IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE COMMERCIAL DIVISION
CLAIM NO. 2010 CD 00086

IN CHAMBERS

BETWEEN	FIRST FINANCIAL CARIBBEAN TRUST COMPANY LIMITED	CLAIMANT
AND	DELROY HOWELL	1ST DEFENDANT
AND	KENARTHUR MITCHELL	2ND DEFENDANT
AND	FIRST FINANCIAL CARIBBEAN (JAMAICA) LIMITED	3RD DEFENDANT
AND	FIRST FINANCIAL INTERNATIONAL GROUP LIMITED	4TH DEFENDANT
AND	FIRST FINANCIAL CARIBBEAN LIMITED	5TH DEFENDANT
AND	FIRST FINANCIAL CARIBBEAN (HOLDINGS) LIMITED	6TH DEFENDANT

Mr Michael Hylton Q.C., and Mr Sundiata Gibbs instructed by Michael Hylton and Associates for the Claimant.

Lord Anthony Gifford, Q.C. and Mr G. Anthony Levy instructed by G. Anthony Levy & Co. for the 1st Defendant.

Lord Anthony Gifford, Q.C., Mr Conrad George and Ms Kimone Tennant instructed by Hart, Muirhead Fatta for the 2nd, 3rd and 5th Defendants.

Mr Richard Small instructed by Livingston Alexander and Levy for the 4th and 6th Defendants.

Civil Procedure – Summary judgment – Company holding trust monies - Company alleging that trust monies improperly removed from the its control or improperly invested by directors – Company's trust money loaned to or invested in companies

in which its directors have an interest - Claim against directors for recovery of those monies and for damages for breach of fiduciary duty – Directors averring that monies properly invested and that assets in place representing the investments – Whether the value of the assets is an issue for trial – Whether summary judgment appropriate in the circumstances - CPR r 15.2

Company – Directors – Company holding trust funds – whether duty of directors of the company in respect of those funds any different from their duties in respect of other assets of the company

18, 19, 24 January, 28 April and 5 May 2011

BROOKS, J.

This is the judgment arising from a contested application for summary judgment made by the claimant First Financial Caribbean Trust Co. Ltd against three of the six defendants named in this claim. The three defendants are Mr Delroy Howell, Mr Kenarthur Mitchell and First Financial Caribbean (Jamaica) Limited (FFCJ).

The details of the claim have been set out in previous judgments concerning various aspects of the claim and all that is required, by way of introduction, is a summary of the basic facts in order to set out the context for the reasoning which will hereafter follow. A summary of the claimant's case was contained in a judgment delivered, herein, on 15 October 2010:

> "…the claimant seeks, among other things, to recover from the first and second defendants, Messrs Delroy Howell and Kenarthur Mitchell, the recovery of monies which had been held by the claimant on trust. The claimant has provided *prima facie* evidence that many millions of the trust money, which is in the currency of the United States of America, were transferred from the claimant's accounts to Mr Howell, to some corporations for which Mr Howell is a director and a substantial shareholder, to other corporate entities and to certain individuals.

> Three of the former set of corporations, have been named as defendants to the claim. A fourth member of that group of companies (the fifth defendant) has also been so named, although no evidence has been produced, thus far, that it was in receipt of any of the trust funds.
> The claimant has also identified real estate which was purchased with trust funds. These transfers and purchases were on the direction, or with the authority of either or both, Mr Howell and Mr Mitchell. It is not without significance that when these transactions were carried out, both men were directors of the claimant and Mr Howell was its majority shareholder."

The respective defences filed by the defendants aver that the transfers were neither unlawful nor improper. They also aver that the trust funds, which were transferred, have been properly accounted for and are represented in certain assets. These assets, it is argued, are valued well in excess of the monies transferred. Some of the assets are parcels of real property and two of them have already been sold. One such sale (of a Dumfries Road property) apparently realized a profit on the investment while, Mr Howell alleges, the other (of a Bay Roc property in the Bahamas), realized a loss.

A large volume of affidavit evidence has been, thus far, adduced in the claim. The claimant has asserted in the present application, that that evidence (including the evidence in the affidavits filed on behalf of Messrs Howell and Mitchell), make it clear that they are in breach of the fiduciary duty which, as directors thereof, they owed to the claimant. On this basis, the claimant asserts, these defendants have no real prospect of successfully

defending the claim. As a result, the claimant has asserted, it ought to have summary judgment against these two men.

