CLAIM NO. C.L. 1998/E. 095

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN EAGLE MERCHANT BANK OF JAMAICA LTD 1ST PLAINTIFF

AND CROWN EAGLE LIFE INSURANCE CO. LTD 2ND PLAINTIFF

AND PAUL CHEN-YOUNG 1ST DEFENDANT

AND AJAX INVESTMENTS LIMITED 2ND DEFENDANT

AND DOMVILLE LIMITED 4TH DEFENDANT

Heard: May 19; 20, 21,22, 26,27,28, 2003; September 17,18,19,22,24,30, 2003; October 1, 2,3, 2003; November 24,25,26,27,28, 2003; December 8,9,10,11, 2003; February 16,20, 2004; May 16, 2004 and May 4, 2006.

Appearances: Michael Hylton, Q.C, Solicitor General; Mrs. Michele Champagnie, Ms. Debbie-Ann Fraser; Ms. Julie Thompson, Ms. Nicola Brown, Ms. Francine Fletcher instructed by the Director of State Proceedings for the 1st and 2nd Plaintiffs; Mr. Abe Dabdoub, Mr. Conrad George and Mr. Roderick Gordon instructed by Roderick Gordon for the 1st Defendant; Mr. Abe Dabdoub, and Mr. Jalil Dabdoub instructed by Mr. Raymond Clough and Dabdoub & Dabdoub for the 2nd and 4th Defendants.

CORAM: ANDERSON: J.

There is a profound sense in which, what has now come to be regarded as the calamitous “collapse of the Jamaican domestic financial sector” in the mid 1990s, found its fullest expression in the decline of the Eagle Financial Network. That group of companies (the “Group”) was headed by Dr. Paul Chen Young, a Jamaican economist and entrepreneur, the first defendant herein. I believe I do no violence to where this judgment will take me to say that by all accounts, by the mid nineties, Dr. Chen Young had become the public face of the Group, and was the person who was perceived as the leader thereof. As a banker, Dr. Chen Young had emerged from relatively humble beginnings to become the head of what was the first, and eventually to become, the largest Jamaican owned financial conglomerate.

On or about March 1996, the Government of Jamaica took control of the Group of companies which then included the first and second plaintiffs herein for a consideration of one dollar ($1.00). The first and second Claimants, at the time this suit was instituted, then owned by the Government of Jamaica, now sue Dr. Chen Young, along with two other companies which according to the allegations and the pleadings, were also controlled by him. This issue of control will resonate throughout the consideration of this matter. Because of the specific claims being made by the protagonists in these cases, and I use that word “cases” advisedly, I have decided to set out here and for ease of reference to anyone who will be brave enough to read this judgment in its entirety, the terms of the statement of claim, as amended, as well as the Defence and Counterclaim. I should point out that, in their closing submissions, counsel for the claimants sought further amendments to the amended statement of claim in light of the evidence which was placed before the court.

This historic trial lasted several weeks spread over several months and generated several volumes of documents of which it has been my duty to take cognizance. There have been more than twenty volumes of transcripts of the evidence, (notwithstanding the submission of voluminous witness statements), covering the substantive trial, as well as the trial of a preliminary issue as to the admissibility of the expert evidence given in a report at the request of the plaintiffs. There were sixteen (16) witnesses who testified, including the First Defendant who became the first person in Jamaican legal history to give his evidence from overseas by way of video link as now allowed by the Civil Procedure Rules 2002. There were as well, more than twenty-five volumes of exhibits, each exhibit containing scores and, in some cases, even hundreds of pages. There is also the expert’s report which, as indicated above, was itself the subject of a trial within this trial and which gave rise to a full forty (40) page judgment. Closing submissions by the Claimant’s counsel covered one hundred and fifty eight double-spaced typed pages, including appendices and over two hundred and thirty footnotes. The Defendants’ closing submissions covered over

one hundred and thirty single space typed pages, referred to over one hundred and ninety authorities and contained over six hundred footnotes. The Defendants also submitted a “Closing Reply” to the submissions of the Claimants’ counsel, covering a further thirty-five pages. Also of interest to note in these proceedings was that when the trial eventually started, the First Defendant was also an Ancillary Claimant as he purported to file a claim for contribution and indemnity against several persons including persons who would be called as witnesses for the Claimants, and who thereby became Ancillary Defendants. These claims were later withdrawn. However, it may be borne in mind that their position as ancillary defendants would have exposed them to potential liability if they remained in that position and if the Claimants succeeded.

Clearly a lot is at stake here and in order to do justice in coming to a decision or rather decisions, in this matter, I have decided that it would be useful to set out at the outset the approach I shall adopt so as to ensure that all the issues are properly ventilated and justice is not sacrificed on the altar of brevity.

Having reviewed the closing submissions of both Plaintiffs and Defendants, as well as the Response submissions of the Defendants, and in light of the pleadings and the evidence, I have taken the view that the way to approach this task is to define the issue to be considered; to review the evidence in relation to that issue and then to determine on a balance of probabilities which evidence is the more credible; to consider the nature of the relevant submissions made on behalf of the parties in respect of both law and facts, and to determine whether the particular claim has been made out. In this regard, I believe that the definition of the issues as set out in the Claimants’ Closing submissions allows for a full consideration of the issues and the submissions and I adopt that definition for the purpose of the ensuing analysis. Based upon the pleadings, there are eight (8) discreet elements to the claim of the Claimants and four (4) in relation to the counterclaim by the First Defendant. While the specific submissions may not be pigeon-holed in the definition of the issues as I shall consider them, I will

endeavour to align those submissions with the issues. Before doing so, let me make one further observation in light of the volume of authorities cited by counsel as referred to above. I shall adopt the wise approach implicit in the dicta of Lord Steyn in the House of Lords case **Williams & Another (Respondents) v Natural Life Health Foods [1]Limited and Mistlin (Appellant**). He said:

> My Lords, a great many precedents were cited at first instance, in the Court of Appeal and in the printed cases lodged for the purpose of the present appeal. It is unnecessary to embark on a general review of the authorities. The sole purpose of the citation of precedent is, or ought to be, the identification of a legal principle or rule which covers, or may arguably cover, the issue in the case to be decided. And that is how I hope to approach the problem under consideration.

The Issues

1. Control of the Eagle Financial Network, Ajax Investments Limited and Jellapore.
2. The Liability of Directors.
3. The Grenada Crescent Transactions. What is to be made of them?
4. The First Equity and IBM Share Transactions.
5. Funds purportedly loaned to Domville: the true character of the transaction between CEL and Domville.
6. Is the Moneylending Act relevant and if so how?
7. Has there been any unjust enrichment?
8. If the Claimants succeed on any of their claims, what entitlement to interest, if any, do they have?
9. On the Counterclaim: Was the First Defendant's contract wrongfully terminated and if so, what rights accrue?
10. Is the First Defendant entitled to compensation for leave not taken?
11. Compensation for expenses of holidays not taken.
12. Are there any accrued rights to pension contributions?

[1] Decided April 30, 1998

The First Issue: The Issue of Control

One of the most contentious of the issues argued between the parties, and one which was central to and underpinned many of the other allegations of the claimants, was whether the First Defendant was "in control" of the Eagle Financial Network (EFN), Ajax Investments Limited ("Ajax") and Jellapore, an offshore company in the Cayman Islands. It is common ground that Ajax, (an industrial and provident society under the relevant statute,) was at one time the major shareholder in the First Claimant and that in time the controlling bloc of shares was transferred to Jellapore. The Claimants say that Dr. Chen Young was "in control", indeed was the controlling mind or directing will of the First Claimant as also the Second Defendant and Jellapore. The attorneys for the Defendants say, "Not so"! They submit that the Claimants have misunderstood the concept of control and the First Defendant was not "in control" as that term is to be properly understood. Indeed, this was also the position of the First Defendant when he gave his evidence. Thus, for example, he said that Ajax, as an industrial and provident society, is controlled by its committee of management and that he was not a beneficiary of the Paul Trust which held the shares in Jellapore. The attorneys for the Claimants submitted that the attorneys for the Defendants as well as the First Defendant himself, are taking a narrow "legalistic" view of the concept, and urges this court to adopt a more liberal view.

It was submitted that "control" means "the ability to direct the course of action of a person or entity. In that context, the First Claimant was a licensee under the Financial Institutions Act, section 2(1) of which provides as follows:

> "Control" in relation to a licensee or any other company means the power of a person to secure by means of the holding or the possession of voting power in or in relation to that licensee or other company or by any agreement or by virtue of any other powers conferred by the articles of association or other document regulating the licensee or other company, that the affairs of the licensee or other company, are conducted in accordance with the wishes of that person".

Claimants' counsel cited **Gower, "Principles of Modern Company Law", 3rd Edition page 197** which is in the following terms.

> It will be apparent from the foregoing that the statutory definition of control does not cover all the cases in which control can be exercised. Control is a matter of degree, ranging from complete legal control for all purposes over a wholly-owned subsidiary to *de facto* control, except in the event of a major scandal, normally exercisable by the existing management even though they may hold few or none of the shares……..The statutory definition is undoubtedly right to place the emphasis which it does on the power to control the board, for, as we have seen, the board is the company's head and brains. But *de facto* control over the board can exist without any legal power at all"

In support of the proposition that control is not limited to majority beneficial ownership, counsel also cited the seminal 1933 work on the separation of corporate ownership and control, **Berle and Means, "The Modern Corporation and Private Property**" to the following effect:

> "For practical purposes that control lies in the hands of the individual or group who have the actual power to select the board of directors (or its majority) either by mobilizing the legal right to choose them – 'controlling' a majority of the votes directly or through some legal device – or by exerting pressure which influences their choice…Thus legal control may be exercised through agreements divorced from shareholdings, through weighted voting, through inter-locking directorships, through voting agreements or through the voting trust so popular in America"

From the above citations, counsel for the Claimants argues that "beneficial ownership" or "control" goes beyond the technical nature of official shareholding of an entity. It was argued that because of this, courts have held that an ostensibly separate legal entity is the mere *alter ego* of a person who is its controlling mind and to find in those cases, that such a person was the true "beneficial owner" of the entity. Reference is made in this regard to the local case **Donovan Crawford v Financial Institutions Services**, an unreported decision of the Jamaican Court of Appeal, judgment delivered July 31, 2001 in Supreme

Court Civil Appeals, nos. 61 and 88 of 1999, and a section cited from the judgment of the learned President of the Court of Appeal, Forte P.(SEE NOW PRIVY COUNCIL DECISION)XX

While I am not necessarily persuaded that the section of the judgment referred to in Claimants' closing submissions, is wholly relevant to the specific issue of control being urged by the Claimants, the Defendants' counsel in their closing submissions only deal with that issue within the context of the "directing mind and will". This term is, of course, taken from the report of Edward Avey, the expert witness called by the Claimants. But the Defendants' closing submissions in paragraph 32, clearly seem to concede, as claimed by Claimants' Closing Submissions, that the First Defendant was in fact the "directing mind and will" of the First Claimant and Ajax. The paragraph in relevant part says:

> For example, if the Defendant has breached his duties to EMB, *then as 'directing mind and will' of both EMB and Ajax,* it is arguable that Ajax had knowledge of the breach and may be held as constructive trustee to EMB. (My Emphasis)

Defendants' counsel objects to Claimants' counsel's characterization of this paragraph, as a "concession". If it is not such, then I cannot imagine what would be. The relevant paragraph of the Defendants' submission is quite clear. For ease of reference I set it out below,

> For example, if the Defendant has breached his duties to EMB, *then as 'directing mind and will' of both EMB and Ajax*, it is arguable that Ajax had knowledge of the breach and may be held as constructive trustee to EMB. (My emphasis)

The only condition in that submission relates to whether there has been a breach of duties to the First Claimant. The submission could only make sense if the argument that Ajax is a "constructive trustee to EMB", (whatever that means) is premised upon the *fact* that the First Defendant was the *"directing mind and will of both EMB and Ajax"*. To now suggest that the proposition as to the directing mind and will was also meant to be a condition, changes the submission completely. The attempt by counsel in their "closing reply" to rehabilitate that

submission by suggesting that it was defendants' "attempt to decipher the legal relevance of the Claimants' arguments" is unfortunate. Further, counsel for the Defendants seeks to rely upon the case of **Tesco Supermarkets Limited v Nattrass, 1972 A.C. 153**, to support the proposition that the principle of the directing mind and will is usually only relevant where there is an alleged wrong against some third party and not against the company itself. Whatever the merit of this submission, it fails to understand the fundamental rationale of **Tesco**. In **Tesco**, a store manager's actions formed the basis of a criminal charge against the company. **Tesco** defended the charge by arguing that the manager's actions were the "act or omission of another" rather than an act of "the company". The House of Lords agreed that the defence should succeed as such a person was not "the directing mind and will" of the company. As is made clear by later cases which considered Tesco such as the New Zealand Court of Appeal decision in **Trevor Ivory v Anderson 1992, 2 NZLR 517**, that case established the legal principle that the words and actions of a director who is the controlling mind of the company may be treated as the actions of the company for the purposes of determining the statutory liability of the company.

The effect of **Tesco**, as applied in **Trevor Ivory**, is that a director could avoid personal tortious liability to third parties if a director was deemed the embodiment of the company. It will be apparent that the submission that a "finding that a company officer constituted the 'directing mind and will' is used to deflect personal liability from the individual to the company" is, with respect, indicative of a flawed understanding of **Tesco**.

There are two interesting points in paragraph 29 and 33 of the Defendants' closing submissions to which reference should be made. The former paragraph has the following observation. "The issue is whether the First Defendant has committed a wrong against *his own company"*. (Emphasis supplied) The second comment, made in paragraph 33 is to the following effect: "The paradigm case of courts finding non-executive directors negligent is where the non-executive

directors have abdicated their duties in favour of the manager who, like the Defendant, *is the 'brains and head' of the company"*. (Emphasis mine) It is difficult to interpret these submissions as other than a concession by the maker that EMB was, in fact, the First Defendants "own company" and that, secondly, he was its "head and brains".

Before leaving this part of the discussion, I wish to observe, *en passant*, that the closing submissions for, the Defendants cite several cases including **Dorchester Finance v Stebbing, (1989) BCLC 498**, **Statewide Tobacco v Morley (1990) 2 ACSR 405**, **Commonwealth Bank v Friedrich (1991) 5 ACSR 115**, **Group Four Industries v Brosnan (1992) 8 ACSR 463**, and **Rema Industries v Coad (1992) 7 ACSR 251** on the liability of non-executive directors before acknowledging the obvious in this case. The court here is not required to decide the liability of non-executive directors, and these cases are accordingly not considered here.

The specific issue of "control" is dealt with in the Defendants' "Closing Reply". There, the response starts off with the proposition that "The claimants' arguments that the First Defendant controlled Ajax and Jellapore reveal no actionable cause". The rejoinder to this assertion, if one is needed, is simply that there had been no submission that control, *per se,* itself gave rise to any cause of action. In a submission which is unsupported by any reasonable interpretation of the Claimants' closing submissions and which otherwise quite misses the point, the Defendants' counsel in their closing response say:

> "The claimants rely upon **Donovan Crawford v Financial Investments Services** for the proposition that the Court will lift the veil of incorporation where a company is the *alter ego* of an individual who owes duties to a corporation".

In my view, this submission is factually incorrect in that it mis-states the Claimants' submission. In any event, as I have suggested, it misses the point of the discussion on the issue of control. One submission of Defendants' counsel with which it is impossible to disagree, is that "even if the Claimants could prove

the First Defendant's control of the Eagle Financial Network, they must then go on to demonstrate the legal consequences flowing from that conclusion". It is, indeed, part of the Claimants' submissions that while Ajax and Jellapore may be "separate legal entities", if the entity was merely the alter ego of a person who was its controlling mind, that person may be treated as the true "beneficial owner" of the entity, notwithstanding the failure to establish technical control through, for example, the ownership of shares. The Claimants further submit that even if they are unable to prove that the First Defendant controlled Ajax and Jellapore, there was clear and persuasive evidence that he controlled the Claimant companies. In that respect, Claimants' submissions cite the evidence which was produced before this court through the witnesses that it heard.

Several of the witnesses, (indeed even the Defendants' witnesses), testified that the First Defendant was in fact in control of the Claimants. Thus, for example, Mr. Keith Senior who was called by the Defendants, in explaining his statement that the First Defendant had "significant influence over the Claimants, stated that it was his view and a view shared jointly by "myself and several other people" that Dr. Chen Young was "in fact, the majority shareholder of the group". Perhaps more significantly, he said that persons reported directly to the First Defendant although he, Mr. Senior, was the managing director. Mr. William Eaton said: "Dr. Chen Young was the majority owner of the bank" Similarly, he also said that "it's always a delicate situation when one person owns a substantial amount of the shares. In Eagle, it was 61 per cent". Dr. Oswald Harding, a sometime Deputy Chairman of the Group, said that Dr. Chen Young always wanted to be in control, and that he ran the Eagle Financial Network "like a fiefdom". Mrs. Pamela Phillips who according to her evidence acted as attorney for both Dr. Chen Young and the EFN, confirmed that he was, in fact, the controlling shareholder and that his shares in Ajax had been transferred to Jellapore for tax planning purposes.

Mrs. Daisy Coke, Deputy Chairman of Eagle Merchant Bank at the time of its demise, who was also one of the main actors in this drama, gave evidence that

at a time when she was acting as Chairman of EMB, Everald Bryan, an executive manager in the organization, refused to allow her to see the asset register unless he had the prior approval of the First Defendant. Mr. Colin Steele said that he always dealt with Dr. Chen Young on the basis that he, or companies owned by him, owned the majority of the shares in the entities in the EFN, and in answer to questions posed by me, said that Dr. Chen Young was a dominant chairman and CEO who had significant influence on those on the board and on management.

Another witness, Mr. Patrick Hylton, who became the managing director of FINSAC, the company which the Government of Jamaica used to take over failed financial institutions, testified that all his negotiations with Dr. Chen Young on the takeover of the EFN, proceeded on the basis that he was the owner of, or in fact controlled, the majority of the shares in the EFN. He was therefore entitled to negotiate the takeover, but then purported to deny his ability to sign off on the agreement to transfer to the Government, on the basis that he could not sign for Jellapore Investments Limited. Mr. Hugh Croskery, the manager of Mount Investments limited at the relevant time and who was also called by the Defendants, was a witness who quickly dissipated any credibility with which he might have come to the witness stand. Indeed, I should note, *en passant*, that if his is typical of the behaviour of corporate executives in Jamaica, then we, as a country, are in serious trouble. He was evasive and clearly played fast and loose with truth, concerning many of the things about which he was asked. However, his evidence also lends credence to the view that Dr. Chen Young was in "control" of the EFN. For despite the fact that he was the sole manager of Mount Investments at the relevant time, according to him, he was not aware of the loan made by Mount to Domville or the instructions from Dr. Chen Young to Norman Lai or Everald Bryan which was in the following terms.

