142] Mr Lewis was the main witness as to fact. I have assessed the consistency of his evidence as a whole with what is agreed or clearly shown by other evidence to have occurred on the documentary evidence. "I can't recall" was his standard response to most of the questions asked of him in the witness box. He was not asked if he had refreshed his memory, rather, he was confronted with the documentary evidence.

[143] I can't recall is an answer I view as an election not to give evidence, for unless "I can't recall" is accompanied by some explanation as to what accounts for the

failure to recall; be it the passage of time, illness, or an insufficient familiarity with the material, some evidence ought to accompany this overused response.

[144] It is significant that the witness chose to retreat behind "I can't recall" having been shown documents which he created, relied on and which formed part of the records of his own company. This posture in the witness box demonstrated a choice not to give evidence of that which was peculiarly within his own knowledge as the chairman, director and company secretary of Ideal Betting. The creation of the documentary evidence was for posterity, there was no need to rely on his recall when a document had been placed in his hand as it was he who authored it or signed it in many instances and it was ostensibly created contemporaneously with the transactions recorded in them.

[145] The internal consistency of Mr Lewis' evidence left much to be desired as the company's documents when shown to him were insufficiently explained in cross-examination. For example, the evidence that the company's share capital needed to have been increased at the behest of the Betting, Gaming and Lotteries Commission was proven to be false by the company's financial records.

[146] In paragraph 32 of Mr Lewis' witness statement, he said that the increase in share capital was necessary in order to meet the Betting Gaming and Lotteries Commission("BGLC") requirement that the company maintain a 2:1 current asset ratio, Mr Lewis gave evidence that Ideal Betting was operating on marginal share capital. The documentary evidence disclosed that contrary to Mr Lewis' assertion, the current asset ratio was operating at 2:2:31.

[147] The 1989 and 1990 financial statements disclosed that at the time of the 1989 increase in share capital, there were capital reserves of $611,000, accumulated profits of $599,000 and short-term investments of $1,400,000. He admitted in cross-examination when confronted with this evidence that the company was not at marginal share capital, this was therefore not the reason for the increase in share capital in November 1989. There was no evidence as to the reason for that

increase. When confronted with the financial records, Mr Lewis reluctantly admitted the truth of their contents.

[148] The demeanour of the witness was of lesser importance in a case such as this which involves considerable documentary evidence but had to be considered nevertheless as it remained important in fact finding.

[149] To countervail this witness, King's Counsel Mrs Small-Davis skilfully demonstrated a cross-examination of the whole man. The court having seen and heard the witness when taxed, noted that Mr Lewis' witness statement said "I am one of the directors and the majority shareholder of the first defendant, which is a private company. In my capacity, as a director, I had access to the company's files and records and the statements I make in this witness statement are based on my personal knowledge and on the documents in the company's files and records."

[150] My assessment of Mr Lewis is that he was an experienced and astute businessman who had been overseeing a successful multimillion-dollar business for decades. From the minutes of the Jamaica Bookmakers Association of which he was secretary and record-keeper, it is evident that he possesses considerable business savvy. He is an accountant by profession and this means he is accustomed to documents and numbers and is used to financial records. Record keeping and documentation are a part of his function and at Ideal Betting, he was the creator of and keeper of the company's records. His life's work involved precision and accuracy. Therefore, the imprecision in his responses in the witness box, when coupled with the agreed documentary evidence from company records before the court was unimpressive.

[151] I reject the evidence of Mr Lewis on the issue of the voluntary transfer of shares by way of sale from Mr Wilson to Mr Lewis. However, I bear in mind that a rejection of the defendants' evidence is not proof of the claimant's assertions and that means I have to return to the claimant's case.

[152] There was direct evidence from the claimant that Mr Wilson was overseas on November 25, 1994, which was the date the instrument of transfer was lodged. The claimant adduced evidence that the share certificate was in the family's possession at the time the transfer was made; that the family knew nothing of an intention on the part of Lloyd Wilson to part with the 22,000 shares, the timing of the transfer and the absence of a deposit in his bank account equivalent to $543,840.00 and argued that these are strands in a cable which form a strong circumstantial basis for the conclusion that Lloyd Wilson did not sign the instrument of transfer.

[153] There was also direct evidence from Mr Lewis that he witnessed Mr Wilson sign the instrument. The evidence from Mr Lewis that the instrument was signed in the presence of the claimant has been found to be inconsistent and unreliable. The expert evidence presented by Mr Lewis is inconclusive.

[154] The claimant's evidence was strengthened by the response of Mr McGann who testified that he would not sign a blank document when he had not been asked about any such thing. Mr McGann's answer is significant when viewed against the evidence from Mr Lewis that it was Goldsons who completed the transfer document. I drew the inference that the document Mr McGann had been asked to sign was in fact blank. It was the solemnity of the courtroom and being under the gaze of the court in the witness box which led him to acknowledge what should be the correct behaviour rather than his actual behaviour. I accept that Mr Wilson had not signed the instrument of transfer, there was no information in it and that Mr McGann witnessed a blank document which was later filled in and that is why he said it was not blank.

[155] Additionally, there was no evidence of a deposit in the sum of $543,840.00 in the bank statements of Mr Wilson and no evidence of a note of this transaction made or a copy of the instrument of transfer among Mr Wilson's papers. The fact of his meticulous record keeping having been established, Mr Wilson had no document among his papers to show that he had engaged in this transaction, particularly

since the original share certificate remained in his possession. There was no receipt for payment to Mr Wilson for the 22,000 shares among his papers. There was no evidence as to how Mr Lewis paid for the shares from his personal funds, whether cash, cheque, wire transfer, or other means, and no date or location of payment for the shares. This was evidence which ought to have come from Mr Lewis to support his assertion that the instrument of transfer was genuine as it was based on an agreement for sale.

[156] Significantly, there was no evidence that Mr Wilson complied with his obligation to notify the other shareholders in accordance with Article 17 of his intention to transfer his 22,000 shares to Mr Lewis.

[157] The burden on the claimant is to adduce evidence which is capable of justifying a reasonable inference from primary facts that there was no signature by Lloyd Wilson on the instrument of transfer. It is not enough merely to raise suspicious circumstances. I find that the claimant has discharged the legal and evidential burdens by adducing sufficiently cogent and probative evidence on this issue. I am satisfied that on the cumulative effect of all of the evidence, on a balance of probabilities, given the serious nature of these allegations, the primary evidence adduced by the claimant has laid a sufficient foundation from which to both logically and reasonably draw the inference that the signature on the Instrument of transfer could not have been placed there by Lloyd Wilson.

The Annual Return

[158] The claimant pleaded that Mr Lewis fraudulently represented in an annual report made up to 29 December 1994 and filed with the Registrar of Companies on 24 January 1996, that the shares previously held by Lloyd Wilson and Reginald Wilson were transferred to him on 25 November 1994. Further that Mr Lewis filed the 1st defendant's annual return made up to 27 December 1989, bearing signatures purporting to be that of Lloyd Wilson knowing that the signatures are not authentic.