In respect of FFCJ, the claimant has asserted that FFCJ cannot successfully resist the claim for restitution of the trust monies which it admits that it has received. Nor, asserts the claimant, can FFCJ deny liability for *mesne* profits for its occupation of the Dumfries Road property which was registered in name of the claimant until the property was sold. As an alternative, the claimant claims a judgment on admission against FFCJ on the basis that FFCJ has admitted that that it still holds approximately US$1.7m of the claimant's funds.

In response, these defendants submit that there is a fundamental difficulty with awarding summary judgment against them, for amounts representing the various sums taken from the claimant's respective accounts. This is because, these defendants submit, the claimant remains the owner, either directly or through an intermediary, of the assets purchased by those funds. The assets purchased are both real estate as well as shares in companies owning shares in other companies, which own real estate.

The question arising from these contending positions is whether these defendants have a real prospect of successfully defending this claim.

Further background

It is necessary to provide further background information in order to fully inform the analysis which is to follow. Some portions of the correspondence which has been exhibited, as well as information provided by counsel appearing in this claim, have revealed the original source of the trust funds. The beneficiaries of the trust were persons who had entered into contracts whereby they were provided with credit cards bearing the Mastercard brand mark. These cards were secured by monies which the cardholders deposited with the entity initially issuing the cards (hereinafter called Axxess), in whose shoes the claimant now stands. The cardholder would then be entitled to use the card up to a percentage of the sum deposited. As I understand the process, on expiry of the card, or earlier termination of the agreement, Axxess would, thereafter, depending on the use of the card, be required to pay the monies deposited by the cardholder, either to Mastercard to settle any outstanding balance on the card, or to the cardholder (by way of refund) or to both, depending on the debt owed to Mastercard. The agreement with the cardholder constituted the trust deed by which the monies were held by Axxess.

There were several thousands of these individual trust deeds but they fell broadly within three categories. The details of each category need not

be explored for these purposes but it is important to note that they all impliedly required the trust money to be held on short term, low risk investments. One specifically required the monies to be invested "directly or indirectly in Short Term U.S. Government Guaranteed Securities". Others required that the monies be invested for "a minimum of twelve (12) months after the issuance of the card" but all three types stipulated that the monies would be repayable to the cardholder, "upon six (6) months written notice".

At some point in time the funds held by Axxess came to be held by Leadenhall Bank. Leadenhall, it seems, also issued cards on the same bases that Axxess did. On 15 March 2002 Leadenhall entered into an agreement with the claimant, called a "Deed of Retirement, Appointment and Indemnity" (the Deed of Retirement), whereby the claimant succeeded Leadenhall as the holder of and trustee for, the funds. The Deed essentially rolled all the thousands of individual trusts into a single trust for which the claimant would be the trustee. In the Deed of Retirement the claimant declared that it would:

> "…hold the Trust Property and all and any other property at any time subject to the trusts of the said Trusts upon the trusts and subject to the powers and provisions in the said Trusts contained so far as the same are now subsisting and capable of taking effect under the laws of the Commonwealth of The Bahamas".

All those transactions were outside the jurisdiction of this court; taking place principally in the Commonwealth of the Bahamas and the Turks and Caicos Islands, the latter of which comprise a British Overseas territory.

The next stage of the background, which brings the matter to Jamaica, has also been covered in a previous judgment (delivered October 1, 2010). It is convenient to quote from that judgment.

> "The claimant is incorporated in the Turks and Caicos Islands and has offices in that jurisdiction. It succeeded a company called Leadenhall Bank and Trust Company Ltd. as the holder of certain trust assets, including cash deposits, which deposits totalled approximately US$14,000,000.00. It appears that the trust was in fact a composite of a number of smaller trusts. The beneficiaries (numbering approximately 5,000) of each of the individual trusts had invested various sums which, together, funded all the trust assets.
>
> In March 2002, the claimant and Leadenhall entered into an agreement, the terms of which were engrossed in a Deed of Retirement, Appointment and Indemnity. By that deed, Leadenhall should have surrendered the trust assets to the claimant. Later that year, the claimant filed a claim in the Supreme Court of the Commonwealth of the Bahamas against Leadenhall Bank to enforce the agreement. Sometime after the claim was filed, Leadenhall transferred various amounts of the trust money to the claimant.
>
> In August 2008, the Bahamian Supreme Court made an order, by and with the consent of the parties to that claim. By that order Leadenhall would transfer the remainder of the trust assets to the claimant. Also by the order, the claimant was "authorized to make a first distribution on a *pro rata* basis to all Beneficiaries in the amount of [US]$9.8 million, representing 70% of the sum of approximately [US]$14 million held by the Plaintiff as Trustee in accordance with [a specified] Schedule of Distribution". **Finally, for these purposes, it should be noted that the order also stipulated that "upon the final distribution of all the Assets to the Beneficiaries this action shall stand dismissed**".
>
> The monies have not been so distributed. There is, however, evidence of trust monies being transferred from the claimant's account with Jamaica Money Market Brokers (JMMB) respectively, to Mr Howell, First Financial (Caribbean) Jamaica Ltd., First Financial Caribbean (Holdings) Ltd., First Financial International Group Ltd. and other persons and entities. (Emphasis supplied)