As submitted by the Claimants, there is also documentary evidence to indicate that Dr. Chen Young himself proceeded on the basis that he had authority to make certain corporate decisions without reference to the Board. Thus he

defended his decision to instruct the Chief Accountant to reduce the interest on loans to his companies and recalculate them on a simple rather than a compound interest basis, on the basis that "I felt that this was reasonable". I note that this action was not defended on the basis that he was executive chairman and that he made this decision as a function of his executive responsibilities. I say this because, if it were sought to defend the act on such a basis, the obvious rejoinder would be that where such a decision was to be made that benefited the chairman of the Board of Directors, it would be unusual in the extreme, not to have had that brought to the Board with appropriate notice of interest and have the Board make such a decision in full knowledge of its implications.

Before leaving this question of the control of the Claimants, I make one further observation in respect of the Claimants' submissions on control. Claimants' counsel points out that the Defendants' Closing submissions have the following quite profound assertion in relation to the Grenada Crescent transactions and the claim by the First Claimant in relation thereto, to which reference will be made later:

> In any event, had the matter gone to a general meeting, the Defendant would have been entitled to exercise his voting power as a shareholder in general meeting to ratify such transaction;

It is difficult to consider this proposition as other than an acknowledgment that the First Defendant was the majority shareholder of the First Claimant with enough votes to secure ratification of his position. It is instructive that the Defendants' closing reply makes no reference to this assertion by the Claimants.
The Claimants submit, and I accept the submission, that the question whether the First Defendant also controlled Ajax and Jellapore must also be relevant to the first issue. The Claimants' counsel submit that the question of the First Defendant's control of Ajax had already been considered on the same evidence as is presently before this court, by the Court of Appeal (See **Paul Chen Young v Eagle Merchant Bank of Jamaica Limited; SCCA nos.2, 3, 4, 5, 45 and 46**

of 2000) and, according to the judgment of Downer, J.A., it had been determined that Dr. Chen Young was in fact in control of Ajax. Notwithstanding the assertion in Claimants' closing submissions that the evidence before this court was the same that grounded the finding in the Court of appeal, rather than relying on the accuracy of that assertion, I think it is preferable to look at the specific evidence which has been placed before this court.

According to that evidence, both Mrs. Daisy Coke and Mr. Derrick Milling were members of the Board of Management of Ajax. However, neither exercised any executive functions and neither knew any details of what went on in the company. Both were of the view that it was Dr. Chen Young's company, and Mr. Milling volunteered that he "did not have a clue as to what went on in this company". It is unquestioned that Dr. Chen Young's management fees from his employment to the First Claimant, were paid to Ajax. In fact, in answer to interrogatories, Dr. Chen Young did confirm that it was he who gave instructions for the formation of Ajax; was the majority shareholder of the company and gave instructions for it to be converted to an industrial and provident society for tax planning purposes. He declared interest on occasions when, at meetings of the First Claimant's board, it was sought to transfer Ajax's mortgage to EMB. There is no evidence that any other member of Ajax's committee of management ever declared interest in any similar transaction. The minutes of the EMB Board of July 25, 1989, concerning the purported purchase of premises on Half Way Tree Road for the proposed Eagle Centre, also indicated that the land was being sold to Dr. Chen Young but that the site would be "purchased" by Ajax. Mr. Croskery, one of Dr. Chen Young's witnesses, also said that Ajax was "Dr. Chen Young's company". Finally, and perhaps most importantly, Mrs. Pamela Phillips (who did much of Dr. Chen Young's personal legal work), and Mrs. Elaine Williams, (both of whom worked within the Eagle Financial Network) and Hart, Muirhead, Fatta, ("HMF") attorneys-at-law, who did work for Dr. Chen Young, expressed the view that he owned or controlled Ajax. Thus HMF's letter of March 20, 1997 to Dr. G. Bonnick, chairman of FINSAC stated: "We would like to advise of the following

transactions involving Ajax Investments Limited, an industrial and provident society controlled by Dr. Paul Chen Young. In Mrs. Elaine Williams letter of May 17, 1999, she said that Ajax and Jellapore are "the personal companies of Dr. Paul Chen Young". Finally, as noted above, there is the apparent concession in the Defendants' Closing Submissions concerning the proposition that the First Defendant was the directing mind and will of both EMB and Ajax.

The Claimants also assert that Dr. Chen Young controlled Jellapore Investments Limited. With respect to that assertion, the Claimants' closing submissions cite the same judgment of the Court of Appeal referred to above on page 6[2] hereof. The evidence in relation to this company is that it was purchased from a Cayman Islands law firm, Myers and Alberga, in or around, 1993, by the First Defendant, who also paid the purchase price. Shortly thereafter, he advised the Bank of Jamaica that the Ajax-owned shares in Eagle Merchant Bank had been transferred to Jellapore, and for "cash consideration". On the contrary, it is instructive that Myers and Alberga's letter of January 28, 1997 to Dr. Chen Young, in relation to that same transfer says: "As you will recall, the company acquired these shares for debentures which were issued to you in each case". This was at variance with statement earlier that the shares had been issued for cash. Further, it also raises questions as to why debentures in payment for shares in EMB previously owned by Ajax, would have been issued to the First Defendant rather than to Ajax, unless the recipient of the debentures was in fact the beneficial owner of the shares.

The evidence also reveals that in April 1994, Eagle Merchant Bank issued an information memorandum which stated that: "Jellapore is a company controlled by Dr. Paul Chen Young". I reject the attempt by the First Defendant to suggest in his answers in cross-examination, that this must have been a "mistake". Nor am I enamoured by the submission in Defendants' counsel's closing submissions that the document was a "draft" and that accordingly, that "is where you would expect to find inaccuracies". Moreover, an internal memorandum dated April 18,

[2]Donovan Crawford v Financial Institutions Services Ltd

1995 shows that Jellapore's shares are "owned" by Dr. Chen Young. As late as September 1996, VNESH proceeds due to Dr. Chen Young were credited to Jellapore's account. Mrs. Coke's evidence is that Dr. Chen Young's emoluments were sometimes paid to Jellapore.

Despite these facts, a month later, Dr. Chen Young was advising the Bank of Jamaica that Jellapore was not owned by him and the evidence that emerged was that when it was time for Jellapore to transfer its shares in the claimants to the Government, Dr. Chen Young then claimed not to be able to do so. This was on the basis that the shares in Jellapore had been transferred to a discretionary trust in the Cayman Islands, the Paul Trust, which would act on instructions of the Dr. Chen Young. In this regard, I should note the singularly unhelpful and even obfuscatory answers given by the First Defendant to the question whether he had ever given instructions or directions to the Trustee of the Paul Trust. Moreover, the stark conflict between his answer in interrogatories in which he said that Ajax received no consideration for the transfer of shares in EMB to Jellapore, and his letter to the Bank of Jamaica, as well as the January 1997 letter from Myers and Alberga, raise serious issues of credibility which, regrettably, are not even mentioned by the Defendants' closing submissions.

Claimants' counsel makes the observation that, despite his purported "inability" to sign on behalf of Jellapore in order to give effect to the transfer of shares to the Government of Jamaica, it is noteworthy that there were times when Dr. Chen Young seemed to have no difficulty with signing on behalf of Jellapore. Thus, for example, he was the signatory on the transfer of the EMB shares from Jellapore, in return for which Jellapore received a controlling shareholding in Crown Eagle Life Insurance Company Limited, the Second Claimant herein. The Second Claimant then became the "ultimate parent" of the First Claimant, a finding also made in the Court of Appeal in the matter referred to above. I note with some interest the proposition that here the First Defendant acted as agent of the Trustees and with their permission.

Counsel for the Claimants also sought to highlight the transfer of property to the Paul Trust and suggested that as long as the Trustee acted on the instructions of Dr. Chen Young, the transfer could not have been properly called “irrevocable”. This assertion, ostensibly directed at bolstering a claim of continuing control, seems to provoke counsel for the First Defendant to spend an inordinate amount of time and effort on arguing the First Defendant’s right to carry out tax and estate planning exercises. Note the Defendants’ counsel’s submission that counsel for the Claimants “are not entitled in the absence of evidence to ask the court (if that is what they are doing) to infer that the First Defendant and the Trustee were somehow in collusion, merely because the trustee was granted discretion under the trust”. It was accordingly submitted that “the whole purpose of the Claimants’ submission is to distort, without any evidence of impropriety, a legitimate tax planning scheme to depict the First Defendant as a dishonest individual”. Given the well-known principles by which discretionary trusts are established by settlors who issue “letters of wishes”, it is difficult to understand the basis for this interpretation of Claimants’ submission. I am of the view that those submissions were directed at the issue of “*control”* and could not have been aimed at establishing “collusion” or that the First defendant was a “dishonest individual”.

Having considered the evidence which has emerged in relation to this first issue, the court finds that the overwhelming preponderance of the evidence leaves little doubt that Dr. Chen Young controlled not only the Claimants, but also Ajax and Jellapore, at all relevant times. The implications of this finding will become apparent below as I examine the claims and counterclaim.

The Second Issue: Whether a chairman of a Board of Directors can escape liability for a purportedly improper act on the ground that it was pursuant to a Board decision.

The Claimants frame the second issue to be decided by this court in the foregoing terms and I accept that this is a legitimate formulation. The question to be canvassed here is: "What is the nature and the extent of the duty owed to a company by a person in the position such as the First Defendant"? It is trite law that directors owe a fiduciary duty of loyalty and good faith. I cite and adopt herewith the propositions advanced by a commentator on the issue of the duties of directors:

> Directors have both a fiduciary and a statutory duty to act in the best interests of the company and not for personal gain. The company's best interests need not be the same as those of its shareholders (including any holding company). The directors have a duty to ensure that transactions entered into by their company are for the benefit of the company and are entered into for good cause. For example, if a company was to guarantee certain liabilities of one of its shareholders, without receiving any benefit for doing so, not only may the guarantee be void for lack of cause but the directors may, in agreeing to give the guarantee, have been in breach of their duty to the company.

Not only do directors have a duty to act honestly, in good faith with a view to the interests of the company, but they also must exercise the care, diligence and skill that a reasonably prudent person would in comparable circumstances. This principle has been well established certainly as long ago as 1925 in the English Court of Appeal case of **Re City Equitable Fire Insurance Company, [1925] CH. 407.** Indeed, the Defendants' counsel's closing submissions cite the judgment of Romer L.J., (as he then was), to the following effect: "A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience". Counsel for the Defendants also cite, to the same effect, a similar proposition from the judgment in **Re Brazilian Rubber Plantations and Estates [1911] 1 CH. 425,** a case which counsel urges the court to find is authority for the

proposition that in the absence of "gross negligence" by the director, there can be no liability. As will be seen below, this case is also adverted to by Counsel for the Claimants.

With respect to the duty of care, Defendants' counsel submits that:

> The standard of care is sometimes described as meaning that a director will be found negligent in adopting a particular course of action only if no reasonable person would have adopted that course in the circumstances.

In support of this counsel cites the nineteenth century case of **Overend and Gurney v Gibb, [1872] L.R. 5 HL 480**. It was submitted that the test the court applied in that case was whether the directors:

> were cognisant of circumstances of such a character, so plain, so manifest and so simple of appreciation that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into.

It was accordingly submitted that:

> The modern form of expression is that a director will not be liable if he 'rationally believed' that his decision was in the best interests of the company. This requirement is 'a minimal requirement of some basis in reason'. Thus, a decision will lack rationality if it 'defies explanation'.

With due respect, I regret that I cannot accept the propositions in these submissions. Firstly, they are based upon a very old case which, on any analysis reflects an outdated view and secondly, and more importantly, they appear to be grounded in an Australian statutory provision, the Corporations Act of 2001, and an explanatory memorandum to the Bill which apparently became that Act. There is no attempt to show that the provisions of that Act may have any remote relevance to the situation in this jurisdiction. In any event, it seems to me that the test in **Re City Equitable Fire Insurance Company** has correctly and unequivocally defined the *extent of the duty* as being a function of the knowledge and experience of the person in question.

In their closing submissions, Claimants' counsel submit that a breach of the duty of care will lead to personal liability. The submissions cite the case of **Donovan Crawford v Financial Investment Services Ltd. SCCA 64 and 88 of 1999 delivered July 31, 2001** where the Court of Appeal in upholding the decision of the Supreme Court that Mr. Crawford had breached his fiduciary duties, relied upon the following section of the judgment of Neville J. in **In Re Brazilian Rubber Plantation and Estate Limited:**[3]

> "I have to consider what is the extent of the duty and obligations of Directors towards their company. It has been laid down that so long as they act honestly they cannot be made responsible in damages unless guilty of gross negligence. There is admittedly a want of precision in this statement of a director's liability. In truth one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. *A director's duty has been laid down as requiring him to act with such care as is reasonably to be expected from him having regard to his knowledge and experience.* (Emphasis mine) He is, I think, not bound to bring any special qualifications to his office … He is not, I think, bound to take any definite part in the conduct of the company's business, but so far as he does undertake it he must use reasonable care in its dispatch. Such reasonable care must, I think be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. He is clearly, I think, not responsible for damages occasioned by errors of judgment."

Claimants' counsel submits that where a director has breached his duties he will not be able to claim as his defence that a particular decision was sanctioned by the Board. In support of this proposition, the submissions cite **Gower's Principles of Modern Company Law 3rd Edition at page 517** thereof. It was submitted that notwithstanding the principal of collective or collegiate responsibility inherent in the workings of a board of directors, the duties of good faith are individually owed. Gower puts it this way.

[3] 1911 Vol 1 Ch. D. 426 at 436

> "In the first place it should be noted that whereas the authority of the directors to bind the company as its agents normally depends on their acting collectively as a board, their duties of good faith are owed by each director individually. One of several directors will not as such be an agent of the company with power to saddle it with responsibility for his acts, but he will be a fiduciary of it. To this extent, directors again resemble trustees who must normally act jointly but each of whom severally owes duties of good faith towards the beneficiaries." (Emphasis supplied)

Claimants closing submissions call in aid of the proposition that each director owes his duty separately, the English decision, **Re Westmid Packaging Services, [1988] 2 BCLC 646.** In that case, the English Court of Appeal purported to review the duties of directors in these circumstances. The learned Lord Woolf, M.R., delivered himself of the following:

> "Mr. Davis also submitted, correctly, that the collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. That collegiate or collective responsibility must however be based on individual responsibility. Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. A proper degree of delegation and division of responsibility is of course permissible, and often necessary, but total abrogation of responsibility is not."

It is also the Claimants further claim that the duty of the First Defendant was heightened because he was not only an ordinary director but the board chairman and an executive officer of the company. As such, it is asserted, his duties are both fiduciary and contractual and counsel cites Pennington's Company Law 5th Edition, 1995 at page 678 to the following effect:

> "[A higher] standard of care [is] expected of full-time directors employed under service contracts, especially when they are each employed to manage some department of the company's business as well as to supervise its whole undertaking at board meetings. Such directors will usually be specialists in their own field…and they will be expected to

> exhibit the skill and care of a competent practitioner in that fi*eld when handling the company's affairs."*

The final submission of the Claimant in respect of this issue is to the effect that a director may still be liable for losses suffered by the company "even where he received no personal benefit". That submission cites the Court of Appeal decision in the **Donovan Crawford** case referred to above and the judgment of the learned President of the Court. However, when one looks at the section of the judgment referred to, what the President speaks of seems not to be the issue of "personal benefit", but rather the fact that the director did not have a "personal or beneficial interest in any of the companies to which these large sums of money were loaned". The words of Langrin J.A. in his own judgment, also echo this thought. He said: "The fact that Mr. Brown had no personal interest to serve cannot exonerate him of his fiduciary duty as a director".

I am not of the view that the proposition which inheres in that statement takes us any further than to state the obvious: that is, that any director of a company owes fiduciary duties to that company, whether or not he is a beneficial holder of shares. I certainly do not accept the view that the authorities cited support the submission sought to be made by Claimants here that: "a director of a company and, a fortiori, the chairman of the board of directors who is also a paid employee of the company, cannot escape liability for an improper act on the ground that it was pursuant to a decision of the entire board".

The second submission which the Claimants make in relation to this issue is that "in any event, the acts of Dr. Chen Young complained of in this case were not pursuant to decisions of the board, and where the board did make a decision, it did so without the benefit of all the facts in Dr. Chen Young's knowledge". Before making a final comment on this issue, it is fair to consider the submissions made by the Defendants' counsel, at least in partial response to Claimants' submissions on this issue.

The defendants' submissions in relation to this issue of the duties of the director, do cite a number of cases which are aimed at reinforcing the importance of the principle of collective responsibility and lessening the Claimants' emphasis on individual responsibility. Those cases are put forward as authority for the proposition that even non-executive directors may be held liable where ***they*** have failed to take the necessary steps to inform themselves of the facts that they need to know, in order to effectively carry out their functions as directors. For example, the submissions cite an English decision, **Dorchester Finance v Stebbing [1989] BCLC 498**, and some Australian cases, **Statewide Tobacco v Morley, [1990] 2 ACSR 405**, **Daniels v Anderson, [1995] 13 ACLC 613** and **Commonwealth Bank v Friedrich [1991] 5 ACSR 115**. These, they say, are examples of cases where courts had confirmed that non-executive directors could not escape liability for failure to perform their statutory duties as a director merely on the ground that they "did not have the knowledge of the executive director". It was also submitted that the decision in **Dorchester Finance v Stebbing** was helpfully explained in the Hong Kong Court of Appeal case of **Law Wai Duen v BF Construction** on the footing that:

> Executive directors and non-executive directors have the same responsibility in law as to the management of the company's business. They have the same responsibility in law with regard to the finances of the and as regards accounting to the shareholders for the company's finances. The law…..does not have regard as to whether a director has an executive position within the company or whether a director is paid a salary. The duties and responsibilities arising from directorships are the same.

The defendants' counsel also submit that Claimants' submission to the effect that the board made decisions "without the benefit of all the facts in Dr. Chen Young's knowledge" is, in fact, a weakening of their own case and an indictment of those other members of the board of directors as a matter of law, since: "Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them". This statement is taken from **Re Westmid Packaging Services**, a case itself

previously cited by the Claimants. If the non-executive directors have failed to do this, then they are in breach of their duties. The Defendants' counsel's submissions therefore conclude with the following question:

> "So, if the first defendant in this case has acted negligently or in breach of trust, then it may be asked why the non-executive directors, through their acquiescence, are not also liable"?

They then answer the question themselves in the next paragraph in the following way.

> Fortunately, the court is not required to decide the liability of the First Defendant's co-directors. The First Defendant's case is that *no one* is at fault. However, the question of why the First Defendant has been singled out is relevant, as it tends to show that the Claimants have fixed their minds on making the First Defendant liable—whatever the law or evidence might say on the matter.