[159] **The claimant relied on Mr. Canute Sadler who gave evidence that he had been investigating Ideal Betting and had done extensive searches of the company's records at the Companies Office in 2012/2013, which revealed that Mr. Lewis had acquired all of Mr. Wilson's shares in December 1994, after Mr. Wilson's death. He contacted the family of Mr Wilson who were dismissive of this information because the date of the transfer was stated in the Annual Return as November 25, 1994. That was a date when Mr Wilson was not in Jamaica and only four days before his death.**

[160] **The defendants in paragraph 45(d) of the defence stated that the annual return did bear the signature of Lloyd Wilson and at paragraph(a) that Mr Lewis acquired all 936,000 ordinary shares lawfully. The parties each bear the legal and evidential burden to prove their assertions.**

[161] **The standard of proof is on a balance of probabilities with the range of probabilities varying within the circumstances of each case. Mr Lewis bears no legal burden to prove that he was not fraudulent in his conduct. It is for the claimant to prove on the evidence adduced that at the time of the lodging of this document with the Registrar of Companies he knew the transfer of shares had been obtained by fraud.**

[162] **In cross-examination Mrs Small-Davis, KC carefully took Mr Lewis through the annual returns in evidence. She highlighted the annual return made up to December 31, 1989,[30] which was the first annual return filed after the increase in the allotment of November 17, 1989.[31] The signatures of Lloyd Wilson, Director and Donovan Lewis, Secretary appear on the certificates.**

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[30] **Bundle 3C, p.835**

[31] **Transcript, page 278**

[163] Thereafter, the annual returns made up to, December 31, 1990, 1991 and 1992[32] contain certificates signed by Donovan Lewis as director and a Mr Chambers as secretary. Mr Lewis said that Mr Chambers was the Financial Controller of the company whose name was listed among the directors of the company.[33] He could not point to a document appointing Mr Chambers as company secretary. Mr Lewis admitted that the signature of Mr Chambers as secretary represented to the Registrar of Companies that he was the company secretary when this was not so.

[164] On the annual return made up to December 27, 1993,[34] Mr Lewis admitted that the signature of the company secretary was that of his sister Claudette Chung and on that date she was in fact the holder of that position. It was put to him that no notice of change of secretary was filed with the Companies Office and Mr Lewis responded that he could not recall. She was also not listed among the directors. Mr Lewis admitted that his sister Claudette Chung had signed on the balance sheet for the year ended February 1978 even though she was not then a director. When the witness was confronted with the balance sheet for year ended 1978, he admitted that the directors listed there did not include Ms Chung and that there had been no change of directors from January 6th, 1979 through to November 1994. The directors noted in the records were Lloyd Wilson, Donovan Lewis and Eulalee Huie. For the balance sheets noted at pages 44, 55, 67, 79, 94, 109, 125, 139 and 155 of the judge's bundle, despite being shown these documents Mr Lewis, could not recall the date Claudette Chung was first appointed director.[35]

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[32] **Bundle 3D, p. 1086**

[33] **page 1091**

[34] **Bundle 3C, p.866, Transcript p. 282**

[35] **June 14, 1995**

[165] It was apparent from the evidence of Mr Lewis that between 1978 to 1989 he and Mr Wilson had signed all the annual returns. From 1990 onwards the signatories were Mr Lewis and Mr Chambers then Mr Lewis and Ms Chung. It emerged that Mr Chambers is the father-in-law of Barbara Chambers, sister of Mr Lewis. Barbara Chambers worked as a director of the company. Mr Linval Roache, worked for the company as an accounting clerk or accountant, Mr Lewis could not recall. On the annual return for June 8, 2006 Mr Roache signed as company secretary.

[166] After the transfer of the 22,000 shares, the annual return for the year made up to December 29, 1994[36] shows the signature of Mr Lewis as director and Ms Banbury as company secretary. The evidence from Mr Lewis was that Ms Banbury worked in the office as a secretary as well as at that time she held the position of company secretary. She was not a director as the only two directors listed were Donovan Lewis and Eulalee Huie. Unsurprisingly, there was no re-examination of Mr Lewis.

[167] The defendants rely on the audited financial statements for the year ended February 28, 1993[37] and the annual return made up to December 27, 1989 to establish the validity of the transfer of 22,000 shares. The annual return bears the purported signature of Mr Wilson.

[168] As has been established on the evidence of Mr Lewis, the annual return made up to December 29, 1994, does not accurately reflect that which it purports to and given the pattern of filing the annual reports with the signatures of those who were not directors, the representation cannot be said to have been innocently made to the Registrar of Companies. Does this conduct rise to the level of fraud?

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[36] Bundle 3C, p.874, Transcript p.285

[37] para 33 witness statement of Mr Lewis, Bundle 3A, p. 139.

[169] **It could not be said that there was no intention for this representation to be legally binding; nor could it be said that the representation was innocently made. There could be no honest belief in the truth of the representation that Mr Chambers, Ms Chung or Ms. Banbury were then the company secretaries when Mr Lewis affixed his signature to these returns. I can come to no other view than that these annual returns were signed with the intent to deceive the Registrar of Companies as to the composition of the board and Mr Wilson. It cannot be said however, that Mr Wilson was not aware of the content of the documents he had signed up to 1993 and there has been no proof by the claimant to the contrary.**

Expert Witnesses

[170] **It is the duty of the expert witness to: "…furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or Jury to form their own independent judgment by the application of those criteria to the facts proved in evidence.[38]" I cite the dictum of Cresswell, J in National Justice Compania Naviera SA Prudential Assurance Co Ltd ("the Ikarian Reefer")[39] for the principles below:**

> **"1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation (Whitehouse v Jordan [1981] 1 WLR 246, HL, at 256, per Lord Wilberforce).**
>
> **2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see Pollivitte Ltd v Commercial Union Assurance Company plc (1987) 1**

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[38] **Davie v Edinburgh Magistrates [1953] SC 34 at 40.**

[39] **[1993] 2 Lloyd's Rep 68, [1993] FSR 563, [1993] 2 EGLR 183**

Lloyd's Rep 379 at 386, per Garland J, and Re J (1990) FCR 193, per Cazalet J. An expert witness in the High Court should never assume the role of an advocate . . .” Toth v Jarman [2006] EWCA Civ 1028.”

[171] Ultimately, the question of how much weight to attach to the evidence of an expert is a matter for the court. In Price Waterhouse (A Firm) v. Caribbean Steel Co. Ltd.,[40] Panton, P delivering the judgment of the Court of Appeal stated:

> **“The learned judge had a determination to make as to whether the valuation exercise had been properly done. He had the evidence of three persons – two of them with expertise in the particular area, and one definitely without. That he preferred the evidence of the one without is surprising….**
>
> **...“Given Mr. Holland’s qualifications and vast experience as well as his chairmanship of the disciplinary committee of the ICAJ, it is difficult to understand how the learned judge could have rejected his evidence virtually out of hand.”**

[172] At paragraph 45 the learned President found that the judge said in his judgment that he had erroneously employed a common sense approach.