The situation, in a nutshell, therefore, is that the claimant was holding trust monies which it was obliged to pay out. Although no period was

specified for the disbursement, it would have been expected that it would have been done reasonably quickly. This was in order, among other things, to bring the litigation in the Supreme Court in the Commonwealth of the Bahamas to a satisfactory end. Mr Howell and Mr Mitchell were directors of the claimant when it initiated the litigation and at the time of the consent judgment.

The result of that scenario is that the claimant owed fiduciary duties to the cardholders and Messrs Howell and Mitchell, as directors of the claimant, owed fiduciary duties to the claimant.

I now turn to examine the law which is relevant to this application.

The Law

Rule 15.2 of the Civil Procedure Rules 2002 (the CPR) is the rule which guides the court in applications such as these. It states as follows:

> **"15.2. Grounds for summary judgment**
>
> 15.2 The court may give summary judgment on the claim or on a particular issue if it considers that -
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) **the defendant has no real prospect of successfully defending the claim or the issue**.
>
> (Rule 26.3 gives the court power to strike out the whole or part of statement of case if it discloses no reasonable ground for bringing or defending the claim.)" (Emphasis supplied)

Rule 15.2 has been considered by our Court of Appeal in *Stewart and others v Samuels* SCCA 02 of 2005 (delivered 18 November 2005). Two of the three judgments delivered therein, dealt with the standard to be met in accordance with that rule. P. Harrison JA (as he then was), at pages 6 – 7, stated:

> "The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a "real prospect of success" not a "fanciful" one – *Swain v Hillman* [[2001] 1 All ER 91]. **The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party.** "Real prospect of success" is a straightforward term that needs no refinement of meaning. The latter term should not therefore be equated to the "good and arguable" case concept as required to obtain the issue of an injunction. The "good and arguable case" or "a serious question to be tried" test, in the case of the grant of the injunction, is directed to a preliminary assessment of the party's contention in contrast to an ultimate result." (Emphasis supplied)

Panton JA (as he then was), dealt with the point at pages 21-23 of his judgment in the *Stewart* case. He stated in part, at paragraph 11:

> "In *Swain* (*supra*) Lord Woolf, M.R. (as he then was) concluded that the civil procedure rules were "**not meant to dispense with the need for a trial where there are issues which should be investigated at the trial**" …This case and others…are saying that summary judgment ought not to be granted where a party has a real, as distinct from a fanciful, prospect of success in the matter which is before the Court. Where there are genuine issues to be tried, the trial should proceed." (Emphasis as in the original)

On the question of where the burden of proof lies in applications for summary judgment, the rule is itself, neutral. The judgment of Potter LJ in *E.D. and F. Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472; [2003] All ER (D) 75 (Apr); [2003] CPLR 384, at paragraph 9, suggests that

the burden rests on the applicant to establish that the respondent's case has no real prospect of success. That case dealt with a provision concerning summary judgment in the English Civil Procedure Rules (rule 24.2), which is in very similar terms to rule 15.2, and I accept that opinion as correctly describing the position of our law on the point.

In considering an application for summary judgment, the court must also bear in mind the words of Lord Judge in *Swain v Hillman* cited above. He said, in part, at page 96.

> "To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step."

Finally, by way of guidance, it is always wise counsel to remember that, in such applications, the court should not embark on what could be described as a mini-trial of the claim. That does not, however, prevent the court from making a careful analysis of, especially the available documentary evidence, in order to determine whether assertions by one or other party, to the claim cannot be accepted by tribunals of fact or law or both. In *ED & F Man Liquid Products Ltd.*, cited above, Potter LJ, in referring to rules 13.3 and 24.2 of the English Civil Procedure Rules (the latter dealing with applications for summary judgment) stated, at paragraph 10 of the judgment:

> "It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in *Swain v Hillman* ... However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. **In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents.** If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable…" (Emphasis supplied)

In addition to the law guiding the procedure, it is also necessary to make reference to the law governing the duties which directors owe to the companies which they oversee. In this area, I confess some amount of discomfort. The submissions on the relevant law have proceeded on the unspoken assumption that Jamaican/English law is applicable to the actions of the directors in the instant case, in respect of the handling of the trust monies. When this fact was brought to the attention of counsel they were all of the opinion that, as far as the instant case is concerned, there was no difference between the relevant law of the Turks and Caicos Islands and that of Jamaica/England and Wales.