This classic *non sequitur* does not really respond to the assertion of the Claimants that there is a heavier duty imposed on the executive director who is an executive officer. There seems to be a failure to recognize the fact that the First Defendant himself had, as was his right, sought to proceed against several of the other directors of the First Claimant by way of ancillary claims for indemnities, but decided against so proceeding. Of course, that possibility is now no longer open. Moreover, the fact that the Claimants have chosen to sue the First Defendant cannot, *per se,* be taken to support a proposition that "the Claimants have fixed their minds on making the First Defendant liable – whatever the law or the evidence might say on the matter". The simple fact is that it was open to the First Defendant to bring the other directors into the action and the fact that the Claimants themselves did not do so, raises no presumptions of law.

Having considered the submissions on this second issue, I am not persuaded that it has been established to the satisfaction of the Court that a director who is the chairman and who is also a paid employee cannot escape liability for his acts on the ground that the acts were pursuant to a decision of the entire board. Clearly, such an issue would never arise where the company was continuing with

the same persons in charge. For it could hardly be a point taken by a board which had made the decision pursuant to which the chairman might have acted, to later seek to impugn that act. Certainly, at the very least, issues of estoppel would arise. However, the other relevant question raised by consideration of this issue, that is, whether there had in fact been informed decisions of the board based upon full disclosure by the chairman, must still be answered, and I believe that the answers will more clearly emerge as we consider the specific allegations of wrongdoing leveled against the First Defendant by the Claimants.

The Third Issue: The Grenada Crescent Transactions

Again, the characterization of this issue as posited by the Claimants provides an appropriate formulation for examining this aspect of the case. What were the "Grenada Crescent Transactions" and what, if anything, was the legal effect of those transactions? The Grenada Crescent transactions concerned certain substantial expenditure incurred on the refurbishment and/or renovation of premises at 24-26 Grenada Crescent. It has been established to the satisfaction of this court that the building in question was owned by Ajax. Copies of the relevant Certificates of Title for the premises are to be found in the "Grenada Crescent Bundle" at pages 1-4. Further, Ajax admits that it is the owner of the properties in its defence. In light of the findings above, it can now be said the Ajax was owned and controlled by Dr. Chen Young. In any event, it needs to be borne in mind, if anything further were needed, that the 1987 lease (Exhibit 21A), the 1989 Supplemental Agreement (Exhibit 21B), the 1992 lease and the 1994 Agreement were signed by Dr. Chen Young on behalf of Ajax.

Although made at different times, one on May 22, 1992, and the other on June 23, 1995, both leases expired on November 30, 1997. The Claimant, EMB, alleges that pursuant to the terms of the two leases, it leased the 1st, 2nd and 3rd floors of the Grenada Crescent building. It further alleges that between 1995 and 1997 "Eagle purchased furniture for and made substantial alterations, improvements and additions to the Grenada Crescent Premises in the sum of

approximately $65,824,056.00 at the direction and request of Dr. Chen Young and Ajax, including to areas which were not the subject of leases". The sums expended were particularized in the Amended Statement of Claim and may be summarized as follows.

Construction not Completed	
Ground Floor and staircase	12,941,057.00
Second Floor	11,672,201.00
Construction Completed	
First Floor	14,915,775.00
Third Floor	26,295,023.00
TOTAL	**65,824,056.00**

In addition to the above expenditures, Eagle has been called upon to make payments in relation to works not completed on the Ground floor, second floor and staircase, to the tune of $4,097,233.00. It is the Claimants' contention, and it was so submitted, that Eagle had no obligation to incur these expenditures under or by virtue of the terms of the leases; that Eagle, received no, or no commensurate, benefit from the said alterations, improvements or additions; and, Eagle having vacated the premises on or about November 30, 1997, the only beneficiaries of the alterations, improvements and additions for which Eagle had paid or was liable, were Dr. Chen Young and Ajax. It was further alleged that the retaining of the services of EB Young Limited, as contractors, Eddie Young Associates as Architects and Keith Ryan & Company as furniture suppliers in 1995, was done "without maintaining any documents setting out the terms on which they were retained and without implementing any system to ensure that the sums claimed by them were properly incurred or expended".

In light of the foregoing, the Claimants assert that the first and second defendant had been unjustly enriched and ought to disgorge to the extent of that enrichment; that the first defendant, Dr. Chen Young, had breached his fiduciary duty to Eagle by causing or allowing Eagle to enter into the Grenada Crescent transactions with the consequences articulated above. Alternatively, Eagle claims that Dr. Chen Young's negligence or, in the further alternative, his breach of his

contractual obligations to Eagle, was responsible for the losses that Eagle suffered as a consequence of the Grenada Crescent transactions. The Claimants, therefore, claim that they ought to recover the sums in question from the Defendants.

In support of the submissions, Eagle's counsel points to the evidence suggesting that the Eagle Board of Directors had not been advised, or not fully advised, by Dr. Chen Young and that, in fact, the decisions were made by the said Defendant. The leases had a relatively short time to run when the decision to renovate refurbish and improve was taken. Indeed, both were due to expire on November 30, 1997. Before Mr. Hugh Croskery had prepared a memorandum for submission to the Board of Directors on the subject of the renovations, Dr. Chen Young had already approved them. Mr. Croskery's June 23, 1995 memorandum which is captioned "Proposed Renovation of EMB's 1st Floor 24 Grenada Crescent", is in the following terms.

> The undersigned met with Dr. Chen Young yesterday pertaining to the captioned renovation and also to the renovation of our building's ground floor including the entrance, the 2nd and 3rd floors.
> We are of the impression that Mr. Edward Young has provided your office with revised costing estimate to include the renovation of the total building and we ask that you submit same to the undersigned to present same to the EMB Board for ***ratification***. (My emphasis)
> Dr. Chen has indicated that he is in agreement with this proposal and we are anxious to have our first floor renovations/remodeling completed without further delay.

The submissions of counsel for the Claimants also suggest that, based upon the evidence, the Board may have approved some of the expenditure but certainly not all of it, and that there were only sporadic references back to the board as deponed to by Mrs. Daisy Coke.

In his submissions on this case, counsel for Dr. Chen Young denies that the evidence is as characterized by Claimants, and further submits that, critically, Eagle ***had an option*** to renew the leases for a further period of six years. It is

submitted that in relation to the Grenada Crescent transactions, the expenditures and "the scale of such expenditures are easily explained". It is claimed that: "All the testimony including the Claimants' own witnesses, support the circumstances and reasons that led to the Grenada Crescent transactions". It is pointed out that the Eagle Board had considered the problem of accommodation as early as 1989. It is then said, without any supporting evidence, that:

> "The option of renovating the Grenada building was submitted by Mr. Croskery as a last resort, and decided upon after full discussion and consideration by the Board. Neither Ajax nor the Defendant (Chen Young) took the decisions relating to the nature of the refurbishments and renovations. Those decisions were made by EMB's special projects Department".

Indeed, Dr. Chen Young in his evidence said that Mr. Croskery's characterization of what was to be done as "ratification" was incorrect, but Mr. Croskery insisted that his characterization of what transpired was correct. The First Defendant's counsel pointed to instances where the evidence, as contained in the witness statements, allegedly supported the defendant's basis for justifying the expenditure. However, most of these instances cited were taken from the "Further Witness Statement of Dr. Paul Chen Young". For example, the assertion by Dr. Chen Young that "cost over-runs were the result of increased labour costs and were well within standards" is at best self-serving. Another assertion, that "the cost of the renovations was also justified on the basis that the Board saw them as long term investments", is not supported by any Board Minutes to this effect, or any other witness.

Other assertions in which the First Defendant finds support, are drawn from the evidence of Mr. Maurice Stoppi and Mr. Eddie Young. With respect to these testimonies, Mr. Young clearly is unable to speak to whether the internal procedural proprieties had been observed. And so, on the essential question which the court must decide, that is, whether the decision to incur the expenditures was properly made, his evidence does not assist. Nor, indeed, does Mr. Stoppi's testimony that no costs were attributable to structural improvements,

affect the determination of the issue. It was conceded that expenditure was incurred in respect of areas not even covered by the lease, but suggested that this could be justified on the basis that "the Claimants had long enjoyed the use of those areas". Moreover, says counsel for the defendants, these areas were used without charge. In any event, counsel submitted that there was no "proof to support [the] allegation that EMB was in financial difficulty at the relevant time".

Claimants' counsel submits that any submission that EMB had an option to renew the lease was not correct as a matter of law. Counsel points out, in my view correctly, that clause 4(9) of the 1992 lease which provided that not less than three months before the expiry of the lease, EMB could "request" that Ajax grant a further six years "at such new standard rental as shall be mutually agreed upon" between them, did not give rise to an enforceable obligation. The clause did not provide for how the rate would be fixed in the absence of an agreement. Rather, it specifically provided that "if no agreement shall have been reached…..regarding the rental of the extended term…..then the lease shall absolutely determine upon the expiration of the term hereby created". It was submitted that based upon the authority of **King's Motors (Oxford) Ltd. v Lax**[4], there was no enforceable option in the hands of the Claimant. In that case, the plaintiff alleged that it was entitled to renew a lease since it had an option to do so. The "option" provided it was for a further term "at such rental as may be agreed upon between the parties". It was held in that case that the defendant must succeed as a term necessary was not agreed but remained to be agreed and the option was unenforceable. It was submitted that here, at the very best, there was an agreement to agree. This proposition is reinforced by a citation of a footnote from **Halsbury's 4th Edition**: "The absence of any specified machinery for settling the new rent is not fatal if there is a formula for determining it which the court can apply". Since there was no such formula in the 1992 lease, there was no option. Accordingly, the Claimants' counsel also asks the court to reject the submission by the First Defendant's counsel that not only was there an

[4] 1969 3 All E.R. 665

option, but that the first defendant had “offered to honour it”. However, the letter which purports to make this offer, a letter of April 28, 1997, merely stated that he “could consider it”.

I accept that, upon a balance of probabilities, the evidence which has been placed before this court supports the finding that the Eagle Financial Network was in serious financial difficulty by the end of 1996. As far back as June 1994, the Board of the second Claimant had been concerned about the losses suffered in the financial year, 1993-94. This emerged from the testimony of Dr. Oswald Harding, who had been a prominent member of the Board of Directors. In March 1996, the EMB Board also expressed concern for at the lack of profitability of the Bank and its future viability. The evidence is also clear that by the end of the financial year 1995/96, the Group was in dire straits. The auditor’s note to the second claimant’s audited financial statement for fiscal 1996 stated that “continuation as a going concern is dependent……ultimately on the results of the negotiations with the Government of Jamaica”. In the result, the court accepts that there is clear and convincing evidence, that a considerable part of the refurbishing was carried out after the extent of EMB’s financial difficulties, was already known to the first defendant. Some of the work, the refurbishing of the second floor, was not in fact started (mobilization payment made January 14, 1997), until after discussions had commenced with the Government of Jamaica, which event took place in the Summer of 1996.

Did the Board give its “Approval” for the extent of the renovations?

With regard to this question, it was the submission of Claimants’ counsel, that the evidence which had been adduced supported the proposition that the Board did not give approval to the “full extent of the renovations carried out”. It was further submitted that to the extent that it gave some limited approval, such approval was given “without full knowledge of the facts”. Counsel for the Claimants submit that, firstly, it is significant that the Board of EMB never approved the two current leases pursuant to which EMB, in 1997, occupied most of the building at Grenada Crescent. In particular, the board seemed unaware until that year that the leases expired on November 30, 1997. In support of this proposition, counsel

cited the evidence of several witnesses. These included Mrs. Daisy Coke, Deputy Chairman of EMB, who acknowledged that she had assisted in the negotiation of the rental amount in the original lease entered into in 1985. It was her testimony that it was at the March 1997 meeting of the Board of EMB, that the terms of the then current lease "were revealed to [board members] for the first time". Dr. Harding also testified that prior to that meeting, "I had not known of the terms of the lease". Mr. Derrick Milling stated: "I was not aware of the terms of the leases for 24-26 Grenada Crescent prior to the board meeting in March 1997", and Pamela Phillips, the legal advisor to the Board and sometimes to the first defendant admitted that she could "not recall the leases being tabled at any board meeting".

If there were some board approval, did the board know fully what it was authorizing? Did the board approve renovations, refurbishing and additions in the sum of over $64 million?

Claimants' counsel submits secondly that the Board did not approve the renovations etc. Mrs. Coke averred in her oral evidence that the information about the refurbishing came to the board sporadically; in her words, in bits and pieces. She was sure that the board never approved renovations etc., of over $65 million, and she referred specifically to two (2) sets of approvals. These related to "four something million and five something million". She also then remembered "that there was $15 million dangling around". An examination of the minutes of the board meetings seems to support this averment. According to the evidence which I accept on the basis of an analysis of the minutes the following is a correct statement of how the matter developed.

a) On July 4, 1995 the Board approved renovations totaling $14.7M: $4.8M for the ground floor, $4.5M for the first floor and $4.5M for the third floor (page 81 Grenada Crescent Bundle)
b) At the next meeting of the Board the approval was scaled back to the ground and first floor "with nominal changes to the 3rd floor for the time being" (page 91 Grenada Crescent Bundle)
c) In May of 1996 Dr. Chen Young reported on the renovation of the 3rd floor being completed at a cost of $15M (page 207, Grenada

Crescent Bundle). He did not in that meeting explain how the third floor was done in light of the Board's previous directive. At this time the total cost of $15M was erroneously described as being an "overrun" of $4M. The board was not reminded that the total amount approved for the third floor had been $4.5M or that they had said that only "nominal changes" should be done.

d) In that same meeting the first defendant apparently advised of an estimate of $15M to do the ground floor and stairwell. The board was not reminded that they had previously approved $4.8M for the ground floor.

It will be recalled that there was an initial memorandum from Hugh Croskery to Norman Lai dated June 23, 1995[5], this pre-dating the first reference to the Board at a) above, which dealt with the renovations having been decided upon. Mr. Croskery also advised the architect in his letter of July 5, 1995, that the board had approved the purchase of furniture, although it is clear from the minutes that this was incorrect. He also advised Mrs. Saulter, the Assistant manager for Special Projects, that refurbishing for the second floor had been approved when, again, that floor had not been considered by the board. His July 27, 1997 memorandum to Mrs. Saulter is instructive as it states: "For the time being, the board has indicated that the renovations to the 2nd and 3rd floors will be very minor in order for expenditure to be contained". In fact, the minutes of the relevant board meeting stated:

> Renovation of 24-26 Grenada Crescent.
> A memorandum from Mr. Croskery was tabled giving an estimate from Edward Young & Co. of $4.8M for the ground floor, $5.4M for the first floor and $4.5M for the third floor. Subject to Mr. Goldson's verification, the board agreed with the renovation expenditure.

Clearly the board had not discussed the 2nd floor and Mr. Croskery's memoranda seem very strongly to suggest that the decisions had been made previously by Dr. Chen Young to proceed with the various areas of renovations. As far as Mr. Milling was concerned, the renovations of which he was aware are reflected in the minutes of EMB. His recollection was that renovations were approved for the first and ground floor. He had not seen or been aware of the memorandum purportedly sent by Dr. Chen Young to the board of directors at page 131 of the

[5] See page 24 above

Grenada Crescent Bundle. I should note en passant, that this document was provided by the defendant and was not among those classified as the EFN documents.

Mrs. Phillips who was present at all relevant board meetings stated that there were "no detailed discussions on the leases at board meetings"; nor was she aware of the magnitude of the renovations. Her own recollection of the March 11, 1997 board meeting was that Dr. Chen Young was primarily concerned with the issue of the option to renew being given up by EMB, and that this made the directors uncomfortable. This was confirmed by Mrs. Coke who had the following to say about this meeting in her oral testimony:

> "…What we felt was that to revert to no value after we had spent 50 million, 48 million, I don't remember, but certainly not 15, on repairs in less than a year was certainly not a proper use of the Board's money….No way could we as directors have spent this amount of money to repair a property and hand it over back at no value within a few months, not in the context of 1996/1997. The proposal was stupendous.

Given the evidence outlined above which I accept, the question which needs to be answered in relation to this issue is: What is the cumulative effect, if any, of that evidence, on the liability of the first and second defendants to account for the sums spent by Eagle, or now being demanded from it, and which have not been recovered? I have already dealt with the purported option to renew the leases and indicated that I have agreed with the Claimants that there was no valid and enforceable option. I also agree with the Claimants that, given the evidence, on a balance of probabilities, the information given to the board was inadequate and far less than full. There is also documentary and credible evidence which suggests that Dr. Chen Young had information and made decisions without the knowledge of the board. Thus for example, both Dr. Harding and Mrs. Coke in cross examination denied knowledge of the memorandum from Mr. Croskery to Norman Lai or the report of Robkovi Associates to Dr. Chen Young dated October 9, 1996. Dr. Harding said he was "shocked" when he saw it. What is

interesting about this latter report is that it indicates that at the time of the inspection of the building by Robkovi, the "works value added exceeded the cost by 15%". I find the following quotation from the report also very instructive.

> Since the lease is nearing completion most of the value indication would come from Reversion and little from Net Income Capitalization. It should also be noted that in this marketplace, only hotels and resort-type income producing properties are appropriate for the application of this approach.

Dr. Harding also said that the letter from E.B. Young Ltd. dated January 6, 1997, giving an estimate in the sum of $10,332,254.24 for works on the second floor, was never brought to the attention of the Board. He said: "I am surprised that Dr. Chen Young continued to allow such expenditure to be incurred even in 1997 when it was clear that EMB was in serious financial trouble".

Given the evidence of both Dr. Harding and Mrs. Coke concerning the discussion of the "surrender of the reversion" and their lack of knowledge of the expiration date, I also hold that the leases had not been presented to the board for discussion and the board was not aware until about March 1997 that the leases would have expired in November of that year. I accept Dr. Harding's evidence to the following effect as credible: "The meeting of March 11, 1997 was very unpleasant because the members of the board were very angry with Dr. Chen Young. I had not known the terms of the lease and when we were asked to approve the expenditure of $14.7 million in 1995, I did not know that the lease had only two years left to run if not renewed. Had I known that, I would not have approved the expenditure. I remember saying to Dr. Chen Young that the lease was not an arm's length transaction and he said that he knew that I would say that".

I also accept the Claimants' submission that the fact that some of the renovation paid for had been done to areas that had been used by EMB without having to pay for that use, is irrelevant in the context of whether the expenditure was properly incurred ***and*** with the full approval of the board.