[173] At paragraph 47, Panton, P continued by saying:

> **“In Sansom v Metcalfe Hambleton & Co. [1998] PNLR 542, Butler-Sloss, LJ in giving the judgment of the English Court of Appeal said:**
>
> > **‘In my judgment, it is clear… that a court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party), without evidence from those within the same profession as to the standard expected on the facts**

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[40] [2011] JMCA Civ 29

> **of the case and the failure of the professionally qualified man to measure up to that standard. It is not an absolute rule … but, it is less in an obvious case, in the absence of the relevant expert evidence the claim will not be proved."**

[174] The reasoning of the Court of Appeal in Price was upheld on appeal to the Privy Council and specifically, the learned President's dictum regarding the weight to be given to the experts' evidence.

[175] There is therefore a duty on this court to scrutinize the viva voce evidence as well as the reports produced by the expert witnesses. A judge or a jury is not obliged to accept the views of an expert. The duty of the experts called by either side is to furnish credible information in order that the court can make an independent assessment by applying the information presented by the expert to the facts found in the case.

[176] Rule 32.3 (1) of the CPR governs the duty of an expert witness to render assistance to the court, in an impartial manner on the matters relevant to his or her expertise. This duty overrides any obligations to the party by whom the expert has been retained. In Cala Homes (South) Limited and others v. Alfred McAlpine Homes East Limited[41], Laddie, J. said and I agree with the following:

> **"The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth: That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in the pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the**

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[41] **[1995] EWHC 7**

court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill…"

[177] **In the case at bar, bearing the dicta cited above in mind, I reviewed and assessed the evidence of Mr Mesquita for the claimant and Mr Walters for the defendants, the experts appointed by the court, as also Mr Smiley whose evidence was dealt with earlier. I noted that the application to have Mr Walters appointed an expert was supported by the Affidavit of Daynia Allen, both filed and served on January 13, 2022 from which there was no objection. This affidavit specifically stated that Mr Walters was a partner in Capleton Jones and exhibited his résumé, which made the same statement. This court was put in the unhappy position of having to decide what should have been resolved in case management, namely the issue of the potential conflict regarding the appointment of Mr Walters as an expert at the mid-trial stage. The parties have that ruling in note form.**

[178] **I will not go through the myriad financial statements save to say that I accept the conclusions drawn by Mr Mesquita over those of Mr Walters. Mr Mesquita demonstrated in detail how he arrived at the findings in his report, he verified its accuracy and gave reliable and credible evidence. Mr Walters demonstrated a great deal of accounting knowledge however he failed to answer the questions he was asked and as a result fell into the category of the student who writes everything about a subject and fails the course for want of knowledge. He forgot his duty to the court, failed to observe the rules of civil procedure and the law related to expert witnesses. I gave greater weight to the evidence of Mr. Mesquita and accepted his reasoning and conclusions over that of Mr. Walters for these reasons.**

[179] Mr Horace Mesquita, chartered accountant and expert witness for the claimant pointed out that the company was a private entity and was not obliged to file financial statements with the Registrar of Companies. The fact that the company filed annual returns despite its private status meant that it had to comply with the law. The effect of this failure to comply was the presentation of false annual returns to the Companies Office designed to misrepresent the true state of affairs of the company.

[180] The conclusion arrived at from all of this evidence is that the instrument of transfer purportedly executed by Lloyd Wilson after his death was fraudulently used to transfer 22,000 shares into the name of Donovan Lewis. The annual return filed based its efficacy on this fraudulent transfer. The annual return was designed to misrepresent the true state of affairs at the company and to cause the registration of shares in the name of Donovan Lewis with the effect of diluting the shareholding of Mr Wilson.

The financial statements

[181] These documents were examined by Mr Mesquita for the claimant and Mr Walters for the defendants. I accept the findings of Messrs Mesquita and Walters that the cost method is acceptable, however, it did not represent fair value for the shares. Both experts gave their calculations as to what sum represented fair value in 1994 and 2020 for the guidance of the court. I do not propose to go through all of their findings.

[182] It was established on the evidence that there was a bonus share issue to Mr Lewis. The company held significant funds as accumulated profits and capital reserve. The capital reserve increased by over $400,000. Share capital reflected this increase as well. Short term investments were increased by $1.4 million. As at the 28th of February 1989, the capital reserve was $611,000. In cross-examination, the revaluation of the quoted assets showed a $1.4 million increase on the financial statement of the 28th of February 1990.

[183] All the financial statements show the signatures of two directors, whereas when the audited financial statements for the same years were disclosed in Mr. Sadler's case, for the period between 1977 to 1995 no balance sheet had been affixed.

[184] In the cross-examination of Mr Lewis, the financial records of the company were meticulously reviewed. I remind myself that Mr Lewis was a sophisticated businessman and an accountant by profession. He was confronted with the records of his company and he admitted that in 1987, the year of the company's incorporation, a dividend was declared with no other dividend paid until the year 2013 in the sum of $5,000,000.00. This dividend was paid to himself as majority shareholder, holding 97% of the shares. Again in 2014, a dividend was paid out of retained earnings in the sum of $5,000,000. In 2019, there was a proposed dividend of $100,000,000.

[185] In the evidence of Mr Horace Mesquita, expert witness for the claimant, the net asset valuation method means that the capital and equity of the company is used to value shares. Equity means what is attributable to the shareholders in terms of shares, accumulated profit and capital reserves. He found that on the notes to the financial statements for the year ended February 28, 1994, the value of the fixed assets was stated at cost as there had been no valuation and that this did not represent market value.

[186] The defendants accept in their submissions that the accounting records in evidence before the court were incomplete and perhaps even unsatisfactory in some respects and cite two reasons for this.

[187] The first was the passage of time, the claim was filed in 2018, documents and the transactions in evidence go back to the 1970's. They contend that it is not surprising that the available records would be incomplete. There was also the unchallenged evidence that there was a fire that destroyed many of the company's records.

[188] **Secondly, that Ideal Betting is not a large, publicly traded company or regulated financial institution. It is a small, private, closely held company started and operated by a group of friends. By all accounts, there was a significant level of informality in the way the company's affairs were conducted, and this inevitably resulted in documents not satisfying strict accounting regulations or standards.**

[189] **The defendants' submission does not make up for the fact that Mr Lewis is an accountant by profession. Incomplete records would not be an expectation which could be reasonably held by the court with regard to the record-keeping of the chairman, director, and majority shareholder who as an accountant stands also in a fiduciary relationship to the company. It was a little curious to my mind that Mr Lewis, himself an accountant, was not more forthcoming about the several issues raised concerning the financial statements in cross-examination for taxed he was, about the accounting records of his company.**

[190] **The fact that there was a fire in the submissions of the defendant does not explain the content of the accounting records, nor did Mr. Lewis give this evidence. The fire is one fact, the state of the financial records is another. There was no nexus shown between any particular document and a fire and/or the passage of time rendering it incomplete. Additionally, the company relied on its auditors for the preparation of its financial records. The audited financial statements are agreed documents before the court and the auditors make no mention of incomplete, partial or destroyed records in their various reports.**

[191] **It is difficult looking at the records of the company to see where Mr. Lewis considered the interests of the other shareholders in the allotment of shares to himself or how that allotment was in the best interests of the company.**

Issue 4: Whether the claimant has established oppression, unfair prejudice or unfair disregard on the part of the company and/or Mr. Lewis with regard to the estate of Lloyd Wilson

[192] Each case turns on its own facts. Having considered all of the evidence under this head, the court is to answer two questions. One, does the evidence support the reasonable expectation the claimant asserts and two, does the evidence establish that her reasonable expectation was violated by conduct falling within the terms of oppression or unfair prejudice.