Proceeding, therefore, on that understanding, it may be first stated that directors owe fiduciary duties to the company which they oversee. Lord Porter in *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 at page 395F said, "[d]irectors, no doubt, are not trustees, but they occupy a fiduciary position toward the company whose board they form". *Regal (Hastings) Ltd*

v Gulliver is also authority for the principle that a director who makes a profit by virtue of his position is liable to account for that profit.

Another principle is that a director must not place himself in a position of conflict with his company. In *Bray v Ford* [1896] AC 44 at pp 51-52, Lord Herschell said:

> "It is an inflexible rule of a court of equity that a person in a fiduciary position…is not, unless otherwise expressly provided, entitled to make a profit; allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather that by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

If a director puts himself in a position of conflict then the company will be given a remedy by the court (see *Tito v Waddell (No 2)* [1977] Ch 106 at pp 248-9 – although discussed in the context of a limitation period). Where, however, the director makes full and fair disclosure of his interest and position, in respect of any transaction in which he may be in a position of conflict with his company, it seems the court will not interfere with the transaction (see *Erlanger v New Sombrero Phosphate Co and others* [1878] 3 App. Cas. 1218 at page 1233). Despite the position at common law, the articles of association of a company may also provide for a director to make a profit in certain circumstances.

In identifying the duties owed to a corporate bank by a director thereof, Forte P, in *Crawford and others v Financial Institutions Services Ltd* SCCA 64 & 88 of 1999 (delivered 31 July 2001) said at page 29 of the judgment:

> "As a director, he occupied a fiduciary position and all the powers entrusted to him were exercisable in his fiduciary capacity. This fiduciary relationship with the Bank, imposed upon him duties of loyalty and good faith. He was also under duties of care, diligence and skill, which are very different from the duties to be cautious and not to take risks which are imposed on many trustees….As a director, his personal interest cannot conflict with the interest of the Bank. It may be useful to reiterate at this time, that Crawford had a personal interest in all these (related) companies that were given unsecured loans by the Bank."

It must be borne in mind, however, that as fiduciaries, directors must act "bona fide in what they consider – not what the court may consider – is in the interests of the company, and not for any collateral purpose" (see *Re Smith and Fawcett Ltd* [1942] 1 All ER 542 at page 543G).

The claim

In embarking on the exercise of determining whether summary judgment may be granted on this claim, it would be useful to outline some of the details of the documentation in the claim.

The claimant claims, as against Messrs Howell and Mitchell jointly and severally, the sum of US$13,911,092.15, damages for breach of fiduciary duty, breach of contract and fraud, and *mesne profits* for the use of

the Bay Roc property and of the Dumfries Road property. The latter is located in this country, in the parish of Saint Andrew.

Against all the defendants, including the three mentioned above, the claimant seeks an order for the return to it of "all files, correspondence, financial and bank statements, and all other documents or assets belonging to the Claimant or to which the Claimant is entitled".

It similarly claims against all the defendants, including these three, restitution for and by reason of unjust enrichment and interest on monies found to be due to it.

Finally, for these purposes, it claims such other relief as the court may think fit, including tracing orders.

As mentioned above, the claimant is relying, for the purposes of this application (as against Messrs Howell and Mitchell), on the principle that they have each breached their respective fiduciary duties to it.

The Bay Roc property, it is generally accepted, was purchased with trust monies, but was bought in the name of First Rock Ltd, a company which Mr Howell had had incorporated. There is some uncertainty as to whether the claimant originally held any legal interest in the shareholding of First Rock. The property was sold when, due to initial deficiencies in the registration of the transfer of ownership of the property to First Rock, Miss

Judith Wilchcombe and Mrs Miriam Philpot de Vargas (representing the claimant), were eventually able to be registered as nominee shareholders and directors of First Rock. They directed the sale of the Bay Roc property on behalf of First Rock. The proceeds of sale were placed in the claimant's accounts.

It is also accepted that monies entrusted to the claimant were used in the purchase of the Dumfries Road property. It was purchased in the claimant's name but it is a matter for enquiry, whether only the claimant's monies were used or in fact funding came from other sources. After the property was sold, the net proceeds of sale were delivered to the claimant.