It may be instructive, at this juncture, to consider some of the evidence as to the nature of the renovations which had been undertaken. In this regard, particular assistance is derived from the expert report of Maurice Stoppi, who testified on behalf of the defendants. The report by this witness was prepared between 6 and 8 years after the work had been done, 1995-1997. Mr. Stoppi's evidence is that he "conducted an inspection of subject premises on August 26, 2003 in the presence of a Mrs. Brown and Mr. Bailey". He was at that time still able to identify much of the renovation work, the benefit of which enured to the holder of the reversionary interest. The work done involved walls, doors, windows, ceilings and floor finishes, air conditioning and electrical systems, sanitary appliances, staircases and rails. Stoppi said he was of the view that the renovations were not structural, meaning "elements of the building that are designed to support both itself and whatever supreme loads are put on the building." However, as noted, much of the work was still there when he made his inspection several years later. Part of Mr. Stoppi's report included a letter from Edward Young Associates dated November 16, 2003, which indicated that although the original letter from Mr. Croskery[6] was limited to complete renovation of the first floor, "that was later added to in the below listed order:-

1. Third Floor
2. Ground floor, Elevator and stair;
3. Second Floor
4. Building Entrance and Exterior at Street Level only".

The letter from Mr. Young also stated that: "The interior of each floor was methodically gutted, replaced with the below listed new installations:-

- Floor finishes including floor rescreeding;
- Walls and wall finishes including glazed timber screens;
- Doors and hardware
- Electrical lights and services".

[6] See above at pages 24-25

Mr. Stoppi, in his report, indicated that in his expert opinion, the expenditure appeared to be justified in relation to the work done. One of the questions which was asked of him for the purposes of his expert report, was as follows:

> "How much of the expenditure was related to work designed for the specific use of the tenant as opposed to structural improvements?"

Mr. Stoppi responded:

> "I am of the opinion that all expenditures incurred in this exercise were for the specific requirement, comfort or use of the tenant".

However, it is axiomatic that the fact that the renovations were not structural, did not mean that they were not enduring, for, as noted above, Mr. Stoppi was able to view some of the work several years after EMB had ceased to occupy the premises, or even to exist in an operational sense.

The Defendants' counsel in their "response closing submissions" which technically should only have been limited to authorities cited by the Claimants and which had not been previously addressed, take issue with the approach of Claimants' attorneys with respect to the Grenada Crescent transactions. In that regard, they submit that the Claimants raise, "apparently, for the first time, a comparatively lengthy argument that the Grenada lease did not contain an option to renew, without indicating which cause of action this new argument relates to. It presumably relates to the question of unjust enrichment even though that label does not appear in the Claimants' submissions under the heading, 'Whether the Grenada Crescent transaction constituted a breach of fiduciary duty, negligence or breach of contract on Dr. Chen Young's part'". Further, the defendants' counsel, in relation to the lack of an enforceable option to renew the lease, said this:

> Whether or not there was a formal option to renew, the Claimants have not pleaded an actionable ca][ ][se, or related their argument to a legitimate cause of action. And even if they had done so, they still could not succeed on the ground of unjust enrichment, for the reasons stated in our closing submissions.

Defendants' counsel proceeds to argue that, by virtue of their pleadings, the Claimants have "pleaded that there was an option to renew" and "cannot now say that 'It is submitted that the lease did not contain an option to renew'". In support of this proposition, the defendants' counsel cites the case of **Broadway Import and Export v Michael Levy and Life of Jamaica (unreported) Supreme Court Suit No C.L. B – 081 of 1993**. Reference was made to the judgment of Langrin J in which he said:

> At paragraph 4 of the defence of the first defendant there is an admission of the grant of an option. That being so, counsel cannot now argue that there was no consideration for the option, since he is bound by his pleadings.

Proceeding in this vein, counsel says that the Claimants are precluded from saying there was no option since they had in effect "pleaded in their amended particulars of claim that there was an option to renew". The flaw in this submission is that there has been no "admission" that there was an option. It was the first defendant who proceeded on the basis that such an option existed, and who accordingly sought the surrender of the "option" without consideration. As the authorities cited above show quite clearly, that was not the case as there had been no agreement on the essential element of the rental to be paid under the terms of any renewal. Indeed, the defendants' counsel's suggestion that whether or not there was a "formal option to renew", the Claimants "have not pleaded an actionable case, or related their argument to a legitimate cause of action", with respect, misses the point of Claimants' submissions on the validity or otherwise of the option.

Having assessed the evidence in relation to the Grenada Crescent transactions, and considered the submissions from the Claimants' and Defendants' counsel on the evidence and the law, this court must decide, in relation to Grenada Crescent, whether any wrong had been done in relation to which redress was available. The Claimants, upon whom the burden for proving their case remains, submit as a basis for finding liability the following,:-

1. The leases under which parts of the Grenada Crescent property were occupied by EMB, were due to expire on November 30, 1997.
2. There was no enforceable option to renew and so would end on Nov. 30, 1997.
3. The First Defendant well knew this as he had signed the leases on behalf of the Second Defendant.
4. The First Claimant was already in serious financial trouble, and this was known to the First Defendant
5. In the premises, the expending of considerable sums for the renovation and refurbishing of, and additions to, the leased property was likely to lead to the benefit of any such works, whether structural or not, enuring only to the benefit of the owner of the reversionary interest, being the Second Defendant.
6. That there was no valid approval by the Board of EMB of the expenditure of almost $65million and if any approval was given it was given in circumstances where:-
    a. The decision had already been made by the First Defendant, and the Board was being asked to "ratify" that decision;
    b. the Board was only provided with incomplete and "bits and pieces information" so that any such approval was not from an informed position.

It will be apparent from my review of the evidence and the submissions on this issue, that I accept that the Claimants have, on a balance of probabilities made out the allegations at 1, 2, 3, 4, 5 and 6. What legal consequences flow from this finding?

Counsel for the Claimants again referred to the case of **Donovan Crawford**[7]. In that case the Plaintiff sought to recover a property from the defendant, Crawford. The Plaintiff claimed that the property had been wrongfully transferred to the defendant and he, in turn, claimed that the transfer had been authorized by the Plaintiff's board of directors. The evidence was that the bank's board had not

[7] See above

been provided with the information which the defendant, who was a member of the board, had. The information in that case, related to the value of the property which was being transferred. The Court of Appeal upheld the decision of the learned Chief Justice at first instance. Claimants' counsel cites the judgment of the learned judge of appeal, Forte, JA in a passage which I adopt for the purposes of the instant case.

> In resolving this issue, the learned Chief Justice outlined the circumstances surrounding the transaction and relying on two passages from Palmer's Company Law Vol. 2 paragraphs 8-517 and 8-518, came to the following conclusion:
>
> > Applying the above principles to the instant transaction it is clear to me that this transaction must not be allowed to stand, Crawford having failed to disclose to the Board the true market value of the property. The board approved the contract not knowing the true facts. It matters not that the contract might have been a fair one. The Court discourages situations in which possible conflict of interest and duty may arise. The Court in such circumstances will not address its mind to the merits of the transaction. In the circumstances, I order that the transfer of 1 Paddington Terrace to Regardless ltd. be set aside and the Plaintiff is hereby declared the true owner of the property.

Forte JA continued:

> In the instant case, the Respondent had to show that the 3rd Defendant/Appellant, Donovan Crawford failed to make full and fair disclosure to his board of directors when he sought and obtained the latter's permission for his purchase of 1 Paddington Terrace. There is no evidence that the market value of the property was known at the time the board approved the option to purchase. At the time, however, that the option was extended the evidence clearly shows that Donovan Crawford had knowledge that the market value of the property was $4 million in October of the previous year. This knowledge he did not disclose to the board at that time, nor at the time of applying for the extension…..In view of the above, it is clear that there was ample evidence upon which the learned Chief Justice could come to the conclusion that this transaction was in breach of Crawford's fiduciary duty.

I hold that in light of the foregoing decision, there is a clear basis that Dr. Chen Young was in breach of his fiduciary duty to the bank and the Claimants ought to succeed against him on that ground. I also hold that on the facts found with respect to the reversionary interest in the leases that the case for unjust

enrichment has been made out. I would also be prepared to hold, if I thought it necessary, that the Defendant Dr. Chen Young was in breach of his contract of employment and therefore liable to compensate the Claimants.

I should advert briefly at this point to the Closing Reply Submissions of the Defendants' counsel with respect to unjust enrichment, to which reference will again be made later[8]. Both in the Closing Submissions and the Closing Reply Submissions, counsel for the defendants deals with the issue of unjust enrichment. This is done in response to the Claimants' claim that "the Claimants have proved the elements necessary to establish an unjust enrichment and submit that it would be unjust to allow the defendants to retain the benefit accrued to them as a result of the enrichment". I commend the Defendants' counsel for the analysis of the elements of a valid claim for unjust enrichment, but am surprised that despite that analysis, the conclusions which it is submitted arise from that analysis, could be so wrong. Defendants' counsel refers to the Claimants' citation of the judgment of Lord Clyde in the case **Banque Financière de la Cite v Parc (Battersea) Ltd. and Others**[9]. In that case the learned law lord had this to say:

> "My Lords, the basis for the appellants' claim is to be found in the principle of unjust enrichment…Without attempting any comprehensive analysis, it seems to me that the principle requires at least that the plaintiff should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss. The loss may be an expenditure which has not met with the expected return. The remedy may vary with the circumstances of the case, the object being to effect a fair and just balance between the rights and interests of the parties concerned. The obligation to provide the remedy does not rest on any contractual basis but on the general principle of the common law and it may find its expression in a variety of circumstances."

[8] See "Issue 7" below
[9] [1998] 1 All E.R. 737

The Defendants' counsel states that Lord Steyn's formulation of the principle in the same case is preferable. They say: "Four questions arise: (1) Has [the Defendant] been enriched? (2)Was the enrichment at the expense of [the Plaintiff]? (3)Was the enrichment unjust? (4) Are there any defences"? I accept the submission that the English Court of Appeal decision in **Lloyds Bank v Independent Insurance**[10] is a proper statement of the law on unjust enrichment. As Waller L.J said in that case:

> The structure of this form of restitution is now firmly established. There are five questions to be asked: (1) Has the Defendant been enriched? (2)If so, is his enrichment unjust? (3) Is his enrichment at the expense of the Plaintiff? (4) Has the defendant any defence to the claim? (5) What remedies are available to the Plaintiff?

It seems to me that given the evidence that I have accepted in relation to the Grenada Crescent transactions, the answers to the questions posed by the Defendants' counsel, are obvious.

Ajax's Position

Before leaving the issue of the Grenada Crescent transactions, I shall turn briefly to consider the position of Ajax. Ajax, as noted above, and also in another matter before the Court of Appeal but on substantially the same evidence, has been found to be Dr. Chen Young's company. It was outside of and not a part of the Eagle Financial Network. On the evidence accepted and the conclusions drawn therefrom, the submission by the Claimants' attorney that Ajax had received the benefit of the improvements to its buildings for which it had given no consideration, and that, by virtue of the First Defendant's breach of fiduciary duty and/or breach of contract, is unanswerable. There would clearly be in law, a basis for the return of that benefit, even in the absence of a claim for unjust enrichment. In this regard, recourse may be again had to the **Donovan Crawford** case. There, a company in which a director had an interest received a benefit as a result of that director's breach. It was held by the Court of Appeal

[10] Cited at [2000] 1 Q.B. 110 at 123

that the company had to disgorge the benefit. Again, I cite with approval and adopt the dicta of Forte J.A. (as he then was):

> "The legal title to the property having passed to Regardless Ltd, the question arises as to whether Regardless could be said to be a bona fide purchaser for value without notice. If of course it was not, then some equitable proprietary interest in favour of CNB would have attached to the property. Consequently, though the legal title would be in Regardless, a beneficial interest would reside in CNB. Regardless, cannot be said to be a 'stranger' to the transaction, as it was Crawford who had the controlling interest in Regardless, who negotiated with the Board of Directors of CNB in a manner which amounted to a breach of his fiduciary dealing and a fortiori would be seized of the knowledge of that breach. His knowledge must necessarily be also attributed to him in his position of major shareholder of Regardless and consequently it cannot be said that Regardless was a bona fide purchaser for value without notice."

It was submitted that the same reasoning must apply in this case. I agree. Even the submissions of Defendants' counsel seem to suggest agreement with this approach. Thus, in the submissions it is stated: If the [first] defendant breached his duties to EMB then as "directing mind and will" of both EMB and Ajax, it is arguable that Ajax had knowledge of the breach and may be held as a constructive trustee to EMB".

It is clear that all the parties recognized that a benefit was accruing to Ajax. During the period when there were some discussions concerning the selling of the Grenada Crescent building to one of the Eagle Group companies, the discussions proceeded on the basis that the purchase price should be arrived at after deducting the cost of the renovations. It is difficult to interpret this as other than a concession that Ajax would be in receipt of a benefit to which it was not entitled.

Before leaving this topic, I should touch upon the issue of the conflict of interest of which the Claimants accuse the first defendant. Defendants' closing submissions say that the duty to avoid conflicts of interest was enunciated by

Lord Cranworth, in **Aberdeen Railway b Blaikie**[11] in what it claims to be a "rule of universal application". This is to the effect that directors, as fiduciaries, shall not be allowed "to enter into engagements in which he has or can have a personal interest conflicting or which may possibly conflict with the interest of those whom he is bound to protect". The Defendants' submissions suggest that a gloss was put on this by Lord Upjohn in **Phipps v Boardman**[12] when he explained in this latter case that the expression "possibly may conflict" as used in the **Aberdeen Railway v Blaikie** case meant that:

> "The reasonable man looking at the relevant facts and circumstances of the particular case would think that there is a real sensible possibility of conflict; not that you could imagine some situation arising which might in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict".

The Defendants' counsel submits that in considering this principle of conflict, the facts of each case need to be examined and considered on their own merits. However, the touchstone test was: "Was there a real possibility of Conflict"? In this regard, the submissions cite **Inge v Inge**[13] as a case where it was held that there was no real possibility of conflict. It was said that the case was decided in this way because the impugned transactions took place "openly and not secretly". I do not agree with the Defendants' submissions that the same is true in the instant case. Indeed, I accept the Claimants' submission on this case that it was clear that the board in **Inge** "was aware of the true value of the transactions it was considering and there was a benefit which would flow to the company from the purchase of the assets by the directors". I would also believe that that case may be distinguished on the basis of competing fiduciary duties and the Court has to balance those interests. That is not the case in the instant matter as at the heart of this matter was the lack of information by the board on the one hand, and the withholding of information by the first defendant, on the other. For completeness, I need only add that there is no virtue in law or in common sense, in the Defendants' submissions that since the directors owned 90-95% per cent

[11] [1843-1860] All E.R. 249
[12] [1967] 2 AC 46
[13] [1990] 3 ACSR 63

of the shares and Dr. Chen Young "could have exercised his right to vote as a shareholder" the shareholders also and not only the directors are deemed to have approved the profit made". But this argument comes up against the same problem of a lack of knowledge on the part of those same shareholder/directors. Nor is the suggestion that as the directors knew of Dr. Chen Young's interest, he had complied with his duty to declare.

In this regard again, I hold that based upon the evidence, neither the nature nor the extent of the first defendant's interest was fully declared. Thus, for example, the board did not appreciate the full cost of the renovations, did not approve even the figures that they were made aware of; nor did they know of the Robkovi Report which would have helped to appreciate the value that the renovations would add to the building that they could soon lose at the end of the lease, to the benefit of the reversioner. The Defendants' submissions spend a lot of time on cases and materials on the subject of the duty of care and whether the fact that "everyone knew of Dr. Chen Young's interest", this somehow vindicated the defendant's conduct. I have not spent a lot of time on those cases and materials, because, as will have become apparent, I have taken a certain view on the issue of the first defendant's failure to disclose or his withholding of information to which the other directors were ***entitled*****.**

Finally, before leaving the issue of the Grenada Crescent transactions, it should be noted that the Claimants sought to amend the sums claimed under this head in line with the evidence given by Edward Avey the expert witness. The figures provided by Mr. Avey differed in a few cases from that in the statement of claim. It is clear that the court has power and should allow an amendment to bring the pleadings in line with the evidence which has been given in the proceedings. In a recent case in the United Kingdom, it was held that an amendment could be made even after judgment had been given.[14] In that regard, I set out at some

[14] See Charlesworth v Relay Road Ltd. [1999] 4 All E.R. 397 per Neuberger J

length the observations of the learned judge, Neuberger J in the Charlesworth case:

> It seems to me that, as a matter of principle, if, as those cases all show, the judge retains control of the case, to the extent of being able to reconsider the matter of his own motion or to hear further argument on a point which he has decided, it seems to me that there must be power to permit pleadings to be amended, even if that involves a new argument being put forward, or further evidence being adduced, or even both, as the defendants seek here.
>
> **The applicable principles: discretion**
>
> I turn, then, to consider how the discretion should be exercised in a case such as the present where the application involves amending the pleadings and calling further evidence. Particularly in light of the Civil Procedure Rules ("the CPR"), to which I have regard in light of Rule 51.11 as this application was issued on June 29, 1999, it seems to me that this application must be approached with "the overriding objective", as set out in Rule 1.1, in mind.
>
> As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted.
>
> That view could be said to derive support from the observations of Millett L.J. in ***Gale v. Superdrug Stores plc* [1996] 1 W.L.R. 1089 at 1098F to 1099D**, where he said this:
>
> > 'The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake,

> justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party. The rules provide for misjoinder and non-joinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of litigation, little harm may be done; the later it is corrected, the greater the delay arid the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice. ….'

In ***Clarapede & Co. v. Commercial Union Association*** **(1883) 32W .R. 262, 263** Baliol Brett M.R. said:

> 'However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs;'

> I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognize the exigencies of the modem civil justice system. On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity."

In our jurisdiction, our Court of Appeal in **Ketesha Clarke v Patrick Hughes et al**[15] has held that a trial judge was wrong to refuse to allow an amendment sought during a final address. I should point out that there is no prejudice here as amended sums came out of the testimony of Mr. Avey. There are no new issues at stake, only a difference of figures. I accordingly allow the amendment to allow the claim under the Grenada Crescent transactions to be for $66, 629,968.00 as appears from Exhibit 23A.

The Fourth Issue: Whether the First Equity/IBM transactions constituted a breach of fiduciary duty, breach of contract or negligence on the part of Dr. Chen Young

There are three separate claims which form part of this issue. These are:

The acquisition of First Equity;

[15] [1991] 28 JLR 383

The trading of IBM shares; and
The transfer of funds to Dr. Chen Young's account.