[193] This court recognises that directors have a duty to act in the best interests of the company and that the content of this duty is unaffected by any one shareholder's interests at stake. The evidence, when viewed objectively, supports a reasonable expectation that Mr. Lewis would consider the position of the other shareholders in making his decisions as both chairman and company secretary. The purpose of a claim grounded in oppression is not confined to simply to legal interests. Given the potential impact on the other shareholders it was expected that Mr. Lewis would act in their best interest as well as in the interests of the company.

[194] In deciding this issue, the court is entitled to look to the Companies Act, the company's constituent documents and any agreements, whether in writing or made orally, which give rise to equitable considerations.

[195] In the case of Ebrahimi v Westbourne Galleries Limited[42], the House of Lords ruled that an unlimited company is more than a mere legal entity with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se, which are not necessarily submerged in the company structure.The court held that the application of equitable considerations enables the court to subject the exercise of legal rights to equitable considerations of a personal character arising between one individual and another, which may make

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[42]1973. A C 360.

it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[196] I bear in mind that shareholders in a closely held company may be directors all of whom are well known to each other and are significantly involved in its management. This may mean that they are not necessarily engaged in the formalities of good corporate governance. This does not mean that the Companies Act and the articles of association of the company can be ignored or avoided. The exception to this is where there is some evidence of an agreement or understanding among the shareholders in order to override the provisions of the articles of association (see Benjamin v Elysium Investment Property Limited[43]).

[197] There is a duty on a director to exercise powers for a proper purpose. The authorities show that shares issued in the self-interest of a director or for the purposes of maintaining management control will be held to be invalid (see Whitehouse v Carlton Hotel Pty[44] and Howard Smith Ltd v Ampol Petroleum Ltd.[45]) The allotment of shares in this present case has not been shown to be for the purpose of raising capital.

[198] In the case of Benkley Northover v Eric Northover v Eric Northover, Rohan Northover, Godfrey Dixon and Winston G. Northover Associates Limited,[46] Edwards, J (as she then was) distilled the principles set out in Howard Smith:

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[43]1960. (3) S.A. 467 (ECD)

[44][1987] 162 CLR 285

[45][1974] AC 821

[46][2014] JMCC Comm. 14

"68 In Howard Smith v Ampol Petroleum Ltd. the Privy Council held that the allotment was invalid as it was only made to destroy Ampol's majority shareholding in the company. The court must be guided by the underlying rationale of the proper purpose doctrine. The approach taken by the court in Howard Smith v Ampol Petroleum Ltd. was to

(i) identify the nature and extent of the power;

(ii) identify the range of purposes for which that power might properly be exercised;

(iii) identify the substantial purpose for which it was actually exercised in the particular case;

(v) measure that actual purpose identified in step (iii) against that range of permissible purposes for the exercise of that power as indicated by the articles or ascertained by the court in accordance with step (i).

69 If the substantial purpose is proper, the exercise of the power will not be invalidated by the presence of some other improper, but insubstantial purpose. However, if the director's opinion is bona fide and shows good managerial judgment the court may conclude that the exercise of the power to allot was, broadly speaking, proper in an all the circumstances. The court will consider whether it was for the benefit of the company as a whole as distinct from maintaining control of the company in the hands of the directors themselves or their friends or a few select family members.

70 It is clear, therefore, that issuing and allotting shares for improper purposes such as to reduce shareholding will result in the allotment being prohibited by the court. This is subject to the proviso that an act which is within the scope of the expressed or implied powers conferred by the articles and memorandum of the company is not to be held to be outside of the scope of the company's capacity simply because it was entered into for

other improper purposes. It is also recognised that whilst the power to issue shares is usually exercised to raise capital, there may be other genuine reasons or occasions when the directors may properly and fairly issue shares: see Punt v Symons and Co Ltd [1903] 2 Ch 506 [1903] 2 Ch 506."

[199] The law in this area is taken from section 19 (1) of the Companies Act, 2004 which provides that the articles of incorporation constitute a statutory contract:

> **"19(1) Subject to the provisions of this Act, the articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the articles.**

Section 213A, Companies Act, 2004

[200] Section 213A of the Companies Act, 2004 which provides remedies where a company has been operated in a manner that is oppressive, unfairly prejudicial or unfairly disregards the interest of an officer of a company. Section 213A provides that:

> **(1) A complainant may apply to the Court for an order under this section.**
>
> **(2) If upon an application under subsection (1), the Court is satisfied that in respect of a company of any its affiliates –**
>
> > **(a) any act or omission of the company or any of its affiliates effects a result;**
> >
> > **(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner;**
> >
> > **(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner, that is oppressive or unfairly prejudicial to, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of.**

(3) The Court may in connection with an application under this section make any interim or final order it thinks fit, including an order –

(a) restraining the conduct complained of;

(b) appointing a receiver or receiver-manager;

(c) to regulate a company's affairs by amending its articles or bylaws, or creating or amending a unanimous shareholder agreement;

(d) directing an issue or exchange of shares or debentures;

(e) appointing directors in place of, or in addition to, all or any of the directors then in office;

(f) directing a company, subject to subsection (4), or any other person to purchase the shares or debentures of a holder thereof;

(g) directing a company, subject to subsection (4), or any other person to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures;

(h) varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract;

(i) requiring a company, within the time specified by the Court, to produce to the Court or an interested person, financial statements or an accounting in such forms as the Court may determine;

(j) compensating an aggrieved person;

(k) directing rectification of the registers or other records of the company;

(l) liquidating and dissolving the company;

(m)directing an investigation to be made; or

(n) requiring the trial of an issue.

(4) A company shall not make a payment to a shareholder under paragraph (f) or (g) of subsection (3) if there are reasonable grounds for believing that –

(a) the company is unable or would, after that payment, be unable to pay its liabilities as they become due; or

(b) the realizable value of the company's assets would thereby be less than the aggregate of its liabilities."

[201] It is not in issue that the claimant is a complainant within the meaning of section 212 (3) of the Companies Act.

I am guided by the words of Edwards J in Benkley Northover:

"Under section 213A, therefore, what is to be determined in respect of the Company are threefold. That is; a) Whether an act or omission of the company or its affiliates result in oppression or unfair prejudice to any shareholder, debenture holder, creditor, director or officer of the company; b) Whether the business affairs of a company or its affiliates have been or are being carried on or conducted in a manner oppressive or unfairly prejudicial to that group of persons; and c) Whether the powers of the directors of the company or its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to the said group of persons."

[202] Edwards J further stated at paragraphs 90-92 that:

"An oppression remedy is a statutory right usually available to oppressed shareholders. It empowers the shareholders to bring an action against the corporation in which they own shares when the conduct of the company had an effect that is oppressive, unfairly prejudicial or unfairly disregards their interest as shareholders. Conduct considered in the above includes exclusion from management and diversion of Business. Section 213A now provides much wider remedies to a wider group but in considering what may constitute oppression regard may still be had to the English authorities."