The defence

Mr Howell, in his defence, raised a number of issues which he asserts require adjudication at a trial. Among these are the following:

a. he denied that the claimant was ever in possession of the sum it has claimed that it had received from Leadenhall;
b. he denied that the monies were transferred from the claimant's accounts in breach of fiduciary duty;
c. he denied that the monies which were transferred to him in his personal capacity;

d. he insisted that the transfers were intended to and did, benefit the claimant;

e. he averred that the claimant's proprietary interest was recognized in all the various assets which were purchased with its monies.

Mr Mitchell, FFCJ and First Financial Caribbean Ltd (the 5th defendant) filed a joint defence. In it they repeated, among other issues, the stance taken by Mr Howell at paragraphs b, d and e above. Mr Mitchell and First Financial Caribbean Limited denied that they had received any of the trust monies while FFCJ admitted that it had been in receipt of some. FFCJ asserted, however, that it had always recognized all the monies that it had received from the claimant, as being a debt to the claimant. It went further to counterclaim that it had been assigned by the 4th and 5th defendants, debts which it alleged had been owed by the claimant to those entities and curiously averred that the claimant "is not entitled to the sum sued for until it repays [those] debts". More conventionally, it alternatively claimed a set-off of those sums against the sums claimed by the claimant.

In addition to the defences filed, counsel for Mr Howell criticised the claim as being dishonest, duplicitous and doomed to failure.

The Analysis

The nature of the subject monies

Essential to the analysis of this application is the fact that the monies in issue are trust monies which the claimant received on certain conditions. Those conditions were not only contained in the trust deeds pursuant to which the beneficiaries turned over their cash, but are also contained in the consent order of the Supreme Court of the Commonwealth of the Bahamas to which the claimant, as claimant in that case, and Leadenhall Bank, the defendant therein, agreed. A clearly implied element of the consent order is the need to pay out the monies, standing in the trust, to the beneficiary cardholders, in a fairly short period of time. This is because the resolution of the claim in the Bahamian court was dependent on that exercise being completed.

Both the claimant and Mr Howell were well aware of the nature of these trust funds and how they were to be handled. In the claimant's claim against Leadenhall, there was a dispute as to the amount which Leadenhall should have paid to the claimant. Mr Howell, in that claim, complained that Leadenhall had acted with the trust monies in breach of trust. He deposed at paragraphs 5, 6 and 10 of his fourth affidavit, filed in that claim, as follows:

> "5…That as of the filing of my First Affidavit the Defendant [Leadenhall] handed over the total of US$14 million pursuant to the aforesaid Deed of Retirement.

> **The Plaintiff and I were aware of the US$3.6 million owing and arising from the unauthorized loan to the Defendant from the trust assets** as well as the US$3.4 million that was pledged to Mastercard International as security for the licence held by the Defendant. There was a balance of US$12 million that we were aware of and which was unaccounted for and therefore the Norman Saunders' letter of 20th February, 2003 requested a transfer of that amount."
>
> 6. That **the Defendant as the former Trustee had a legal obligation to ensure that the corpus of the trust was accounted for** and that the same was truly and accurately reflected in the Deed [of Retirement]….to the extent that the Plaintiff is entitled to rely on what is represented in and by the Deed**, I verily believe the Defendant has in breach of contract and in breach of trust failed to specifically perform its obligations in accordance thereto**."
>
> 10….**the failure of the Defendant to account for the trust assets would amount to a breach of trust and a breach of the Defendant's fiduciary obligation to the respective and numerous beneficiaries**." (Emphasis supplied)

Both Mr Howell and Mr Mitchell are directors of FFCJ.

The amount received from Leadenhall

As was mentioned above, one of the issues raised by Mr Howell's defence is that the claimant did not receive from Leadenhall the sum of $14,876,092.15 as alleged in its particulars of claim. He averred that the sum received was $13,039,985.00 and he pointed to the claimant's financial statements for the year 2003 in order to support his assertion. The difference in my view is a matter for resolution by accountants. It is not, in my view, an issue which, by itself, would require resolution at a trial.