In or around September 1993, Eagle purchased 88% of the shares in First Equity Corporation, ("FEC"), a company incorporated in Florida and carrying on the business as a securities broker. The preponderance of the evidence suggests that the Board of directors of Eagle thought that the acquisition of the corporation was a good investment. Certainly, Dr. Harding and Mrs. Coke, two of the major players in the Eagle Financial Network thought the acquisition was a good one. It is not seriously disputed that although the purchase was in the name of an Eagle subsidiary, Eagle Investments and Securities Limited, the purchase was funded by Eagle.
According to the Claimants' statement of claim, the book value of FEC at the time of purchase was approximately US$1.5 million. The purchaser was required to pay for the shares, the sum of US$1,321,231 and were also required to enter into an employment and deferred compensation agreement whereby an additional sum of US$1.335 million was payable. In addition, the vendors had a Put Option by which the vendor could require the purchaser to acquire the balance of the shares owned by the vendor. The evidence is that pursuant to the employment and deferred compensation agreement, a further sum was paid over from September 1993 to January 1996 in the sum of US$940,000.00. The Put Option was exercised and a sum of US$799,593 paid therefor, so that a total of US$3,060,824 was paid for the purchase of FEC. Between April 1994 and June 1995 Eagle funded a further sum of approximately US$3,671,508.00 in respect of FEC's operations, through loans and advances to FEC, the purchase of additional common shares in FEC and the purchase of preferred shares in FEC. The company was eventually sold for US$1.2 million resulting in "losses" of US$5,532,332.00.

The Claimants allege that the purchase was negligent in that it resulted in Eagle entering into a business in which it had no expertise or experience, and which

was not in the usual course of the business of a deposit taking institution in Jamaica. The Defendants' submissions on the other hand seek to distinguish between an investment which is bad in law and which would presumably give rise to a liability to account for losses and one which turns out to be a bad investment for which no liability arises. While the defendants sought to show that there was a time when FEC was profitable, it was clear that by January 1995, according to Dr. Chen Young, the situation was such that "no reasonable investor would offer an infusion of additional capital except at an unreasonably low price. Claimants' submissions make the point that, according to the evidence of Patrick Hylton, when FINSAC took over the Eagle Financial Network, they found that there was no one in the EFN "who could properly explain the nature of the business which FEC was undertaking, who understood properly the transactions and the risks associated with the transactions which it undertook". In addition, there were three lawsuits against FEC which had merit. The Claimants assert that: "It is clear that the purchase was not a prudent decision, and the losses the EMB suffered as a result should be recoverable".

The Defendants' counsel submits that the FEC transactions can be easily explained. Defendants' counsel's submissions say: "In fact, this transaction illustrates clearly the difference between a transaction that is bad in law and one that turns out bad. The evidence of Dr. Harding was to the effect that: "It was a fair price. Let me assist you. I don't have any problem with the acquisition of FEC". Mrs. Coke's evidence was to a similar effect. "I believed that at the time, I still do, that the decision to purchase First Equity was a good commercial decision". The decision to purchase FEC was a board decision. As was stated by one witness: "My memory is that the board agreed. I do not have a memory of any director dissenting the purchasing of First Equity". There is evidence from the First Defendant that at the time of the acquisition, a committee was set up for the purposes of carrying out due diligence, and there were persons who gave advice in relation to the acquisition. I believe that this matter of the purchase of FEC can be dealt with quite briefly. There are only two other observations which I would

make in relation to this issue of the FEC purchase. There is no evidence that Dr. Chen Young had any more or any less to do with the purchase of FEC than any other member of the board of directors. There is no averment that Dr. Chen Young placed himself in a special relationship with the other directors which created a duty owed to those other directors in relation to the purchase of FEC. If there is no duty, then there can be no breach of duty. We need not be detained by the submissions about whether this was a good investment which went bad or a bad investment. There is no liability merely because "the decision to purchase was not a prudent one and Eagle suffered losses which should be recoverable". If this were the case, there would be an end to the well-known corporate strategy of company expansions through acquisitions where companies buy other companies which are a natural fit.

In summary, there was no mystery to the purchase of FEC. There is no evidence that there was any non-disclosure or lack of information. Indeed, other directors appeared to have been integrally involved in the acquisition. If the First Defendant is to be liable for anything, it is difficult to see why all the other directors would not also be liable.

The Purchase of IBM Shares

The evidence which has unfolded indicates that Eagle through Dr. Chen Young traded in securities. There is evidence that the First Defendant had the board's authority to trade in shares on behalf of Eagle. This trading was done at the margin which required that the purchaser pays 50% of the purchase price and borrows the balance from the broker, e.g. Paine Webber, at interest. The trading was carried out by Eagle and Eagle Holdings Cayman Limited, a subsidiary of Eagle through FEC. It appears that the trading was limited to so-called technology stocks and, in particular, IBM shares which were regarded as "Blue Chip". The documentary evidence, much of which comes from the Expert Report of Edward Avey, a Forensic and Investigative Accountant is instructive. The unsuccessful challenge to the admissibility of that report has already been the subject of an extensive written judgment by me in these proceedings. In the result I ruled that the report was admissible. Mr. Avey who also gave oral

testimony himself was subject to rigorous cross examination on his report, a considerable part of the cross examination was focused, quite erroneously in my view, on Mr. Avey's ability to value companies. Little, if any, of his factual averments were seriously challenged. Ultimately the court, as with all other witnesses, must decide upon the credibility of the witness as well as the weight to be accorded the testimony. In so far as the following are borne out by the report, I accept the allegations as proven on a balance of probabilities.

Between March 31, 1995 and May 5, 1995, a total of 91,000 shares were purchased. The Eagle board meeting minutes for April 25, 1995 indicates that the board was advised that the shares had increased in value by half-a-million United States dollars. On May 11, 1995, the shares were sold and a profit of US$667,000.00 realized. On May 5, 1995 a further 50,000 shares were bought at a cost of US$96.142 and a further 100,000 shares were purchased on July 3, 1995 on the instructions of Dr. Chen Young and confirmed in a letter of July 5, 1995 over the signature of Mr. Keith Senior, then General manager of Eagle Commercial Bank Limited. The letter confirmed that the sum of US$4,853,994.00 was to be transferred "from Eagle Merchant Bank of Jamaica Ltd's trading account to Eagle Holdings (Cayman) Ltd's Account No. IE 10686".

In July 1995, according to the testimony of both Mrs. Coke and Dr. Harding, when the directors discovered that Dr. Chen Young had invested Eagle funds very heavily in IBM stocks, this led to a confrontation between the board and Dr. Chen Young. He was instructed to sell the shares. This directive was complied with and 228,000 shares were sold for US$104.206 each, realizing a profit of US$1,354,000.00. A day later, Dr. Chen Young caused Eagle to purchase a further 190,000 shares for US$108.694. These transactions were recorded as booked on the 27th and 28th July, 1995, although the actual transactions would have taken place a couple of days earlier.

According to the EMB Board Meeting minutes for August 29, 1995, at that meeting the first Defendant advised the board that there was "current upward trend" in the value of the stock when, in fact, the value had fallen to US$101.62. Again, at the September 26, 1995 board meeting, the meeting was advised that there was "nothing further to report at this time", while the value of the stock had fallen further to US$92.75. In October, the board was advised that "the price was now $108". In fact, it was $98.25. In December 1995 margin calls were made on Eagle in relation to its equity trading account. On January 9 and 11, 1996, 163,000 shares and 27,000 shares were sold at the prices of US$86.869 and US$88.522, respectively, realizing huge losses. On February 14, 1996 Eagle issued a revised internal investment policy. The evidence of Mr. Avey in his report, the credibility of which I accept, is that the cost of the acquisition of these shares was US$20,656,717.00, or a sum equivalent to 169% of Eagle's capital base. The trading loss occasioned by the January 1996 sales was US$4.1 million or a sum equivalent to 33% of Eagle's capital base which stood at J$490 million or US$12.25 million at a conversion rate of US$1:00 = J$40.00. It is also instructive to note that even Mr. John Jackson, who prepared an expert report for the Defendants, was also of the opinion that "the foray into IBM shares *as one investment*, went against the accepted investment rules that recommend diversification". In light of the foregoing evidence and the obvious extent of the exposure to risk of the erosion of the First Claimant's capital base, it is difficult to avoid the conclusion that this adventure was a reckless and even wanton disregard of prudent investment practices and cannot be brought within the realm of the "business judgment rule".

The un-contradicted evidence of the Forensic and Investigative Accountant is that in addition to the trading loss, Eagle paid margin interest of US$413,164, and lost the use of funds invested over the period at a cost of US$418,202. In fact says Mr. Avey, after deducting dividend income from the IBM shares of US$95,000.00, the total loss on the IBM shares acquired on July 28, 1995, was US$4,838,516.00. The Claimants seek permission to amend the figure claimed in

the Statement of Claim by reducing it from US$4,841,516.00 to this lower figure. While the amendment can be granted, it should be noted that the sum claimed includes a figure for what the Expert's Report describes as "loss of use of the funds" in the sum of US$418,202. This is the sum he says he has calculated the "loss" to be. It may be argued that this loss is nothing more than the "economic loss", or the "opportunity cost" of not having the funds in hand. If that view of this figure is correct, then the Court must consider whether it would be too remote and ought not to be recoverable.

Liability for economic loss

The courts have been reluctant to hold defendants liable for purely economic loss resulting from resulting from negligent conduct. In ***Candlewood Navigation v Mitsui OSK Lines (Mineral Transporter Ltd)*** **[1985] 2 All ER 935** it was stated:

> "Their Lordships consider that some limit or control has to be imposed on the liability of a wrongdoer towards those who have suffered economic damage as a consequence of his negligence."[16]

This restrictive approach of the courts to economic loss has meant that the courts have generally found economic loss to be irrecoverable however foreseeable the loss may have been. The authors of ***Clerk & Lindsell on Torts, 16th ed. at page 206*** point out that in order to recover economic loss, the plaintiff must establish that within a particular, 'special' relationship with the defendant, the latter in effect undertook responsibility for the plaintiff's economic welfare. I believe that in this case the purported loss is not being claimed as solely or even mainly due to negligence. However, the fact of the special fiduciary relationship, (as well as a contractual one) between the Claimant and the Defendant, and the First Defendant's "undertaking", have been established and would allow a claim for economic loss even in negligence.

There is also a further observation which Claimants' counsel makes. That is, that Dr. Chen Young in his evidence had sought to say that the Board had not given

[16] Per Lord Fraser at page 945.

him instructions to sell. However, he claimed that there was an “error” in the pleadings when confronted with the fact that the pleadings had acknowledged that this had been the case.

The Claimants’ Statement of Claim, pleads that the trading in the IBM shares at the volume which the first defendant carried out was “speculative and negligent in that, inter alia, the same was beyond the normal scope of the business undertaken by Eagle; same was conducted without the authority of Eagle; same was carried out based on the personal instructions of Dr. Chen Young without due regard to the above and to the risk inherent in trading of the kind undertaken, namely trading heavily and exclusively in a single stock and on margin; failing to obtain any or any proper advice as to the transactions. The Claimants’ submissions also point out that the advice given to the Board at meetings subsequent to July 27, 1995, in respect of the IBM stock, was “incomplete and inaccurate”. It is contended that as a result of the foregoing, there was a breach of fiduciary, breach of contract and negligence on the part of the First Defendant.

Mr. Keith Senior, in answer to interrogatories served upon him by Dr. Chen Young, stated that in his recollection the board of directors did approve the trading in Blue Chip securities which would have included IBM shares. However, while he did not recall the amount which was authorized, it “*was far less than the sum which was actually invested*”. Mr. Senior also confirmed the board’s direction to the First Defendant to sell the IBM shares when they became aware of the size of the holding. It is clear from the evidence that there were two “sets” of share purchases. The one comprised the purchases before the instruction to sell in July 1995, (the “first” purchase) and the other purchase subsequent to that sale (the “second” purchase).

The defence does not deny these essential facts. Rather the defence, as pleaded, seeks to explain the actions in relation to the second purchase. Those explanations are, firstly, that the instructions to sell were merely intended to be

an instruction to realize the profit and then to return to the market. The second explanation is that the purchase had been booked prior to the board decision and could not then be stopped. The Claimants' counsel submits that neither explanation is credible. With regards to the fist explanation that there was to be merely a realization of the profit and a return to the market, it is submitted that the evidence of both Dr. Harding and Mrs. Coke are clear that that the concern was the amount of the investment and by inference the possible over-exposure of Eagle's capital base to erosion of that capital base, by depreciation of the stock value. I accept that on a balance of probabilities Dr. Chen Young's explanation is untenable. Nor is his other explanation that this was done to facilitate the cash flow requirements of the bank, an assertion he was to make in giving oral testimony. There is absolutely nothing anywhere in all the evidence that even remotely suggests that this was the case. Now if, on the other hand, Dr. Chen Young is advancing this as ***his own reason*** for re-entering the market, then he must face squarely the questions as to whether those actions, that of a contracted chief executive officer of the first Claimant, can stand the tests of breaches of contract, fiduciary duty and/or negligence. In this connection, it should be noted that Mr. Keith Senior denied the suggestion that he had advised Dr. Chen Young on these purchases, and there is no other suggestion as to who authorized the magnitude of the IBM share investment.

The second explanation that the purchase was booked before and could not be stopped seems to be equally implausible. It seems very strange to me that if this were the case, the defendant would not have told this to his fellow directors at the time they had given him instructions to sell. It is worth noting that this explanation did not emerge when he gave his oral evidence, and lends further weight to the conclusion that this was not the case.

In the submissions of counsel for the Defendants, it is suggested that "The purchase of IBM shares is fully justified". The submissions go on at length about the quality of the advisors and the nature of the advice received and the quality of

IBM shares as an investment. They also say that the transactions were done with the knowledge and approval of the Board, a proposition which, in light of the Board Minutes available, is unsustainable. The submissions also purport to challenge the evidence of Edward Avey as it relates to EMB, but seek to do so by suggesting that he had gone outside his area of competence. I do not agree. The report made factual assertions about the relationship between the amount invested in IBM shares using Eagle money and the Eagle capital base. The defendants' submissions do not challenge those statements of fact. Interestingly, the submissions also say that "had Eagle kept the IBM shares as Dr. Chen Young wanted, then by the end of January 1996 they would have made astounding profits, as the IBM shares increased in value". They say that it was the Board who "pressured him to sell in January 1996", and that was the reason for the losses occasioned at that time.

The Defendants' submissions return to the theme of ratification in relation to the IBM shares. It is claimed that even if the First Defendant's actions were negligent, the various transactions were "approved" by the Board. The First Defendant's submissions state the following:

> When the Defendant's duty to avoid conflicts of interest was discussed earlier, the point was made that the knowledge and assent by the Board of EMB have cured any alleged breach. Relief from liability for negligence may be found on the same basis. For example, in the English decision of **Multinational Gas and Petrochemical v Multinational Gas and Petrochemical Services Ltd**[17] a majority of the Court of Appeal held that if all the members of a company agreed to the negligent decisions by its directors, then the company could not claim damages for that negligence. Lord Justice Lawton said that when the shareholders:
>
> > acting together required the plaintiff directors to make decisions or approve what had already been done, what they did or approved became the plaintiff's acts and were binding on it … It follows … that the plaintiff cannot now complain about what in law were its own acts[18].

[17] [1983] Ch. 258

[18] See Multinational Gas and Petrochemical v Multinational Gas and Petrochemical Services Ltd in previous note, at page 269.

> In the present case, the directors of EMB represented at least 95% of the company's shareholders. In those special circumstances, the directors of EMB had been acting not only as its directors when they made the various decisions, but also simultaneously acted as members ratifying the alleged negligent acts of themselves as directors. The same chain of reasoning applied earlier to the duty to avoid conflicts of interest applies to negligence, thereby preventing the company from now suing for negligence. A similar approach to shareholder directors was taken by the New Zealand Court of Appeal in **Wairau Energy Centre v First Fishing**.[19]

With respect, this submission betrays a severe lack of appreciation of the distinction between the powers of the company in general meeting and the actions of a board of directors qua directors, and in particular the rise in importance of the Derivative Action as a tool for shareholder redress:

In an article by Matthew Berkahn[20] the following appears

> The rule in **Foss v Harbottle** has long been seen as a significant barrier to effective shareholder enforcement action, particularly in cases of wrongdoing by a company's own directors.

The Article concluded that:

> although the rule in **Foss v Harbottle** may historically have prevented effective shareholder discipline over errant directors in many cases, the liberalisation of the common law derivative action in more recent years, and the development of alternative remedies such as the statutory oppression remedy, have largely neutralised the limitations of the rule.

In the Defendants' subsequent Closing Reply Submissions, counsel for the defence says that the Claimants have failed to answer the question that needs to be answered. The question to be raised, he says, is: How were the decisions by the First Defendant such that "no reasonable man in the circumstances would have made"? It is submitted that the courts have recognized that "directors must be allowed to make business judgments in the spirit of enterprise…….. Great risks may be taken in the hope of commensurate rewards". Even if that is a

[19] [1991] 5 NZCLC 67

[20] "The Derivative Action in Australia and New Zealand: Will the statutory provisions improve Shareholders' Enforcement Rights? [1998] 10 Bond L.R. page 75

correct statement of principle, the truth is that the First Defendant when he purchased the second set of shares was ***not*** acting as a director. The directors had already decided that he should sell the shares. He was acting as either an employee or as the major shareholder who believed that he had a right to make those decisions for the company. As an employee, he owed a fiduciary duty as well as a duty of care and a contractual obligation not to make decisions which could jeopardize the very existence of the company. But that is exactly what he did.

The submissions also point out that Claimants' closing submissions do not mention that in the meeting of July 25, 1995, it had been reported that a profit of approximately US$450,000 had been realized on a sale of the said shares and that some shares had been repurchased. The submission is misconceived as it clearly fails to recognize the order of magnitude difference between a profit of US$450,000 and a loss of over US$4 million representing one-third of the company's capital base.

In light of the views which I have expressed on the evidence and the legal conclusions to be drawn from them, I hold that the trading losses arising from the unauthorized purchase of another 190,000 shares was as a result of the breach of contract and/or breach of fiduciary duty on the part of the First Defendant. I would also be prepared to hold if it was thought to be necessary, that the defendant owed a duty of care as the chief executive officer of the Claimant Eagle, to protect its capital base. I also hold that he breached this duty when he negligently risked the company's very existence on a purchase, of which, at the time it was made, he was the only one who knew that it was made.

Considering the approach of the First Defendant's counsel to the issue of the fiduciary duty of the First Defendant, whereby they suggest that he is protected by the so-called "business judgment rule" unless his conduct was such that "no reasonable person would have so acted", I want to make some observations

which are of general application in relation to fiduciary duties, given the nature of the pleadings, and which I hope will clarify some of the misunderstandings in the Defendant's submissions. The business judgment rule which is widely accepted in the United States is generally viewed as exacting a lower and more subjective standard of duty from directors. I am of the view that even using that standard, the First Defendant fails in his fiduciary duty.