[203] Oppressive conduct is defined as one which is burdensome, harsh and wrongful. It marks a "visible departure from standards of fair dealing and a violation of the

conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely". It may arise on an illegal action, appropriation of corporate property, breach of equitable rights, mismanagement and squeeze outs".[47]

[204] Section 213A of the Companies Act is modelled on the Canadian Business Corporations Act. As a result of that, cases emanating from Canada are persuasive in interpreting the section and in particular is the case of BCE Inc v 1976 Debentureholders ("BCE"), a decision of the Supreme Court of Canada which stated that:

> **"[56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.**
>
> **[58] oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair:… It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.**

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[47] (See judgment of Charles Hari Prashad, J in Joan Devau v Dubulay Holding Limited and others, St. Lucia High Court SLUHCV 2003/0424 decided September 22, 203 (unreported) quoting from the House of Lords in Scottish Co-operative Wholesale Society v Meyer [1959] AC 324.)

[59]…Oppression is fact specific. what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

[89]Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the CBCA. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the CBCA.

[205] Paragraph 63 states:

"As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[206] There may be conflicts between the interests and expectations of different stakeholders. The Court said at paragraph 64 that:

"The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively

or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".

[207] **At paragraph 66, the court said that directors owe a fiduciary duty to the corporation, and only to the corporation. Further, not every unmet expectation gives rise to a claim. Section 241 requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences.**

[208] **In summary, there are two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest? in a claim for the oppression remedy, two questions must be considered. In other words, was there "actionable conduct."?**

[209] **At paragraph 91, the Supreme Court of Canada underscored that the concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of Section 241 is aimed at. However, they do not represent watertight compartments and often overlap and intermingle.**

[210] In the case of Sharma Persad Lalla v Trinidad Cement Holdings Limited, TCL Holdings Limited and Andy J. Bahan,[48] Jamadar J(as he then was,) relied on the treatise: The Company Law of Canada,[49] for the interpretation of the three categories as follows:

> **"Oppressive" has been interpreted as meaning burdensome, harsh or wrongful. See example, Scottish Cooperative Wholesale Society Limited v Meyer (1959) A.C. (H.L.), and Burnett v Tsang (1985) 29 B.L.R. 196 (Alta. Q.B.). "Unfairly prejudicial" has been interpreted to mean "acts that are unjustly or inequitably detrimental": Diligenti v RWMD Operations Kelowna (1976) 1 B.C.L.R 36 (S.C.). "Unfairly disregards" has been interpreted to mean "unjustly or without cause pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers": Stech v Davies (1987) 53 Alta L.R. (2d) 373 (Q.B.). It is not a requirement of the Act that evidence of bad faith or a want of probity must be established by the complainant, although evidence of bad faith may be relevant in a determination of whether the quality or propriety of the conduct is oppressive or unfair: see Bryant Investments Ltd v Keeprite Inc (1991) E Q.R. (3d) 298 of (C.A.) and Palmer v Carling O'Keefe Breweries of Canada Ltd (1989) 67 O.R. (2d) 161 (Div. Ct.)"**

[211] The express statutory language is "any act or omission". This means that an isolated burdensome or harsh or wrongful act can constitute oppressive conduct and it is not necessary to prove a continuing course of action to establish oppressive conduct.

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[48] (unreported decision H.C.A No. Cv. S-852/98 delivered 30th November, 1998

[49] pages 72—721

[212] In determining whether an expectation is actionable in an oppression remedy case, the court has to consider the facts of the case, the relationships at issue, and the entire context, including any conflicting claims and expectations based on strict legal rights or underlying expectations flowing from these rights.[50]

[213] In Ebrahimi, Lord Wilberforce pointed out that in most cases, the interests of shareholders will be adequately and exhaustively defined in the constituent documents of the company and the Companies Acts, but that in some cases, "equitable considerations" might intrude.

[214] Unfair prejudice is a less stringent concept than oppression. Thus, in the Canadian case of Miller v F Mendel Holdings Ltd[51], it was held that conduct complained of which may not be burdensome, harsh and wrongful and therefore oppressive may nevertheless be unfairly prejudicial. On the other hand, in approaching unfair prejudice, the courts have held that the conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interests of the shareholder or other complainant and that as such both unfairness and prejudice must be proved.[52]

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[50]Constitution Ins Co v Kosmopoulos [1978] 1 SCR 2 SCC where it was held that the interests of a creditor included the expectation that the controlling shareholder would cause the company to take out insurance on its assets.

[51](1984) 30 Sask.R. 298 (QB)

[52]Re Saul D Harrison and Sons plc [1995] 1 BCLC 14 Eng CA; Re RA Noble & Sons (clothing) Ltd [1983] BCLC 273.

[215] **It also appears from case law that it is not necessary to show that the conduct complained of is improper or illegal[53] and that an exercise of a legal right may have an unfairly prejudicial consequence.[54] The approach of the courts is to look at any alleged prejudicial conduct from an objective point of view, to take into account any relevant circumstances, and to give the expression its natural meaning without any technical gloss.[55] In deciding whether conduct is unfairly prejudicial, the court may take a number of factors into consideration. For instance, although there is no requirement that the complainant should come with clean hands, the conduct of the complainant may be a factor taken into account.[56] The court may also look at such things as whether any offer was made to buy out the complainant, the motive of the wrongdoer, any delay in bringing the complaint, and any other relevant factors. It is clear from the cases that there are no set categories of what constitutes unfairly prejudicial conduct. The cases in this area show conduct held to be unfairly prejudicial are such as:**

[216] **1. Where a shareholder is excluded from management or removed from the board. 2. Where controlling shareholders make adverse changes to an existing shareholder's rights. 3. Where there is the diversion of business to another company in which the majority shareholder has a greater interest. 4. Where there is failure to hold annual general meetings and to have financial statements prepared in accordance with the Act thus depriving shareholders of their right to**

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[53]Re RA Noble & Sons (clothing) Ltd [1983] BCLC 273; Re Little Olympian Each-Ways Ltd (No.3) [1995] 1 BCLC 636.

[54]Pente Investment Management Ltd v Schneider Corp (1998) (Sub nom Maple Leaf Foods Inc v Schneider Corp) (1998) 44 BLR (2d) 115 Ont CA.

[55]Re Saul D Harrison and Sons plc [1995] 1 BCLC 14.

[56]Grace v Biagioli [2006] 2 BCLC 70 CA.

information on the state of the company's affairs. 5. A failure to call a special general meeting of shareholders to fill a vacancy on the board of directors resulting from the bankruptcy of the second director has been held to amount to unfairly prejudicial conduct. Where there has been a serious departure from normal and business-like practices such as where financial statements were inadequate, inaccurate and not prepared in accordance with accepted accounting principles. (See Re Abraham and Inter Wide Investments Ltd.)[57]

[217] Unfair disregard is concerned with conduct that may not constitute oppression and is that which is unfair to the interests of the protected category. It is a step down from oppression. In Stech v Davies[58] "unfairly disregards" was interpreted to mean "unjustly or without cause pay no attention to ignore or treat as of no importance the interests of the security holders, creditors, directors or officers".