It will be sufficient to state, at this point, two things. Firstly, the consent order of the Bahamian Court was made in 2008; five years after those financial reports were compiled. In it, the claimant agreed that it had

received "approximately US$14 Million as trustee for and on behalf of the Beneficiaries of the Trusts". Secondly, it would have been seen from the above quote from his affidavit in the Bahamian Court (sworn to on 2 December 2003) that Mr Howell had asserted that Leadenhall had "handed over [to the claimant] the total sum of US$14 million pursuant to the aforesaid Deed of Retirement". His comment at the beginning of paragraph 6 of the said affidavit, would speak to the claimant's obligation to have ensured in 2008, that the **consent** judgment "truly and accurately reflected" the sums received. In reference to Leadenhall (then the defendant) denying, during the course of that claim, that it was in possession of the amounts which it had stated, in the Deed of Arrangements, that it had, Mr Howell said:

> "…**the Defendant as the former Trustee had a legal obligation to ensure that the corpus of the trust was accounted for** and that the same was truly and accurately reflected in the Deed [of Retirement…"

Whether the monies were transferred from the claimant's account in breach of fiduciary duty

The common law concerning directors and their dealings with the companies they direct has been set out generally above. It is accepted, however, that the company's articles may limit the liability of their directors or allow the directors greater latitude than the common law permits. The

claimant's articles of association addresses the issue of directors contracting with it. Article 72 states, in part:

> "A Director or officer of the Company:
> …
> 72.3 shall not be disqualified by his office from holding any office or place of profit under the Company…or from contracting or dealing with the Company either as vendor, purchaser, or otherwise, nor shall any such contract, or any contract or arrangement entered into by way or on behalf of the Company in which any Director or officer shall be in any way interested be avoided, **nor shall any Director or officer be liable to account to the Company for any profit arising from any such office or place of profit or realised by any such contract or arrangement by reason only of such Director or officer holding that office or of the fiduciary relations thereby established,** but it is declared that the nature of his interest must be disclosed by him at the meeting of the Directors after the acquisition of his interest. A general notice that a Director or officer is a member of any specified firm or company, and is to be regarded as interested in all transactions with that firm or company, shall be sufficient disclosure under this Article as regards such Director or officer and the said transactions, and after such general notice it shall not be necessary for such Director or officer to give special notice relating to any particular transaction with that firm or company." (Emphasis supplied)

An important fact to be borne in mind for this analysis is that Mr Howell is a director of each of the corporate defendants. In his various affidavits he has sought to account for the payments made from the claimant's accounts. In his affidavit sworn to on 2 September 2010 (at paragraph 40), Mr Howell outlined those payments. They may be summarised as follows:

a. US$1,100,000.00 to UEB Bank to pay beneficiaries;

b. US$1,000,000.00 deposited to Belize Bank Ltd and used to pay Mastercard;

c. US$970,000.00 to purchase the Bay Roc Condominium (in the name of First Rock Ltd);

d. US$435,659.80 to purchase the Dumfries Road property;

e. US$9,000,000.00 to purchase shares in Ocean Bay Jamaica Ltd (which is the sole shareholder in Ocean Chimo Ltd, which owns hotel property in Kingston (Wyndham Kingston hotel));

f. US$1,400,000.00 invested in a Harbour House property, located in the Turks and Caicos Islands, (through Tainos Nominees Limited which owns shares in Whale Watchers Ltd which owns the property – Tainos has declared that it holds 75% of the shares in Whale Watchers, on trust for the claimant);

g. Advances to FFCJ, the majority of which is said to have been repaid and FFCJ acknowledges an outstanding balance of US$1,122,577.38;

Although Mr Howell asserts that the total sum accounted for based on the details presented is US$19,025,525.05, that assertion is based on using his valuation of the shares in Ocean Bay. In this regard I accept the submission of Mr Hylton Q.C., appearing for the claimant, that accounting for trust monies must be in terms of the sums expended, rather than looking at the current value of the assets purchased. To do otherwise, would allow a

situation where a secret profit could be made. It is also to be noted that none of those companies is publicly listed; hence the value of these shares cannot be considered to be easily realisable.

The documentation which the claimant has produced does not indicate that any money was transferred directly to Ocean Bay. What it indicates is that significant amounts were transferred to Mr Howell's accounts and to FFCJ. I quote, by way of example, from the reasons for judgment delivered in this claim on 1 October 2010:

> "In one case, Messrs. Howell and Mitchell, in a letter dated March 14 2007, written on First Financial Caribbean (Jamaica) Ltd's. letterhead, directed National Commercial Bank to encash a million (presumably US) dollar investment held for the claimant, wire $975,000.00 (again presumably US dollars) of it to an account held by Mr Howell in Bank of America and wire US$25,000.00 to an account held by First Financial Caribbean (Jamaica) Ltd." (See page 5)

In his affidavit sworn to on 11 November 2010 Mr Howell exhibited documents connected to some of the withdrawals from the claimant's accounts. His outline of those documents reveals that a total of US$1,766,000.00 was transferred to an account in Wachovia bank in Florida. He asserts that those transfers were in relation to Mastercard transactions but that account, he says, is in the name of First Financial Caribbean USA Ltd. That company has not been named as a defendant. A further US$1,362,876.41 was transferred to another account held in his name. Of the latter sum, he says that US$1,205,000.00, as well as an

additional US$450,000.00, was used to purchase the shares in Ocean Bay. Mr Howell has not produced any documentation explaining why these significant sums were transferred to his personal accounts. In addition to the above, a further US$120,000.00 was transferred to him.