In the highly-publicized American case, **In Re The Walt Disney Company Derivative Litigation**, **No. Civ. A 15452, 2005 W.L. 2056651**, judgment of Chandler, C., delivered August 9, 2005, shareholders alleged that the directors had breached their fiduciary duties when they hired and within fourteen (14) months fired former Disney president Michael Ovitz who then received a severance package of approximately $140 million. A paper published in the magazine **"Corporate Governance"** by the United States of America Law firm Akin Gump Strauss Hauer & Feld LLP, the authors commented on the decision and I found some of their comments instructive. I adopt them here for the purposes of the instant case.

The authors state, and I concur:

> Directors are required to exercise their power with competence (or skill) and diligence in the best interests of the corporation. They owe what is called a "fiduciary duty" to the corporation. The duty is a "fiduciary" duty because *the obligation to act in the best interests of the corporation, at its core, is an obligation of loyalty, honesty and good faith.* (My emphasis)

Further:

> The business judgment rule is a ***common-law doctrine*** which presumes that, ***absent evidence of fraud, bad faith (including waste of corporate assets) or self dealing***, the directors of a corporation act on an informed basis and with the good faith belief that their actions are in the best interests of the corporation. To defeat the presumption, *it must be proven that the directors violated one of their fiduciary duties to the corporation, which are typically*

> *classified as the duty of care and the duty of loyalty; if that can be demonstrated, then the burden shifts to the directors to prove that the action taken was "entirely fair" to the corporation and the stockholders.* If the presumption is not rebutted, then the rule will continue to apply and operate to uphold the directors' action, so long as the action can be attributed to any "rational business purpose." As such, the rule is designed to prevent courts from imposing themselves unreasonably on the conduct of the business of a corporation, and to encourage directors to take actions that may entail an element of risk without fear of legal liability that will turn on the outcome of the action.

I found the following citations of dicta from the judge in **Disney**, Chancellor Chandler particularly instructive.

> "Delaware law does not – indeed the common law cannot – hold fiduciaries liable for a failure to comply with the aspirational ideals of best practices."

The authors in conclusion sum up the situation as follows, citing some of the judge's dicta:

> A violation of the duty of care will be found if the directors' actions are determined to be ***"grossly negligent***," which, as indicated by the court in *Disney,* means "***reckless indifference to or a deliberate disregard"*** for the stockholders as a group or actions that are "***without the bounds of reason.***" The fiduciary duty of loyalty, on the other hand, requires that "***the best interest of the corporation and its shareholders take precedence over any interest possessed by a director, officer or controlling shareholders and not shared by the stockholders generally.***" As indicated by the court, the duty is typically implicated when a fiduciary ***"appears on both sides of a transaction or receives a personal benefit not shared by all the shareholders.*** (All the emphases are taken from the actual judgment of the Court in Delaware, but I adopt each one in turn).

I believe that based upon the evidence which has been accepted by this court in relation to the several issues, there can be no doubt that the First Defendant has been guilty of a breach of his fiduciary duties at common law, and he is not

protected by the Articles of Association purportedly put forward in his defence by his counsel. I am strengthened in that view by the approach of the learned Chief Justice in **Donovan Crawford**. In that case, Wolfe C.J. spoke specifically to the breach of the duty to act bona fide in the interest of the company, a conflict of interest and duty and the making of secret profits and entering into contracts without full disclosure of all material facts to the Board of the company as evidence of a breach of the directors' fiduciary duty

Dr. Chen Young's Personal Trading Account

The Claimants' Statement of Claim alleges that Dr. Chen Young held a personal trading account at FEC and that between March and April 1995 Eagle transferred a total of US$995,000 to that account on the instructions and at the direction of Dr. Chen Young. Of the said amount of US$995,000.00, US$414,276.00 has been identified as part of the proceeds of US$452,084.00 paid by Eagle to Nicot Trading in relation to artwork. It continues that Dr. Chen Young converted the sums of US$580,724.00 (US$995,000.00 less US$414,276.00) belonging to Eagle to his own use in that he caused the aforesaid sums to be diverted from Eagle to settle sums owed by Dr. Chen Young personally in respect of trading losses incurred by him in his account with FEC, which losses followed trading stocks on the New York Stock Exchange.

The First Defendant does not deny the fact that Eagle Merchant Bank's funds ended up in his personal account. The evidence in the report of Edward Avey, the financial and investigative accountant and which is not in dispute is that in 1995, Dr. Chen Young did operate a personal brokerage account with FEC, #IE10559. There were five transfers of funds or securities from EMB to Dr. Chen Young's account totaling US$995,367. It is common ground that part of these funds, the sum of $414,276, represented an advance payment on artwork sold from Nicot Trading to EMB. According to the report, By July 31, 1995, the equity in Dr. Chen Young's brokerage account had increased US$1,973,864, but by September 30, this had fallen to US$125,469 on account of trading losses, and

by December 31 of that year, it was reduced to US$3,895.69 because of further losses. It was the view of the expert witness that the funds were decimated by losses on speculative trading in stocks, and that the monies were diverted from the Eagle account in FEC to Dr. Chen Young's personal account. The claim by the First Claimant here is a claim in conversion. The Claimant must show that it was the owner of the funds so allegedly converted and that the First Defendant has purported to exercise dominion or otherwise deal with the said funds in a manner inconsistent with the proprietary rights of the owner.

In response to the First Defendant's closing submission that the Claimant has not proven that the funds were, in fact, EMB's, Claimant says: "We submit that this is not in dispute. The only question was whether Dr. Chen Young was entitled to receive the money from EMB". With respect, I do not agree that that is "the only question". This is a claim in conversion and it must be incumbent upon the Claimant to show that it had at least a possessory right to the funds in question, not for the defendant to show that he did. Claimant's submissions proceed on the basis that the defendant could only have received the funds in his account on account of salary or otherwise as part of his remuneration. Thus, the fact that Mrs. Coke who normally dealt with the First Defendant's salary said she had not authorized such payments and Mr. Senior also said he found no records indicating that such advances were authorized, are taken to then place a burden upon the First Defendant consistent with the decision in **Marley v Mutual Security Bank and Trust Company Ltd**[21] to establish a claim for the funds. However, it seems to me that as a first step to creating liability under the principles of trust law as in **Marley,** the Claimant must show something more than the fact that the Claimant's funds had been placed in the First Defendant's account. Had it been a loan, a security, or something else? It is true that it was the Defendant who provided the information as to the source of the funds. But the burden of proving the entitlement to the sum so as to make the defendant liable in conversion, must remain on the Claimant. In that regard, Mr. Avey,

[21] [1995] 46 WIR 233

when questioned, could not say that the sum was not money to which the Defendant was entitled. Nor could he say from where the sum of $57,269 came. Neither Mr. Patrick Hylton nor Mr. Avey provide any help in this regard as Mr. Avey in cross examination was forced to admit that he was not in a position to say that the US$416,087 which went to Dr. Chen Young's account on April 19, 1995 did not legitimately come from Nicot Trading. Indeed, the statement in the Claimants' closing submissions at paragraph 178 may be decisive. That paragraph is as follows:

> A person with a fiduciary responsibility who causes the beneficiary's funds to be mixed with his own in this way bears a heavy burden to establish a claim for the funds. Mixing of the funds is in itself a breach of the fiduciary duty.

As far as any evidence to be put forward is concerned, the Claimants' counsel submits that "the facts" relating to the transfer of funds from EMB to Dr. Chen Young's account are to be found in the Expert Report at paragraph 6.5. The paragraph in question summarizes its findings thus.

> Dr. Chen Young also engaged in speculative and high-risk trading on a personal basis and incurred significant losses trading IBM share options. In order to cover these losses Dr. Chen Young transferred funds from the EFN to his personal account at FEC.

The report continues in the conclusion of that paragraph:

> He funded this loss by transferring US$995,367 from EMB to his personal trading account at FEC.

And:-

> The net amount owing to the EFN after deducting this payment is US$581,901.

Regrettably, the report does not tell this court the evidence which was examined to arrive at the conclusion that Dr. Chen Young "funded these losses by transferring" money from EMB. But if that is not enough, the conclusion that Dr. Chen Young now "owes" the sum of US$581,091 to the "EFN" must give pause

to the Court where there is no evidence connecting the transfers directly with the First Claimant.

It will be apparent that there is no clear evidence as to who "caused" the mixing, if such it is. There is no evidence that Dr. Chen Young was the author of the transfer, and if he was not, then the Claimant must do more than show that there had been a transfer of funds. In the circumstances I hold that this part of the Claimant's claim fails.

The Fifth Issue: Domville: Whether the loan amounts were disbursed.

In relation to the Domville claim, the Claimants' Statement of Claim avers that Domville, is and was at all material times the registered proprietor of lands comprised in Certificates of Title registered at Volume 1198 Folio 244 and Volume 1050 Folio 888. On or about December 18, 1992, by an agreement in writing Crown Eagle, (the Second Claimant) agreed to lend and Domville agreed to borrow certain sums. Pursuant to the agreement:

a) Domville executed an instrument of mortgage and deposited the duplicate Certificates of Title with Crown Eagle.
b) Dr. Chen Young executed an instrument of guarantee.
c) Crown Eagle disbursed various sums to Domville or in the alternative on behalf of Domville to settle its debt to Mount Investment Limited.

The Statement of Claim continues that in breach of the terms of the agreement and of the said instrument of guarantee, Dr. Chen Young and Domville have failed to repay the said loans or any part thereof and as at September 30 1998 Dr. Chen Young and Domville were indebted jointly and severally to Crown Eagle in the sum of $7,038,826.01. The Statement of Claim then sets out the particulars of principal and interest and the daily dollar sum by which interest is increasing. In relation to this claim, the Second Claimant says that "Fraudulently and in breach of his fiduciary duties, Dr. Chen Young has caused or allowed the said duplicate Certificates of Title to be returned to Domville; the aforesaid

instrument of mortgage and guarantee to be removed from Crown Eagle's possession; Crown Eagle's file on the transaction to be removed from Crown Eagle's possession; and, the charge in favour of Crown Eagle not to be perfected".

Mr. William Eaton, a consultant, testified that he had been commissioned at a time when Dr. Chen Young was still the controlling shareholder of the Eagle Financial Entities, to look at certain loans held by Mount Investments, which loans had been "poorly documented and to somehow or other get them to enhance the security documentations for these loans". Mr. Eaton's "Private and Confidential Report" provided a summary of specific demand loans for which existing file securities are to be examined and documentation put in place and/or completed as may be possible. The report is instructive and I set out in extensu, what is noted concerning Domville:

> "A Mount Investment loan of $711,078 was disbursed to Domville Limited in January 1989 evidenced by a demand note on file for $611,078 dated January 5, 1989 and another D/N for $100,000 on file dated January 18, 1989. The securities shown for the loan are the following: A promissory note; a first mortgage charge over 67 acres of land in Wakefield, St. Ann (Volumes 1198 and 1050 and Folios 888 and 244 respectively; the personal guarantee of Dr. Paul Chen Young.
> The duplicate certificate of title is not on the legal file and correspondence from the legal department on file with respect to the property at Wakefield, St. Ann, suggests that, on completion of the survey, the property as per titles contains only 47 acres of land.
> A new Letter of Commitment dated April 13, 1992 issued by the credit department for an aggregate loan of $848,167 along with a new demand note for $846,167and a company borrowing resolution for the same loan were not signed by the company / two of its directors and again on January 7, 1993 a new Letter of Commitment, Promissory Note and Personal Guarantee were prepared by the Credit Department but again remain unsigned.
> The loan account print out shows that a payment of $337,951.76 on May 6, 1992 was made on the account followed by a further payment of $364,557.92 on May 29, 1992.
> The intention is to transfer this debt to CEL on December 20 1992, with a then loan balance of $843,154.14 (principal outstanding of $359,905.66 and accrued interest of $483,248.48)
> The legal department needs to advise on the status of the duplicate titles for this property and whether same is in their possession.

> The securities and loan documentation required are the following:
> A Letter of Commitment dated December 20, 1992 showing the then capitalized loan amount of $843,155, the agreed interest rate (27% p.a.) an agreed repayment plan and the securities as originally stated.
> Execution of security instruments, being:-
> A demand note for $843,155 dated December 20, 1992 along with borrowing resolution, both executed under seal.
> A first mortgage charge over premises at Wakefield, St. Ann itle registered at Volume 1198 Folio 888 and Volume 1050 Folio 244.
> The personal guarantee of Dr. Paul Chen Young
> If the loan is to be now put on a 3 or 4 year payment plan commencing December 20, 1992, it would perhaps also be useful to obtain an updated property valuation for CEL's files and which valuation would also confirm the land acreage involved, and if adjustments have been made to the Volume and Folio numbers of the title and its original site plan.

Dr. Chen Young agreed that this original loan was disbursed although he admitted that the terms were not finalized. Further evidence of subsequent disbursement of sums by CEL are produced in documents by Dr. Chen Young and his assistant, Ms. Phyllis Kong. In answer to interrogatories, Mr. Geoffrey Messado confirmed that the purpose of the loan, that disbursements totaling $3,120,806.76 were made and to whom the payments were made on behalf of Domville. It is clear that prior to FINSAC intervening in the EFN, there had been no reservations expressed by Dr. Chen Young or Domville as to the accuracy of Mr. Eaton's report. Indeed, the First Defendant's Amended Defence filed March 31, 2003 in paragraph 39 thereof admitted paragraph 44 of the Claimants' Statement of Claim. That paragraph is as follows:

> Pursuant to the Agreement:
>
> 1. Domville executed an instrument of mortgage and deposited the duplicate Certificates of Title for the property with Crown Eagle.
> 2. Dr. Chen Young executed an instrument of guarantee.
> 3. Crown Eagle disbursed various sums to Domville, or in the alternative on behalf of Domville, to settle its debt to Mount Investments Limited. (My emphasis)

On the other hand, the Fourth Defendant denies paragraph 44 of the Statement of Claim. The First Defendant, having admitted disbursement of the sums

referred to in paragraph 44 off the Statement of Claim, also says, in what is perhaps a contradiction, in paragraph 41 of his defence, that the Second Plaintiff has failed to provide proof of disbursement of the sum claimed. Based upon the evidence including the documentation, I hold that on a balance of probabilities, the funds were in fact disbursed.

Were the Funds disbursed by way of a loan or pursuant to a Joint Venture?

The Claimants allege that the funds were disbursed pursuant to the loan agreement and that consequently they are repayable. The defendants, (or at least the First Defendant) having admitted that there was a loan, now seek to say that the funds were disbursed pursuant to a joint venture agreement. The Defendants' counsel's closing submissions suggest that, contrary to the pleadings of the First Defendant, the sum of $843,154, the sum referred to in Mr. Eaton's report as the loan balance on December 20, 1992) was never disbursed because the First Defendant had already paid it back out of his profit participation. It is trite law that the burden to prove the loan rests upon the Claimants. The argument of the Defendant seems to be that the Claimants must show not only the fact that the money was lent, i.e. the relevant documentation, but must also show that it was disbursed. The submission includes this absurdity: "If there is no signed demand note, then there will be no disbursement". The First Defendant's counsel submits that the First Defendant used part of his profit participation to repay the loan to Mount Investments. The fact is that once the Claimants' evidential burden of showing that the loan had been agreed and made had been complied with, an evidential, though not substantive, burden of showing that it had not, shifted to the Defence. The only evidence of the repayment of the $843,154 is from Dr. Chen Young himself and that flies in the face of his own pleadings. I reject this evidence as implausible. I accept that the clear inference to be drawn from Mrs. Phillips' testimony about the Domville Certificates of Title, is that the First Defendant deliberately did not hand over those titles, when everything including Mr. Eaton's report, indicated that he should.

The Claimants' case is that there is no evidence of any joint venture having been formed, or any agreement having been made, of which CEL was a part, and I hold that as a matter of fact, that is correct. The documentation to which the expert had recourse showed that CEL treated the sums as loan advances. The contemporaneous documentation is in fact consistent with a loan. There was a mortgage, a promissory note and not a joint venture agreement. The expert called by the defence, Mr. John Jackson, concluded that the Domville transaction was in fact, a loan and said that, based upon the information which he had seen, he could not state that the loan was in fact repaid.

The Defendants' counsel re-examines the evidence of Dr. Harding, Mrs. Coke and Mr. Avey to suggest that there had been "talk" of a joint venture. They reject Mr. Avey's claim that there was "no documentary evidence of a joint venture" and suggest that contrary to that claim, "there is considerable written proof of a joint venture including CEL" The submissions then cite a number of instances in the EMB Board minutes which refer to visits of Chinese officials to Jamaica; decision taken to locate the village on the property at Bamboo; Chinese delegation had been written to with the advice that they should concentrate on the health spa concept; proposed hotel and Chinese Courtyard at Wakefield. The submissions also include what can only be described as evidence by defence counsel:

> "There may be no record of an official meeting at which the joint venture was discussed, but that is because the typical practice was to discuss such matters with the EMB Board ahead of other Eagle entities, such as CEL, and other directors common to EMB and CEL were all fully aware of the joint venture involving CEL, as discussed by EMB".

Both Dr. Harding and Mrs. Coke acknowledge that there were some discussions which might have been preliminary to a joint venture, and Claimants' counsel's closing submissions do not shy away from that. With respect to this issue, the Defendants' submissions cite some exchanges between defence counsel and Dr. Harding, Mrs. Coke and Mr. Avey respectively, on the question of a joint venture. The submission highlights the fundamental lack of appreciation by counsel for

the Defendants, of the Claimants' case; that is, that no joint venture was ever entered into, and certainly **not** between CEL and anyone. The submissions are at paragraph 275 -277 of the First, Second and Fourth Defendants' Closing Submissions. The submissions are preceded by the recounting of the following questions to Dr. Harding.

> Ques: Do you agree with me then that there was at least an *exploration of a joint venture agreement*?
> Ans: Yes
> Ques. So you would have been aware from the report that *discussions were taking place with the Chinese on doing a Joint venture*?
> Ans: Yes
> 275. Mr. Harding even agrees with the assumption that money was expended *towards achieving that joint venture*.
> 276. Mrs Coke also does not question the description of a joint venture when counsel asks her whether the 'joint venture would have involved one of the Eagle entities'. Mrs. Coke responds that the joint venture '*would have involved one of the Eagle entities, yes*'.
> 277. Even Mr. Avey acknowledges the *existence of the proposed joint venture* (a fundamental contradiction in terms if ever there was one).
> Ques: Mr. Avey, you are aware that there was *talk of a proposed joint venture with the Chinese delegation*?
> Ans. Yes, I agree
> Ques: And that they went as far as having architects drawings?
> Ans. Yes, it says that.

All the above emphases are mine and clearly indicate that no joint venture was ever in place.