Proof of a claimant's reasonable expectations

[218] The claimant must adduce evidence to:

1. **Identify the expectations that have allegedly been violated by the acts or omissions complained of Lloyd Wilson's reasonable expectations (and indeed those of any of Ideal Betting's directors or shareholders):**

    i. **Fair treatment;**

    ii. **That every director would act in the best interest of the company, and exercise their powers for a proper purpose and abide abiding by their fiduciary duty to the company and its members as a whole;**

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[57] **(1985) 51 OR (2d) 460 Ont HC.**

[58] **British Columbia in Canex Investment Inc v 0799701 Ltd. 2020 BCCA 231**

iii. That every director would act in accordance with the Companies Act and the articles of association.

iv. A return on his investments through the payment of dividends.

As a director, Lloyd Wilson would reasonably expect:

v. To be included in the management of the company

vi. To be kept apprised of important matters affecting the company;

vii. To be provided with accurate and complete information concerning the company and its affairs.

[219] In order to establish that his expectations were reasonably held, the claimant adduced evidence that up to four days before his death, Mr Wilson held shares in the company. From this it may be inferred that Mr. Wilson held on to the very end to his stake in the company.

Unlawfulness is not required. Wrongful conduct is sufficient

[220] The claimant alleges that Mr Lewis obtained an additional 936,000 shares pursuant to the increases of share capital and the subsequent allotment of shares to himself. The claim filed on April 11, 2018 seeks an order striking out the name of Eulalee Huie as ever being a shareholder and reducing the shareholding of Mr Lewis by a corresponding amount. The claimant asks the court to reverse the purported acquisition of shares by Mr Lewis from Eulalee Huie. The particulars of claim state at paragraph 36 that the company reported in its filings with the Registrar of Companies that Mr Lewis had acquired the shares of Ms Huie in or around 2003.

[221] There are three (3) recorded transfers of shares, the transfer of 8,000 shares in 1985 from Estate KR Abrahams to Mr. Lewis, the transfer of a total of 26,000 shares from Lloyd Wilson and Reginald Wilson to Mr. Lewis in 1994 and the transfer of 12, 800 shares from Eulalee Huie to Mr. Lewis in 2003.

[222] **The submissions of the claimant state that the records reflect that after Mr Huie's death, his widow Eulalee Huie acted as a director until her resignation on June 14, 1995. In 1980, Eulalee Huie became a shareholder in the company holding 3,200 shares (5.33%) of the company. In 1978, Noel Huie died and up until his death, he held 1,600 shares (8%), after his death, his estate held 2.67% of the shares and Eulalee Huie became a shareholder holding 5.33% of the shares. It would seem to be a reasonable inference that Eulalee Huie had been allotted the shares that should have been allotted to the estate of Noel Huie.**

[223] **For the years 1983 through to 1995, the register of directors showed that the directors were Donovan Lewis, Eulalee Huie and Lloyd Wilson. In cross-examination Mr Lewis said that Mrs Huie was appointed as a director in January of 1979.[59] There is no record of Ms Huie ever being appointed as a director of the company.**

[224] **Mr. Lewis agreed that the shares given to Eulalee Huie in 1980 should have gone to the Estate of Noel Huie. He said he decided to give shares to Eulalee as her husband Noel did not leave anything for her in his Will. At paragraph 12 of the Defence, it is pleaded that "The decision to allot and issue the shares to Mrs. Huie was due to the inability of Estate Noel Huie to acquire the same. The 2nd Defendant will say that he financed the acquisition of those 3,200 shares on behalf of Eulalee Huie." I will have more to say on this later on as it appears that the shares which ought to have been allotted to the estate of Noel Huie were allotted to Eulalee Huie.**

[225] **Mr. Lewis signed all the financial statements and all the annual returns. He directed who signed, including his sister, his sister's father-in- law and an accounting clerk Mr. Linval Roache, all of whom signed company documents without authorization.**

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[59] Vol 3D, mins at 1135

This is without dispute. Mr. Lewis opted to holding the assets at historical cost rather than true value, which benefitted him significantly, when calculating the net asset value for the price of shares.

[226] Cash and cash equivalents were "reclassified" in the financial statements without any explanation in the company's records. Mr. Lewis said that this was a decision of the auditors, however the auditors do not provide the financial statements that is a function of the directors. Mr Lewis was heavily involved in record-keeping for the Jamaica Bookmakers Association whose affairs were managed as exhibited by his participation at meetings as reflected in those minutes. The minutes of the company were significantly scant in comparison. I recall that the Companies Act, 1965 prescribes in section 140 how minutes of meetings are to be kept.

[227] It is after Mr. Lewis had secured 97% ownership of the company that there was a "Report of Directors" presented to shareholders at the annual general meeting and a recorded discussion about dividends.

[228] Ideal Betting only paid dividends three times in its history. Small dividends were paid in 1987. No dividends were declared for another 26 years even though the company was consistently doing well and maintained $11,000,000 in capital reserves and accumulated profits over the years. In 2013 when Mr. Lewis held 97% of the shares, dividends of $5 million were paid and again in 2014, dividends of $10 million were paid. This conduct qualifies as wrongful and raises the question of unfairness.

Is there unfairness?

[229] From incorporation to present, Ideal Betting increased its share capital four (4) times from $30,000 to $70,000 by the creation of 40,000 ordinary shares in 1979; from $70,000 to $100,000 by the creation of 30,000 ordinary shares in 1980; from $100,000 to $500,000 by the creation of 400,000 ordinary shares in 1989; and from $500,000 to $1,500,000 by the creation of 1,000,000 ordinary shares in 1995. Only two (2) returns regarding the allotment of shares were filed to show that the

shares in the company were allotted. These were for the allotment of shares in 1989 and 1997.

[230] When the issued share capital of the company was increased by 400,000 on November 17, 1989, it was done on the same day that the authorised share capital was increased by 400,000. 400,000 shares were issued to Donovan Lewis and the return of allotment was filed on that date. There are three (3) recorded transfers of shares, the transfer of 8,000 shares in 1985 from Estate KR Abrahams to Mr. Lewis, the transfer of a total of 26,000 shares from Lloyd Wilson and Reginald Wilson to Mr. Lewis in 1994 and the transfer of 12, 800 shares from Eulalee Huie to Mr. Lewis in 2003. The only shareholder to whom shares were being transferred with no evidence of the share certificates ever being present for these transfers was Mr Lewis.

General commercial practice

[231] General commercial practice is not an excuse for breaches of the law. Where there is more than one director, it is a breach of section 152(1) of the Companies Act, to have the balance sheet signed by one director. Mr. Wilson participated in finalizing the financial statements and the decision to record its real estate at historical cost. There were thirteen balance sheets in evidence for the period between 1978 and 1994 during Mr. Wilson's lifetime, it is only the one for the year ended February 1993, dated May 2, 1994, that had a second director's signature. This is evidence that though Mr Wilson was active in the company, he was not vigilant in his duties as a director, and it was Mr Lewis who had oversight of the company's financial records. This was noted by Mr Mesquita whose evidence I accept on this aspect over that of Mr Walters.

[232] There was evidence from Mr Mesquita that one instance of mismanagement of the accounting records was that the date of the directors meeting to approve the financial statements was after the auditor's report had been issued. Mr Walters had no difficulty with this position. There was no attempt to cross-examine on this by Mr Spencer and rightfully so as it is incapable of explanation. Mr Mesquita's

reasoning and conclusion was that this is an unacceptable and unlawful practice, and it is a view shared by the court.