Another practice of the claimant, while under the direction of Messrs Howell and Mitchell, is worthy of particular mention. In his 23rd affidavit, Mr Howell sought to explain the reason for the transfers made to FFCJ's account, the majority of which, he says, were repaid. At paragraph 3 of the affidavit he said:

> "These advancements (sic) and repayments were a mechanism to facilitate the operations of the 3rd Defendant which was trading as Quik Cash. When customers sought to transfer money from Quik Cash abroad to Quik Cash in Jamaica, the actual remittance of the funds sent would take place by a wire transfer, which would take a day or two to come through. As such, to meet the immediate demands of customers receiving money transfers, Quik Cash would borrow from the Claimant. However, once the wire transfer relating to the remittances which had been paid out came through, the 3rd Defendant would repay the Claimant the sums advanced. It follows that there was no risk to the Claimant's funds."

In order to achieve the transfers to FFCJ, the claimant's time sensitive investments had to be encashed. Normally, early encashment would incur penalties. No mention is made of FFCJ compensating the claimant for those penalty charges. What the documents also fail to reveal, is whether there was any repayment of the "bank" charges incurred by the claimant, for each loan transaction.

It is also of significance that there was no benefit accruing to the claimant by having the trust funds used in this way. There was no interest or other charge payable by FFCJ for the benefit which it received. The funds were, also, at risk to the extent that there was no security given for any of the "loans".

Finally, by way of example of the use made of the trust monies held by the claimant, it should be pointed out that trust monies were hypothecated, at different times, to guarantee for FFCJ, a transaction which FFCJ had entered into with Unicomer Jamaica Ltd/Courts Jamaica Ltd. There is documentary evidence that in October 2008, US$762,760.00 was paid to Unicomer pursuant to that guarantee. After FFCJ sold the business enterprise, which it conducted, and although it had monies in hand from the sale, Unicomer claimed and received, in September 2010, the entire sum of US$223,000.00, which was then hypothecated for its benefit from the claimant's monies.

Counsel for the claimant relied heavily on two of the many cases which he cited. These were, firstly the *Crawford* case, cited above, and *Extrasure Travel Insurances Ltd and another v Scattergood and another* [2002] All ER (D) 307. In the *Crawford* case, the evidence revealed that Mr Crawford, the Chief Executive Officer and Chairman of a bank, approved

the loan of bank funds to companies in which he had personal beneficial interest. The court found that he was in breach of his fiduciary duty to the bank. It was pointed out by Forte P. that:

> "As Chief Executive Officer and Chairman of the Board of Directors of the Bank, Crawford indulged in what was a conflict of interest in approving these loans, and consequently a breach of his fiduciary duties." (Page 29)

Another director of the bank, Mr Balmain Brown, was also found in breach of his fiduciary duty, despite the fact that Mr Brown did not have any personal or beneficial interests, in any of the companies to which the subject loans were made. According to Forte, P, at page 38 of the judgment:

> "Nevertheless, as a director of the company [Mr Brown] also had a duty requiring him to act with such care as is reasonably to be expected of him, having regard to his knowledge and experience. It is expected that such a person would exercise reasonable care measurable by the care an ordinary man might be expected to exercise in the circumstances in his own behalf. The words of Neville, J stating the test in *Overend Gurney Co v Gibb* [(1872) L.R. 5 H.L. 480] are equally applicable to the case of Brown as they are to Crawford i.e. whether he was cognizant of circumstances of such a character, **so plain, so manifest and so simple of appreciation that no man with any degree of prudence, acting on his own behalf would have entered into such a transaction**." (Emphasis supplied)

In the *Extrasure* case, "Extrasure" was a member of a group of companies. Two of Extrasure's directors instructed Extrasure's bankers to transfer money from Extrasure's account, by a series of transfers, to the account of another company in the group, "Citygate". The same fax containing the instructions also directed that the money should then be used to pay a creditor which was pressing Citygate rather urgently for payment.

Citygate, thereafter, went into insolvent litigation and Extrasure sought to recover the monies from the two directors on the ground that the instruction to the bank was a breach of the directors' fiduciary duty to Extrasure. The defence was that the transaction had the effect of repaying a debt due from Extrasure to the group's parent company "Inbro".