There are two comments that I believe need to be made here in light of these citations of the evidence. Firstly, there is not one iota of evidence indicating that any joint venture was ever established, nor in any way connecting the Second Claimant CEL with any discussions or participation in any discussions concerning any such enterprise. Secondly, the Defendants' counsel's questions to Mr. Avey who was not a party to any of these discussions, could only be on the basis that his examination of the documents which were made available to him in the course of preparation of his expert report, would allow him to answer. Yet in relation to this self same issue and in the same breath, the same counsel seeks

to call the admissibility of the expert's evidence into question on the basis that he did not prepare the computer print-outs on which he relied to say that loan advances were made by CEL. In these circumstances, it is difficult not to question the bona fides of counsel's submissions. Let me, therefore, in light of the above observations, make one brief, but important, aside as it affects the conclusions drawn by the expert witness from the computer print-outs which were provided to him. Some of what I say here also flows inexorably from my earlier ruling in this matter, on the application to exclude the Expert Witness' Report.

There have already been some exchanges over the nature of the Orders made at Case Management, subsequent Orders and the preparation of agreed documents. Throughout this trial, there have been innumerable references to minutes of various meetings prepared by persons who may or may not have been witnesses in the matter. Since the Defendant had specifically raised this issue here, I would like to state that I accept as a proper statement of the Law of Evidence the submissions made early in the written submissions by Claimants' counsel. I set out below *ipsissima verba* those submissions and adopt them here for these purposes.

> **The Agreed Bundles of Documents**
> In the course of this trial, and in their closing submissions, Counsel for the Defendants has repeatedly stated that the fact that the documents have been agreed does not mean that the truth of their contents is accepted. During our opening submissions, the Court granted our application that the documents be admitted into evidence pursuant to certain orders which had previously been made in the matter, and pursuant to the Civil Procedure Rules. These submissions are set out at page 32 of the transcript of May 19, 2003.
>
> Paragraph 1 of Order dated September 6,1999, provided that:
> "Any objection to the inclusion of a document in an agreed bundle shall be made within 14 days of the expiration of the inspection period, in the absence of such an objection the parties shall be deemed to have agreed to the document being included in such a bundle."

The inspection period referred to in the Consent Order made on September 6, 1999 and quoted above is referring to the period of 14 days after the delivery of the Affidavits. This was the period set out in the Order dated May 5, 1999. It is important to note that when the order was made on September 6, 1999 the Claimants had already filed their affidavit of documents from July 15, 1999 and therefore the inspection period in respect of the Claimants' documents had already passed. The Defendant did not apply for an extension of time to inspect and therefore the effect of the September 6, 1999 order was that it was therefore agreed that the Plaintiffs' documents would be included in an agreed bundle. The Defendants later filed their affidavits of documents and likewise there was no objection from the Claimants within 14 days after delivery and therefore those documents also were to be included in agreed bundles.

There are several orders after the Order dated September 6, 1999 which amended the time periods set out in paragraphs 2 to 6. None of the subsequent orders, including the order of December 18, 2002, amended paragraph 1 on which the Claimants rely.

The effect of these orders and rules is that these are agreed documents and that they are deemed to be authentic. While this does not mean that their contents are proven or agreed to be true, the documents are evidence which the Court is entitled (indeed, required) to weigh in determining what findings of fact to make on a balance of probabilities. In determining what weight to give to these documents, it is submitted that the Court should consider the fact that most of them were generated by staff of the Eagle entities during a period when Dr. Chen Young was the chief operating officer and chairman of the board. They are contemporaneous, and created at a time when no litigation was pending or contemplated. They were disclosed to the Defendants several years ago and in their cross examination of the Claimant's witnesses and in their own witness statements the Defendants did not challenge the truth of the contents including the banking and computer generated information which they now complain about in their Closing Submissions.

Similar issues arose in **Daly v Hubner**[22] The Court was considering evidence concerning a bank statement which was "apparently" authentic. The Court found that the challenge to the authenticity of the bank statement was opportunistic and that it failed. The learned judge said that in view of the fact that the document originated from the bank, "the onus was firmly placed on the Claimant to adduce some cogent evidence to undermine" it. There was no such evidence and the learned Judge concluded: "I would have held that, on a balance of

[22] [2001] All ER D, 102 (Jul)

> probabilities, the bank statement … showing the transactions on ISEL's Florida account was true and authentic"[23]
>
> The court must consider the totality of the evidence, including documents which are in evidence, and deemed to be authentic, and ask whether on a balance of probabilities, the various allegations of the Claimants are proved. (All emphases supplied)

It seems clear, and I hold on sound authority, that this court may have regard to the documents in the agreed bundle of documents and may attach such weight as seems appropriate in all the circumstances.

Perhaps one of the most critical factors in considering this issue, is the evidence of Mrs. Pamela Phillips, who was the main legal advisor to the group companies and, indeed, sometimes to Dr. Chen Young. She confirmed that in relation to Domville Limited, she had prepared the security documentation and that once security documents were prepared, then that would have been evidence of a loan. Although she could not confirm that the mortgage had been signed, she confirmed that the mortgage and other security documents in the Domville Bundle had been prepared, sent to Dr. Chen Young and returned to her executed.

Given the evidence which I have accepted, I hold that the Domville Transaction constituted a breach of fiduciary duty on the part of Dr. Chen Young, the First Defendant and the First and Fourth Defendants are jointly and severally indebted to the Second Claimant as set out in the Statement of Claim. This is subject to the amendment of the figure claimed by reducing the principal claimed from the sum of $3,130,806.76 to $3,094,499.00 based upon the evidence in the expert report, which evidence I accept. This will of course necessitate the re-computation of the interest element of this head of claim as well.

Finally with respect to the pleading of "fraud" in the Claimants' Statement of Claim, it would be difficult to make a finding of "actual fraud" in the terms of the common law tort of deceit as considered in **Derry v Peek 14 App. Cas. 337.**

[23] Per Etherton J at paragraph 168

The onus of proving fraud is a heavy one and remains on the party alleging it[24]. There has not been, in the words of the Defendants' closing submissions, proof by way of evidence which is "clear and cogent such as to induce, on a balance of probabilities, an actual persuasion of the mind as to the existence of fraud"[25] in relation to either the First or Fourth Defendants. However, this submission fails to take into account what has been described as "equitable fraud".

In the **Donovan Crawford** case, the matter was the subject of comment by at least one member of the Board, Lord Walker of Gestingthorpe. He said:

> Mr. James referred, in passing, to some well-known cases on common law deceit in arguing that deliberate, dishonest deception is required for what is sometimes called "actual fraud." 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, 250-251.

Millett L.J. quoted Lord Haldane as saying:

> "In Chancery the term fraud thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction".

In these circumstances, it would seem that the breach of duty owed on the part of the First Defendant, to those whom it was his duty to protect, does constitute "equitable fraud".

The Sixth Issue: Was the loan illegal by reason of the Moneylending Act?

The pleading for the Second and Fourth Defendants claims that if the funds passed to or on behalf of Domville were loans, then they were in breach of the Moneylending Act, as the Second Claimant has not pleaded that they were made

[24] See Bayne v Stephens [1908] 8 CLR 1 (Defendants' List of cases)
[25] Reifik v McElroy [1965] 112 CLR 517

in the ordinary course of business. It is clear that the law applicable to CEL's conduct was the law in force at the time the loans were made. At this time in the late 1980's and early 1990's, the relevant section of the law was section 13(1)(b). That section provided:

This Act shall not apply to any banker or person bona fide carrying on the business of insurance in the course of whose business and for the purpose whereof he lends money.

There is evidence before me that CEL was an insurance company and Dr. Chen Young in his testimony did acknowledge that CEL lent on mortgage in the "normal course" of its business. I am of the view that there is no issue here with the Moneylending Act, but I also accept that if the loan were not recoverable on that account, the submission that that fact would in itself be the basis for finding the First Defendant liable on the basis of a breach of fiduciary duty, or negligence. I so hold.

The Seventh Issue: Whether the Claimants are entitled to claim restitution on the ground of unjust enrichment.

The Defendants' submissions focused considerable time and energy on the proposition that the Claimants are not entitled to restitution on the basis of unjust enrichment and that indeed, the Claimants had not fully understood the principle. It was submitted especially in relation to the Grenada Crescent transaction, the claim for funds in Dr. Chen Young's personal FEC trading account and the funds at issue in the Domville transactions, that the Claimant's claim on this basis is misconceived. The Defendants submit that the Claimants must do more than Assert "unjust enrichment". Secondly, they must show "enrichment" and in the instances referred to above there was none, and thirdly that the enrichment is "unjust". They also submit that the remedy is an equitable one and that accordingly, where the court feels that it would be inequitable to grant the remedy, it would be bound to refuse it.

The extent to which the Defendants' counsel have misunderstood the operation of the principle is shown in the following sections of their submissions. The submissions say:

> [t]he Claimants must do more than establish that the Defendant has been enriched; they must establish that he has been *unjustly* enriched. The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. Lord Halsbury scotched this heresy when in **The Ruabon Steamship v London Assurance**[26] he said:
>
> > I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who had done it.

Defendants' counsel also cite Lord MacNaghten's judgment in the same case:

> There is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it.

These submissions clearly show a lack of appreciation of the words of the learned law lords in the context of the allegations of the Claimants in this case. This is highlighted by the list of examples cited by the submissions which include, *a total failure of consideration and the receipt of property which belongs, whether at law or in equity, to the plaintiff.* (My emphasis)

The Claimants' counsel submits that the leading modern authority on the principle is the House of Lords decision in **Fibrosa Spolkan Akcyina v Fairbairn Lawson Combe Barbour Ltd**[27]. The dicta of Lord Wright is cited:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some other benefit derived from another which it is against conscience that he should keep. Such remedies are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

[26] [1900] AC 6
[27] [1943] A.C 32.

Lord Goff, another member of the House to give a leading judgment, explained that this was not an equitable or discretionary remedy. He said:

> The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even the underlying principle of recovery is he principle of unjust enrichment, nevertheless, where recovery is denied, it is on the basis of legal principle.

The Claimants also cite the comparatively recent case of **Banque Financiére de la Cité v Parc (Battersea) Ltd. and Others**[28]. I have already cited Lord Clyde's judgment. I agree with Claimants' counsel's submission that the criteria for establishing the claim of unjust enrichment has been made out. This finding will come as no surprise as I had indicated when I dealt with the individual issues, at least in relation to Grenada Crescent and Domville.

Neither Ajax nor Domville gave anything ("total failure of consideration") for the benefits they gained. The assertion by defendants' counsel that Ajax got nothing from the improvements to the building and amenities at Grenada Crescent clearly ignores the Robkovi report. As submitted by Claimant, neither can claim that it has altered its position in reliance on the benefit received. I agree with the Claimants, that the principle of unjust enrichment has been made out.

The Eighth Issue: Whether Interest is payable pursuant to the Law Reform (Miscellaneous Provisions) Act, and if so, at what rate and in what amount.

The Law Reform (Miscellaneous Provisions) Act provides in section 3 as follows:

In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit, on the whole or any part of the debt or damage for the whole or any part of the period of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment;

Provided that nothing in this section

i. Shall authorize the giving of interest upon interest; or

[28] {1998} 1All E.R. 737 (See above at page 38)

ii. Shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise;

iii. Shall affect the damages recoverable for the dishonour of a bill of exchange.

The Jamaican Court of Appeal decision in **British Caribbean Insurance Co v Delbert Perrier**[29] is clearly binding upon this court. As Carey J.A. said in that case

> "This leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award. In the case just cited, evidence was in fact led by the plaintiff but I can see no objection to documentary material being properly placed before the judge. Statistics produced by reputable agencies could be referred to the judge to enable him to ascertain and assess an appropriate rate. …
> In summary, the position stands thus:
> (i) awards should include an order for the defendant to pay interest.
> (ii) the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and
> (iii) the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed.
>
> Having regard to the evidence led before the learned judge viz, the contents of the statistical digest published by the Bank of Jamaica, he was entitled to fix the rate at which he did. His approach was consonant with my understanding of the law. In the result, I would dismiss the appeal with costs to the respondent."

In the **Donovan Crawford v FIS** case referred to above, the learned Chief Justice considered the question: When should the court exercise it discretion under the Law Reform (Miscellaneous Provision) Act? He then cited the dicta of Forbes J. in **Tate & Lyle Food and Distribution Ltd. v Greater London Council and Another**[30]**.**

> I think the principle now recognized is that it is all part of the attempt to achieve restitution in integrum.

[29] SCCA 114/94
[30] [1981] 3 All E.R. 716 at page 722

He continued:

> I am of the view that the circumstances of the instant case warrant an award of interest. The authorities are settled on the principle that the rate of interest to be awarded must be the rate at which the plaintiff can borrow money.

He then followed the **British Caribbean Insurance Company Limited v Perrier** to which reference has already been made. With respect to the period to which it should be applied, he referred to the observations of Lord Wilberforce in **General Tyre and Rubber Co v Firestone Tyre and Rubber Company**[31] to the effect that interest should be awarded over the period for which the money was withheld. In the instant case I believe that the discretion of the court should be exercised to curtail interest accruing on the sums claimed by the Claimants to a period ending July 31, 2004, a period of about four (4) months after the submission of the written submissions by both sides and within which the final judgment ought to have been delivered. In line with the authority conferred by the Law Reform (Miscellaneous Provisions) Act, I so order.

One question to be decided is what rate of interest does the evidence support?
In the above-mentioned **Donovan Crawford** case, the learned Chief Justice in dealing with the question of the rate of interest applicable stated:

> Evidence was tendered to show the average commercial bank lending rates between 1994 and 1997 as published by the Bank of Jamaica, and the average loan rate for May and June 1998. These statistics were the latest data available. For 1995, 1996 1997 and 1998 the average lending rates were 50.13%; 53.04%; 48.81% and 44.06% respectively. This, in my view, is the appropriate rate to be applied to the local payments.

In the instant case, the Claimants led evidence through Louise Brown, an Economist and Director of Economic Information and Publication of the Bank of Jamaica, as to the average lending rates during the relevant periods for both Jamaican dollars and United States dollars.

[31] [1975] 2All E.R. 173 at page 188

It was submitted that interest should be awarded,

(a) On the Jamaican dollar amounts at the average commercial bank loan rates for the period 1997 to 2003. These were 46.43% in 1997; 42.12% in 1998; 36.84% in 1999; 32.86% in 2000; 29.42% in 2001; 26.14% in 2002 and 24.44% in 2003; 24.44% in 2004, and

(b) On the US dollar amounts at the respective rates as set out in the evidence of Louise Brown, which evidence I accept. Those rates are as follows:

1996: 13.83%
1997: 13.99%
1998: 14.08%
1999: 13.09%
2000: 12.75%
2001: 12.01%
2002: 11.93%
2003: 12.10%
2004: 12.10%

I hold, on the authority of the Delbert Perrier case, that the Claimants are entitled to interest at commercial rates of interest on the sums recoverable save for the Domville loan amounts, which interest rates are subject to that which is provided for in the agreement. Interest is awarded on the Jamaican and US dollar amounts at the respective rates specified in Ms. Brown's evidence and the final year's calculation is to be up to July 31, 2004 in light of my ruling above.

The next issue which has to be decided is the question of the First Defendant's counterclaim.

The Ninth Issue: Was Dr. Chen Young's management contract wrongfully terminated?

The First defendant pleads that he was employed with the First Claimant from the time it commenced business until March 1997 under a management contract of November 12, 1993. He sets out the terms of the contract which included a management fee of $10,000,000.00 per annum, fully furnished and serviced

accommodation “at a standard in keeping with his status as Executive Chairman and Chief Executive Officer”; rental on paintings owned by the First Defendant at a rate of 10% of the purchase price of the paintings; vacation leave of four weeks per year until the Defendant reached 60 years with all expenses paid, including that of his partner for overseas travel.

It is also averred that the First Defendant “resigned only as a director of all the Companies in the eagle Group pursuant to an agreement with FINSAC LIMITED, a company wholly owned by the Government of Jamaica, and Second Plaintiff by which FINSAC LIMITED acquired a majority interest and control of the Plaintiffs in consideration of the sum of $1:00”. The Counterclaim proceeds to claim that the resignation of the First defendant as a director of the companies in the Eagle Group was in keeping with the terms and conditions contained in the said agreement and pursuant to understandings and assurances given to the First Defendant by Dr. Gladstone Bonnick, in his capacity of Chairman of FINSAC LIMITED and Mrs Daisy Coke in her capacity of Deputy Chairman of First Plaintiff. The First Defendant claimed that he was entitled to inter alia, $7,692,308 for accumulated vacation leave; pension contributions of $209,340; vacation expenses for 40 weeks at the rate of US$5,000 for 10 years, US$200,000 and damages for termination of Management contract in the sum of $11,666,666.00 being 1 month fee per for 14 years.

The First Claimant admits that the First Defendant was its employee under the terms of a contract but denies that the agreement provided for a 10% of earnings contribution to First Defendant’s pension and asserts that the adjustment to Management Fee was effected in July and not June of 1995. The First Claimant denies that the First defendant only resigned as director of the companies in the Eagle Group, and claims that the resignation was, as well, from his employment with the First Claimant. Alternatively, the First Claimant says that the First Defendant abandoned his position or in the further alternative, that the First Claimant was entitled to terminate the First Defendant’s contract of employment summarily and without notice

The evidence which has been led indicates that by letter dated March 14, 1997, Dr. Chen Young wrote to EMB's secretary in the following terms.

> "I hereby tender my resignation as Director of Eagle Merchant Bank of Jamaica Limited, effective as of the date hereof".

All payments to him ceased in March and subsequently he has not purported to carry out any executive functions. Certainly, the First Claimant was of the view, according to the evidence of Patrick Hylton, that "given the massive insolvency of the EFN, it was FINSAC's position that Dr. Chen Young ought not to be compensated for his shares or his position in the EFN. He was therefore asked to resign and transfer his share with immediate effect without compensation". The Board of FINSAC did not give or authorize any assurance to the contrary and Dr. Chen Young did not resume or attempt to resume his duties at any time after March 14, 1997.

It was the submission of the First Claimant that although Dr. Chen Young's resignation letter referred to resigning as director only, it must be interpreted as referring to his executive position as well. This was because he was "Executive Chairman", which meant that he had to have been a member of the Board of Directors. If one is not a member of the Board of Directors, one could hardly be Chairman and certainly not "Executive Chairman". Now it is clear that the Articles of Association of Eagle Merchant bank of Jamaica Limited do not specifically envisage the position of Executive Chairman. The Articles provide that directors may elect a chairman who will chair meetings etc. It was therefore submitted that the position of Executive Chairman should be equated to that of Managing Director, and in the absence of any express agreement as being subject to the same provisions as relate to Managing Director.