[233] Here I will rely on the law as it stands which is that directors have a duty to see to it that the financial statements of the company adhere to accounting principles and that the company's financial records ought to explain the true financial position of the company. This position to approve financial statements after the auditor's report breaches section 152(4) of the Companies Act. I reject the opinion of Mr Walters that the content of the audit report is unaffected by the date on which the balance sheet is signed. Such a suggestion could not seriously be expected to be accepted in a court of law as it amounts to condoning a breach of the law aided and abetted by a court appointed expert.

What is the nature of the corporation?

[234] The size, nature and structure of the company are relevant factors. In assessing reasonable expectations. More latitude is accorded by a court to a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company. Ideal Betting can be described as a small, closely held corporation. The evidence disclosed that there were deviations from the strict formalities in how things were done. Deviations, however, are not the same as breaches of the articles or law.

What is the relationship between the parties?

[235] Reasonable expectations may be said to have emerged from the personal relationships between Mr. Wilson and Mr. Lewis. This relationship is governed by different standards than that of an arm's length relationship in a widely held corporation, given that the company was closely held. The court is entitled to

consider the relationships at play between the shareholders and business realities and not simply narrow legal rights and formalities.[60]

Past practice

[236] The evidence discloses that there were minutes of annual general meetings, extraordinary general meetings and that the company was a part of the Jamaica Bookmakers Association and was profitable. The past practice may create reasonable expectations among shareholders of a closely held corporation in matters relating to participation in the company's, profits and governance.

[237] In the 1991 AGM Minutes, the Chairman presented the first Directors report. There is no record of its content. The first time there is a Directors Report to the AGM with actual information is May 1997 at a time when Mr. Lewis holds 97% of the shares.

[238] The last document signed by Mr. Wilson was the Annual Return made up to December 27, 1989. Thereafter, the certificates are signed by Mr. Lewis as secretary, and various other persons, including persons who were not directors. There was no evidence as to the reason Mr Wilson was no longer a signatory. The evidence is that others who were not directors were signatories.

What preventative steps could the claimant have taken?

[239] Given this state of the evidence, Mr Wilson did not obtain separate verification from the auditors, nor did he question the financial records. I accept that he held Mr Lewis in high regard and trusted him, he did not do any due diligence.

Were there any representations and agreements between the parties

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[60] See BCE paras 58,59,64

[240] There is no evidence of any representations or shareholder agreements.

How are conflicts between corporate stakeholders resolved

[241] This does not arise.

Issue 5: Whether this claim is statute barred

[242] In the context of the present case, it falls to be decided whether a limitation of actions defence exists. A finding that there is a breach of section 231A of the Companies Act would overtake this issue.

Issue 6: Whether the doctrine of laches applies to this claim

[243] It is contended by the defendants that the lengthy delay from the time the invalid acts were done to the time this action was instituted was undue and should bar the claimant from any relief.

[244] The doctrine of laches is an equitable defence which arose from the maxim "equity aids the vigilant, not those who slumber on their rights." It is rooted in the principle that a party who fails to assert their legal rights within a reasonable time may be barred from doing so if the delay has prejudiced the opposing party.

[245] The burden of proof is on the party praying the doctrine in aid. In Halsbury Laws of England (4th Ed,), para 910, the learned authors posited that:

> **"a claimant in equity is bound to prosecute his claim without undue delay…". It was further concluded that there is no fixed time limit for equity, instead, each case is considered on its own merits. To this end, the authors define the defence of laches:**
>
> > **"In determining whether there has been such delay as to amount to laches the chief points to be considered are (1) acquiescence on the plaintiff's part and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean**

> **standing by while the violation of the right is in progress, but assent, after the violation has been completed and the plaintiff has become aware of it. It is unjust to give the plaintiff a remedy where he has by his conduct done what might fairly be regarded as equivalent to a waiver of it; or where the conduct done has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards asserted."**

[246] **The authors further posited that as equity does not fix a specific time limit, each case is considered on its own merit. In essence the doctrine of laches enables the court to deny relief in cases where it would be unjust to grant. This was emphasized by the Privy Council in the oft-cited case of The Lindsay Petroleum Co. v. Hurd (1874) LR 5 PC 221 ("Lindsay"), where Lord Selbourne enunciated:**

> **"18 Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy...**
>
> **In order that the remedy should be lost by laches or delay, it is, if not universally, at all events, ordinarily—and certainly when the delay has been**

only such as in the present case— necessary that there should be sufficient knowledge of the facts constituting the title to relief."

30. … the equitable doctrine of laches may provide the answer: inaccurately summed up in the Latin tag, vigilantibus, non dormientibus, jura subvenient (the law supports the watchful not the sleeping). Sullivan LJ's reference to sleeping on his rights comes from the words of Lord Camden LC in Smith v Clay (1767) 3 Bro CC 639n, at 640n:

> **'A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive and does nothing.'**

31. According to Snell's Equity (32nd Edn, para 5.016) mere delay, however lengthy, is not sufficient to bar a remedy (referencing Burroughs v Abbott [1922] 1 Ch 86 and Weld v Petrie [1929] 1 Ch 33). Mr George disputes this (but referencing Wright v Vanderplank (1856) 2 K & J 1, 8 De GM & G 133, where there was an express finding of acquiescence, 18 (1874) LR 5 PC 221, pg 239-240 - 37 - and RB Policies at Lloyd's v Butler [1950] 1 KB 76, which was a limitation case turning on the date when the cause of action accrued, so scarcely giving strong support for his position). This is not the place definitively to resolve that debate, as we are concerned with analogies rather than the direct application of the doctrine. Nevertheless, the general principle is that there must be something which makes it inequitable to enforce the claim. This might be reasonable and detrimental reliance by others on, or some sort of prejudice arising from, the fact that no remedy has been sought for a period of time; or it might be evidence of acquiescence by the landowner in the current state of affairs."

[247] In light of the foregoing authorities, it is clear that the factors which the court ought to consider in determining whether the claimant should be allowed to vindicate his

particular legal right are: (1) the length of the delay, (2) acquiescence on part of plaintiff and (3) where there has been a change in the defendant's position as a result of the delay which would make it unjust to award the remedy.

[248] Mrs. Bellegarde's evidence was that she became aware of the changes in the shareholding, and of directors, when she was alerted by Canute Sadler. Canute Sadler gave evidence that in 2012, he had a falling out with Mr Lewis, his suspicions were aroused and he made checks at the Companies office. Sometime in late 2012, he contacted Dieter Wilson to make his concerns known and presented documents to them in 2013. This action was commenced with the filing of a claim form on April 11, 2018.

[249] The defendants have couched their arguments in this way, Mr Wilson cannot complain and his estate even less so, given that he was involved in the operations and management of the company; he was appointed to a committee of the Jamaica Bookmakers Association upon which he sat as a representative of the company. Mr Wilson signed the financial statements, had been a member of the board of Ideal Betting for some 20 years and had chaired some board meetings.

[250] The claimant makes the point that Mr Wilson was a passive investor which has already been dealt with, however, after 1989 Mr Wilson no longer signed the financial statements. This is when it could be said Mr Wilson became less involved. However, any reasonable expectation Mr Wilson had that Mr Lewis was managing the company lawfully and in accord with his fiduciary duties as a director and that the company's constitution was being followed was validly held.