When one looks at the Articles as they relate to Managing Director, it will be seen that Articles 113 and 115 provide, respectively, that the directors may appoint one or more of their members to be a Managing director or Managing Directors, and that "A managing Director shall be subject to the same provisions as regards resignation, removal and disqualification as the other directors, and **if he ceases**

to hold the office of director from any cause he shall ipso facto cease to be a Managing Director." In **Southern Foundries (1926) Limited v Shirlaw**[32] the House of Lords had to consider the effect of a similar article in the Articles of Association, but which in that case contained a proviso that the articles "shall be subject to the provisions of any contract between (the Managing Director) and the company". The managing director ceased being a director and the majority shareholder purported to remove him from his position as managing director and the company ceased treating him as managing director. It was held that the removal as managing director was wrongful because the removal had to be consistent with his contractual rights as provided in the Articles. It is submitted, therefore, that the absence of parallel words in the contract of the First Defendant with the First Claimant meant that his position was governed by the Articles and that would mean that to the extent that he voluntarily terminated his position as director, he would automatically have terminated his status as Managing Director/Executive Chairman.

The First Claimants also cite the English Court of Appeal case of **Bluett v Stutchbury's Limited**[33] . The Head Note reads:

> By article 80 of the Articles of Association of a company the directors were empowered to appoint a director at any time, but any director so appointed was to hold office only until the next general meeting of the company, and he should then be eligible for re-election. By Article 86B the directors had power "to appoint any one of their number" to be managing director for such period as they deemed fit, and to revoke such appointment. The Plaintiff was appointed a director of the company, and by an agreement of the same date made between him and the company, he was appointed managing director for four years, one of the terms of the agreement being that if he became incapacitated from attending to his duties as managing director the company might by notice forthwith determine the appointment. The plaintiff failed to secure re-election as a director at the next ordinary general meeting, and the company gave him notice to determine the appointment. The Plaintiff brought an action against the company for damages for breach of the agreement. Held, that as the plaintiff had not been re-elected as a director of the company, he could not be managing director, and therefore the agreement came to an end; and that the directors had no

[32] [1940] AC 701
[33] [1908] 24 TLR 469

> power to appoint the plaintiff a managing director to hold office for four years whether the company re-elected him or not..

It is interesting that implicit in this decision is the finding that the directors, despite the power purportedly given by Article 86B to appoint a managing director "for such period as they deemed fit", could not override the powers of the company to require the managing director to be a member of the Board of Directors. The position would seem be in pari materia with the situation in the instant case. If Dr. Chen Young could not be a director, he could not be Executive Chairman of the Board of Directors.

The First Defendant's counsel makes extensive submissions based on English authorities in support of the proposition that where an employee is forced to resign, that situation is to be treated as a termination of his employment so as to entitle him to "severance pay". I would have thought that those submissions were more relevant to a pleading of wrongful dismissal of which there is none in the counterclaim. It is instructive, therefore, that the First defendant is making no claim for wrongful dismissal by virtue of which he lost his management fee/salary for any ensuing period after March 1997. Certainly, there was no evidence led in this regard. Rather, he is claiming "severance pay" as an additional entitlement to payment in lieu of notice, and all the authorities cited are based upon UK or other Commonwealth cases. The First Defendant's counsel's submits that "It is accepted that an implied term of the employer-employee relationship is that an employee is entitled to reasonable notice, so too it is arguable that there is a general common law right to severance pay implied as an incident of the employment relationship". This submission is wrong in law on both counts. At common law an employer had the right to terminate any worker with or without cause and without notice. Nor is there any common law right to severance pay. These rights are creatures of statute. Consequently, I am puzzled that there seems to be no recognition that in Jamaica there is legislation covering the question of termination and redundancy situations. There is no reference that I can recall to the **Employment (Termination and Redundancy Payments) Act**

or the Regulations thereunder. Specifically, the issue of redundancy which the submissions claim these circumstances to be, is not addressed in terms of the legislation in this jurisdiction.

I do not necessarily agree fully with the submissions of the First Claimant that in his evidence Dr. Chen Young now seeks to be embarking upon a case different than that pleaded. He now seems to be saying that there was an inducement by Dr. Bonnick, the Chairman of FINSAC LIMITED, and Mrs. Coke, the Deputy Chairman of the First Claimant for him to enter into the agreement leading to his resignation. But whatever the evidence that Dr. Chen Young may have given, it is entirely self-serving and not in any way corroborated. There would be, in addition, questions as to whether if the inducement was by FINSAC, it could be imputed to the First Claimant; the absence of Dr. Bonnick for whom the Defendant had submitted a witness summary on the basis that he would be called, but he was not. Further, and very importantly, the submissions of the defendant fail to deal with why it is alleged the purported agreement amounted to an inducement. This is not dealt with either in the Closing Submissions or the Closing Reply. The Defendant's counsel's submissions that the First Claimant breached the terms of the March 14, 1997 agreement and that EMB are "estopped from denying that (the First Defendant) is entitled to termination pay" are both issues not previously pleaded. No facetious dismissal of this assertion on the part of the Defendant's counsel can change that fact. What is also of note is the question: If the agreement of March 17, 1997 was between the First Defendant and FINSAC LIMITED, how is it being alleged that **EMB** broke that agreement to which it was not, on the pleadings, a party.

The Defendant's Counsel's "Closing Reply Submissions", again proceeding on the basis that there is a right to re-state matters which should have been dealt with in the substantive submissions, state in response to the suggestion of a new case being pleaded:

> On The contrary, the case raised in our Closing Submission is exactly the same as the case pleaded. The Defendant's argument is that the First Defendant's contract was wrongfully terminated because his

> resignation was not voluntary. The First defendant was dismissed without the compensation that he is entitled to under his employment contract, the Claimants are therefore in breach of contract, the Defendant has been wrongfully dismissed, and he is entitled to sue for damages".

What is unclear is, if the dismissal was wrongful, why are all the "other entitlements" including "basic salary accrued but unpaid, for the remaining period of his contract" not being claimed.

In so far as this issue is concerned, I hold that Dr. Chen Young was not wrongfully terminated. I hold that there was a valid and voluntary resignation by Dr. Chen Young of his position as Director and thereby as Executive Chairman/Chief Executive Officer. Notwithstanding the voluntary resignation, I also hold that in the light of all the other findings which have been made in these proceedings, the First Claimant was entitled to dismiss the First Defendant on the basis of the significant breaches of fiduciary duty, and/or breaches of contract and/or negligence, on the terms of his contract for "non-performance".

The Tenth Issue: Is the first Defendant entitled to compensation for leave not taken?

According to his pleadings, Dr. Chen Young claimed never to have taken leave over a ten year period. There is, however, credible evidence from both Mrs. Coke and Mrs. Phillips that he did take leave. In fact, Dr. Chen Young himself admitted going on leave although there was no evidence of the amount of time, or the number of times, leave was taken. Claimants' counsel submits that this would create problems of quantification of the amount even if there were to be a finding that he was so entitled and this must be true. Claimants submit, however, that as a matter of law, the First Defendant is not entitled to such payment.

The submission is to the effect that since there is **no common law right to receive payment for leave not taken**, the right must either arise from the contract terms or from statute. The contract of the First Defendant does not, in terms, make this right a term of the contract. He is entitled to *paid vacation leave*

and this is quite a different contractual entitlement. There is no **right** in these circumstances for the employee to say: "I have not taken leave and therefore you must pay me". On the other hand, as the Claimants' counsel's submissions point out, in our jurisdiction the **"Holidays With Pay Act 1973**" and the Order made thereunder, "**The Holidays With Pay Order 1973**", deal with this situation. Paragraph 7(1) of the Order states:

> Upon termination of the employment of any worker, his employer shall:
>
> (a) where the worker earned any holiday with pay which was not granted before such termination, pay him a sum equal to the holiday remuneration which could have been payable if all such holidays were then being granted.

The Order, however, defines "worker" to specifically exclude "a director of any company who is employed by that company". I acknowledge some uneasiness with this finding as here the First Defendant is being categorized as a "Director" as opposed to a "worker", whereas in the first part of the counterclaim, his resignation as "director" essentially was interpreted as a resignation as an employee. Nevertheless, I have to go with the inexorable logic of the first and the clear words of the statute in the second and I accordingly find against the First Defendant on this claim for payment for unpaid vacation leave.

The Eleventh Issue: Reimbursement for expenses for leave not taken.

This need not delay the Court. It is difficult to understand how a claim can be made with a straight face, for reimbursement for **expenses not incurred**. This claim must fail.

The Twelfth Issue: Claim for Entitlement to Pension Contribution

This bald claim in the First Defendant's counterclaim is unsupported by any evidence as to its basis. Is it that the First Claimant should have made those contributions to the First Defendant's pension fund and did not, and if so for what period did this occur? Or is it that the contributions were made and were not

refunded to the First Defendant? And of what earnings is the figure of $209,340 claimed, 10%? There is no evidence to support any award under this head.

Other Aspects of the Claimants' Claim

The Claimants claim the grant of a Mareva Injunction, now called a Freezing Order under the CPR, 2003. There is at present such an injunction in place and the Claimant now seeks either its extension or the grant of a new Mareva pending settlement of the judgment debt. The Claimants argue that if there was a risk of the assets in question being dissipated while the matter was under consideration, that risk is considerably enhanced now that the judgment has been handed down. The case of **Babanaft International Co. SA v Bassatne and Another**[34] has been accepted in our jurisdiction as authority for the proposition that the principles applicable to the grant of a pre-trial Mareva are the same as those applicable to a post judgment. (In **Donovan Crawford** above, a post judgment mareva was given). In any event, the CPR 2003 now specifically provide for the grant of such an injunction/Freezing Order as the terms of CPR Rule 17.2 (1) provides as follows:

> An order for an interim remedy may be made at any time including:-
> (a) before a claim has been made ; and
> (b) after judgment has been given

Based upon the fact that there are no changes in circumstances of which the court is aware, it is the Order of this Court that the Injunction remain in place until the satisfying of this judgment or further Order of the Court.

Costs

I agree that in a case such as this, the normal rule that costs should follow the event should apply. I accordingly award costs to the Claimants to be taxed if not agreed. The huge number of issues, witnesses and documentation make it

[34] [1989] 1 All ER 433

appropriate that costs for three attorneys be an appropriate order, pursuant to the provisions of the CPR on Costs.

The Claimants have asked in their closing submissions that the Court make known its specific findings of fact and law and in light of the vastness and complexity of the case. I have, as I have considered the individual issues canvassed, sought to provide an ongoing explanation of the determinations in terms of the findings of fact and conclusions of law. However, I do believe that a summary of those findings in one cohesive section will be useful in providing a more customer friendly explanation. Accordingly, I set out below the findings of this Court.

a) At all material times, Dr. Chen Young controlled and was the beneficial owner of Ajax Investments Limited.
b) At all material times, Dr. Chen Young controlled and was the beneficial owner of Jellapore Investments Limited.
c) At all material times Dr. Chen Young controlled the Claimants.
d) Dr. Chen Young cannot escape or reduce his personal liability on the ground that he acted pursuant to the Board's approval.
e) The refurbishing of the Grenada Crescent premises amounted to a breach of fiduciary duty, negligence and breach of contract by Dr. Chen Young, and Dr. Chen Young and Ajax Investments Limited are jointly and severally liable to the 1st Claimant in the sum of $242,084,481.90.
f) On a balance of probabilities, the acquisition of First Equity did not constitute a breach of fiduciary duty, a breach of contract and negligence by Dr. Chen Young, or alternatively, it was an action of the Board of Directors.
g) The purchase of IBM shares on July 25, 1995 constituted a breach of fiduciary duty, a breach of contract and negligence by Dr. Chen Young, and Dr. Chen Young is liable to the 1st Claimant in the sum of US$9,956,167.90.

h) I make no finding in respect of the claim that Dr. Chen Young was not entitled to the sum of US$581,091.00 which was transferred to his personal trading account.

i) The funds disbursed to Domville Investments Limited and on its behalf were by way of a loan and not pursuant to a joint venture, and Domville and Dr. Chen Young are jointly and severally liable to repay to the 2nd Claimant the balance due with interest.

j) The Domville transaction constituted a breach of fiduciary duty on the part of Dr. Chen Young.

k) **The Moneylending Act** did not apply to the 2nd Claimant and the loans to Domville Investments Limited are therefore not illegal by reason of its provisions.

l) Alternatively, the Claimants are entitled to restitution on the ground of unjust enrichment in relation to:

    i. The sums expended in relation to the Grenada Crescent transaction;

    ii. The balance due in relation to the Domville Transaction.

m) Dr. Chen Young's contract was terminated by his resignation. (I make no finding on whether he abandoned his post). It was therefore not wrongfully terminated by the 1st Claimant.

n) Dr. Chen Young is not entitled to compensation for leave allegedly not taken.

o) Dr. Chen Young is not entitled to be reimbursed for the expenses in relation to leave allegedly not taken.

p) Dr. Chen Young is not entitled to the sum claimed in relation to pension contribution.

In addition I award judgment as follows:

1. In favour of the **1st Claimant EMB** against the **First Defendant, Dr. Chen Young** and **Second Defendant, Ajax Investments Limited** jointly and severally for the sum of $242,084,481.90 being the cost of the Grenada Crescent renovations and outstanding claims, if any, connected therewith.

2. In favour of the **1st Claimant** EMB against the **1st Defendant** Dr. Chen Young for the sum of US$9,956,167.90 (IBM shares)
3. In favour of the **1st Claimant** EMB against the **1st Defendant** Dr. Chen Young on the Counterclaim;
4. In favour of the **2nd Claimant** CEL against the **1st Defendant** Dr. Chen Young and against the **4th Defendant** Domville Limited, jointly and severally for the sum of $11,564,339.81;
5. Judgment for the First Defendant in respect of the Claimants' claim for US$11,795,364.75, being the costs associated with the purchase of FEC.
6. Judgment for the First Defendant in respect to the claim for US$1,195,705 being sums allegedly intermixed with sums in the First Defendant's Trading Account at FEC
7. Judgment in favour of the Claimants against the Defendants for:
    a) An injunction restraining the Defendants from disposing of and/or dealing with their assets or with assets in their names wheresoever situate and from withdrawing or transferring any funds from their accounts or from accounts in their names wheresoever held until payment of the sums referred to in this judgment.
    b) An Order that the First and Fourth Defendants and each of them do forthwith disclose with full particularity the nature of all such assets and their whereabouts and whether the same be held in their own name or by nominees or otherwise on their behalf and the sums standing in any accounts such disclosures to be verified by affidavits to be made by the said Defendants and served on the Second Plaintiff's attorneys-at-law within 14 days of the service of this order or notice thereof being given.
8. Against the Fourth Defendant:-
    a) A Declaration that the land contained in the Certificates of Title registered at Volume 1198 Folio 244 and Volume 1050 Folio 888 are subject to an equitable mortgage in favour of the Second

Claimant as security for the sum of $7,038,826.01 together with interest thereon as set out above.

b) An order that within 14 days of being requested to do so, the Fourth Defendant do execute a legal mortgage in favour of the Second Claimant over the land comprised in the said certificates of title and deliver up the said Certificates of Title to the Second Claimant;

c) An Order that the Registrar of the Supreme Court do execute the said mortgage on behalf of the Fourth Defendant if the Fourth Defendant fails or refuses to execute same.

d) An order that the First Defendant and/or the Fourth Defendant pay the costs of preparing, stamping and registering the said mortgage.

9. Costs of these proceedings to the Claimants to be agreed and if not agreed taxed. Certificate for three counsel.

General Observations

There are a few general observations that I would wish to make with respect to certain aspects of this trial. It seems clear from all the evidence coming from all sides that the Group of Companies which comprised the Eagle Financial Network was very susceptible to a malady that often ails private companies which are dominated by a majority shareholder with a strong personality and a creative vision which is not necessarily communicated to or shared by all other shareholders. There was a time when the First Defendant had sought to join other directors as Ancillary Defendants. That effort was abandoned early in these proceedings and the question of the possibility of the First Defendant's maintaining an action for contributions against those other directors of the group companies is now foreclosed by the Statute of Limitations. I do not hazard any guess as to whether there would have been any difference in the outcome had those proceedings continued. The fact is that I am confident that the evidence which was produced before me fully supports the findings that have been made. But one may well wonder whether a more assertive group of persons, both among the directors and the functionaries, might have forestalled some of the

excesses that are implicit in my findings and judgment. It is fervently hoped that our new Companies Act will go some way towards addressing the problem by raising the level of accountability or what was termed in the Disney litigation, the "aspirational ideals" of corporate governance. One such provision in the new Act would seem to oblige a director or officer who is a party to a material contract or proposed material contract or who is a director or an officer of any body, or has a material interest in any body that is a party to a material contract or proposed material contract with the company to disclose ***in writing*** to the company or request to have entered in the minutes of the meetings of directors the nature and extent of his interest [emphasis added].

The second general observation that I would make is with respect to the witnesses. I found that the witnesses for the Claimants on the issues were more credible and consistent in their witness statements and under cross examination. The evidence of Mrs. Coke, Dr. Harding, Mr. Milling was credible, clear and helpful. I would describe witnesses Steele, Hylton and Phillips as non controversial in their testimonies.

Neither Mr. Stoppi, nor Mr. John Jackson added in any significant way to the Defendants' case. I was hard pressed to believe the evidence of some defence witnesses like Mr. Croskery or Mr. Senior except where their evidence was corroborated by other witnesses. Some witnesses contributed little to the proceedings and I would urge counsel in matters of this magnitude to ensure that the witnesses who they call are in fact necessary to the proceedings. Should also issue a caution where litigants purport to put in witness summaries on the basis that they intend to call the witness and then do not do so.

I wish to comment upon the evidence of Mr. Edward Avey in particular. I accept the submission of counsel for the Claimant in his summary of the value of that evidence. Indeed, it is implicit in my earlier ruling on the application by the Defendants to have his report excluded.

> It should be noted that the real value of Mr. Avey's testimony is not the matters on which the defendants focus in their closing submissions. It was not his view as to whether certain conclusions were appropriate, since at the end of the day, that is a matter for the Court. There are certain accounting trails and analyses which none of the attorneys involved in this trial are competent to do. The real value of this Expert Witness is that he was able to analyse what would otherwise be disjointed pieces of accounting data and to explain them to the Court in a simple and straight forward manner. A good example is the part of his report which summarizes the IBM share trades, the prices on the different dates, etc. The data was all in the agreed documents, but he put them in a form which was easy to access and understand.

Thirdly, I should issue a caution to those witnesses who allow themselves to be goaded into indiscretions unworthy of the process upon which we are embarked. In this case there was one particularly unfortunate and egregiously distasteful outburst by a witness. I hope that we can avoid a repetition of that event in the future.

Finally, I wish to thank counsel on both sides for their incredible industry and patience. I hope that you will forgive the extended period for which you have waited for this judgment. But maybe, we can take some lessons from this exercise which will assist us in putting those things in place which will make the system of the delivery of Justice, better.

ROY K. ANDERSON J