[251] Based on the claimant's actual knowledge, delay is reckoned at some five years. The question is whether she could have ascertained information as to the actions of Mr Lewis earlier with due diligence, in other words, the date on which she should be fixed with knowledge for the purpose of determining the length of delay?

[252] The earliest date was on November 17, 1989 when Mr Wilson himself was fixed with actual knowledge of the actions of Mr. Lewis as not only was that the date of

the meeting but also the date the return of allotment was lodged with the Registrar of Companies. There was a period of nearly 23 years before any checks were made with the Companies Office by the claimant. There was no evidence of any enquiries made whether personally or through her attorneys as the personal representative of Mr Wilson's estate. I find that despite the evidence from the claimant and her brother that they were both well versed in their father's business dealings, they made no enquiry at an earlier stage, the reason for this is based on the claimant's evidence which I accept that they had no reason not to trust Mr Lewis who was a long-time family friend and her father's business partner.

[253] Ms Bellegarde said she had been working in the family business between 1995 and 2000, she called Mr Lewis in an attempt to see him and the appointment was cancelled. She thought nothing of Mr Canute Sadler giving her information regarding his suspicions as the share certificate was in the safe. Dieter Wilson obtained the annual returns for the year ended June 1995 and discovered the dilution in her father's shareholdings. The claimant gave no date on which Dieter Wilson obtained this document. Dieter Wilson gave evidence that Mr Lewis had no communication with the family after his father passed. Various attorneys beginning in 1995 were hired to probate the Last Will and Testament of Lloyd Wilson, and the files were in disarray.

[254] The evidence discloses that from as early as 1995, the claimants were attempting to put their father's affairs in order with delay being laid at the feet of their various attorneys. However, even a lengthy delay in and of itself will not be a bar to the grant of equitable relief. Accepting that there was delay, the final question is whether in all the circumstances it is unjust to disturb the current shareholding.

[255] Despite any prejudice to Mr Lewis, who was chiefly the person responsible for the success of the company, it would be unjust for him to receive the fruit of his improper actions regarding the transfer of the 22,000 shares, the false statements made to the Stamp Commissioner and the Registrar of Companies, the breaches of the Companies Act and articles under his watch, all of which have not been set

out here. I am mindful that in the proper exercise of their powers in granting the appropriate remedy, the breach of fiduciary duty owed by Mr Lewis to the company and to act in its best interest is a factor to be considered.

[256] The evidence establishes that Mr. Lewis managed and controlled Ideal Betting Company Limited. He failed to act in accordance with the company's articles of association; failed to declare dividends from 1987 to 2012; presented unreliable information in the financial statements of the company which prevented Lloyd Wilson from knowing the true financial affairs of the company.

[257] In addition, in breach of the articles of association, Mr. Lewis' shareholdings were increased from 51% in 1983 to 91.8% in 1989 while Lloyd Wilson's shareholdings decreased from 22% to 4.4% in the corresponding period. Following the various increases, Mr. Lewis' shareholdings now stand at 99.68% and the shareholdings of Lloyd Wilson have been reduced from 22% to 0%. Therefore, Mr. Lewis' actions, collectively amounted to oppressive conduct as regards the estate of Lloyd Wilson.

Conclusion

[258] In the circumstances, following the increase in share capital in 1989 and up to November 1994, Lloyd Wilson ought properly to have been allotted an additional 308,000 shares following the 1989 and 1994 increases in share capital and as part of the 1997 bonus share issue. Lloyd Wilson and therefore his Estate ought properly to have held 22% of Ideal Betting's share capital.

[259] It is incorrect for relief to be formulated in the form of the "return" or "delivery up" of the shares as was prayed for by the claimant in respect of shares issued to Eulalee Huie as if they were chattels or tangible objects. Shares in a company are choses in action. They are not tangible objects. A shareholder has a bundle of rights in the company and the company would only recognise that status by reference to the share register of the company. Upon a transfer, the company should issue a new share certificate in favour of the new shareholder. Thus, to restore the position of a shareholder whose shares have wrongly been transferred,

the proper remedy is to seek a rectification of the share register, (see Palmer's Company Law paragraph 6.441, Barton v London & North Western Railway Co (1888) 38 Ch D 144.)

[260] In the case of forged signatures on the relevant instrument of transfer, the instruments do not in law effect any transfer. Hence, the transferee is not in a position to "return" or "deliver up" the shares to the transferor. In the eyes of the law, the legal title of the shares remains with the transferor.

[261] It was necessary to join the company as a party to this action to provide proper redress for the forged transfer and the transfer from Eulalee Huie. The transfer of 22,000 shares from Lloyd Wilson to the 2nd defendant is invalidated by this court. Lloyd Wilson remains entitled to the 88,000 shares which the defendants failed to offer him pro rata to his current shareholding as the date of the increase in share capital on November 17, 1989. The transfer from Eulalee Huie which ought to have been allotted to estate Noel Huie on the admission of the defendant is also the subject of a remedy by rectification of the share register. The court makes the following orders based on the foregoing.

[262] Orders

1) **Judgment for the claimant.**

2) **It is declared that the 2nd defendant acted in a manner which was oppressive, to the interests of Lloyd Wilson (deceased), the claimant and the Estate of Lloyd Wilson.**

3) **It is declared that the allotment of 400,000 shares to Donovan Lewis was valid.**

4) **It is declared that the transfer of 22,000 shares belonging to Lloyd Wilson to Donovan Lewis was unlawful.**

5) **The share register of the Ideal Betting Company Limited is to be rectified by:**

i. **Inserting the name of the claimant representing Estate of Lloyd Wilson as the holder of shares representing 22% of the company's issued share capital.**

ii. **Fixing the authorised share capital of the company at 100,000 shares of nominal value of $1 each.Striking out the number of shares held by the 2nd defendant and substituting in lieu thereof the number of shares representing 78% of the company's issued share capital.**

iii. **Striking out the name of Eulalee Huie as a shareholder and reducing the 2nd defendant's shareholdings by 12,800 shares.**

6) **The defendants are to provide to the claimant, an account including dividends and payments made to each shareholder of the 1st defendant from incorporation to the present.**

7) **The shares of Estate Lloyd Wilson are to be valued by a valuator agreed by the parties within thirty (30) days of the date hereof, failing which by a valuator to be appointed by this Honourable Court.**

8) **The 1st defendant and/or the 2nd defendant shall purchase the claimant's shareholding in the 1st defendant found to be properly held in the name of Estate Lloyd Wilson at the price fixed by the said valuation.**

9) **The proportionate amount in dividends that are due to be paid to the claimant are to be paid by the 2nd defendant to the claimant within 14 days of the date of declaration of dividends until the date of payment.**

10) **The 2nd defendant shall file with the Registrar of Companies a return of allotment and amended annual returns reflecting the rectified shareholdings within 90 days of this Order.**

11) **The Notice of Rectification shall be given to the Registrar of Companies and the Registry at the Companies Office is to be rectified to reflect the same.**

12) Liberty to apply.

13) Costs to the claimant to be taxed if not agreed.

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Wint-Blair, J