The court rejected the defence that the transfer had been made for the purpose of repaying the debt. It found that it was done because Citygate needed the money to discharge its debt and because Extrasure had money. The court found that the defendants could not have believed that the transfer was in Extrasure's interest and that they were liable to compensate Extrasure for the loss occasioned by the breach.

The trial judge, in considering that, in light of Extrasure's debt, it would be wrong to award judgment in the amount of the sum transferred, gave judgment for Extrasure "for equitable compensation to be assessed, on the basis that the compensation should be quantified by reference to the amount by which the assets of Extrasure have in fact been diminished".

Equitable compensation was first introduced by the decision of the House of Lords in *Nocton v Lord Ashburton* [1914] A.C. 932. This mode of relief is available where there has been failure to disclose a conflict of interest; where there has been a breach of the equitable obligation of

confidence or, thirdly, where there has been a disposal of trust property in breach of trust. “Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach” (*per* Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns* [1995] UKHL 10 at page 12; [1996] A.C. 421 at page 439 A).

Counsel for the defendants sought to distinguish the *Crawford* and *Extrasure* cases. Learned counsel pointed out that the decision, in each case, was made at the end of a trial. The trial judge in *Extrasure*, opined that as a part of discharging his fiduciary duty, “a director’s duty is to do what he honestly believes to be in the company’s best interests” (paragraph 90). The learned judge went on to say at paragraph 90:

> “The fact that his alleged belief was unreasonable may provide evidence that it was not in fact honestly held at the time: **but if, having considered all the evidence, it appears that the director did honestly believe that he was acting in the best interest of the company, then he is not in breach of his fiduciary duty merely because that belief appears to the trial judge to be unreasonable**, or because his actions happen, in the event, to cause injury to the company.” (Emphasis supplied)

I accept this statement as valid in law. It seems to me that in both these latterly cited cases, the subjectivity of the *bona fides* of the relevant director is stressed.

I am, however, of the view that the subjective element has nonetheless been satisfied by the knowledge, of which Messrs Howell and Mitchell were obviously in possession, by virtue of having taken over the trust funds from Leadenhall and by virtue of having directed the litigation against Leadenhall. In support of that position, I make reference to Mr Howell's affidavit in the litigation against Leadenhall. That these monies were trust monies is undoubtedly apparent to Mr Howell. At paragraph 5 of the fourth affidavit filed in that claim, he said:

> "That the [claimant] acted in reliance solely on the terms of the [Deed of Retirement] and representations therein in arriving at the conclusion of what constituted the trust assets **and therefore not unreasonably formed that the trust assets comprising the corpus of the various deeds were the amount acknowledged by [Leadenhall]**..." (Emphasis supplied)

At paragraph 8 of the said affidavit, he addressed a point concerning monies placed by a cardholder after the initial deposit:

> "…With respect, **the claimant and I take a different view, as those funds unless fully utilized by the respective cardholders in making a commercial purchase, would be entitled to be deposited to the cardholder's trust account as would the initial deposit**. Essentially, the cardholder would have paid the additional amounts on the understanding and with the full impression that the additional amounts would be subject to and governed by the application and the underlying trust. To arrive at a different posture or conclusion would create an absurdity and would, in my respectful view, alter the underlying relationship that was intended by the cardholders and the parties thereto. **Such additional sums therefore must be considered as trust assets, being property subject to the terms of the trust**..." (Emphasis supplied)

Mr Howell was also very cognizant of the need to fully and properly account for disbursements. At paragraph 16 of the said affidavit, he

criticized Leadenhall's failure to account for payments made out of trust monies:

> "…I must note that [Leadenhall] failed to exhibit any such proof of payments whether by way of cheques or wire transfer receipts and therefore I am suspicious of such assertions [that trust monies were used to pay out cardholders]and do believe that [Leadenhall] is still holding the said funds to its credit and/or [Leadenhall] may have misappropriated the trust assets **as it has failed to supply the [claimant] and the Honourable Court with any proof of any such and alleged disbursements**." (Emphasis supplied)

As far as Mr Mitchell's participation is concerned, it is my view that he must be taken to have been aware of all the positions taken by the claimant, as against Leadenhall. Yet, in relation to the payments made out of the trust funds, after they came to the hands of the claimant, Mr Mitchell asserted, essentially, that he was merely an automaton; doing Mr Howell's bidding. In an e-mail dated 19 January 2010, responding to queries raised by the claimant's auditors, concerning those payments, Mr Mitchell said:

> "Hi Chris [Donnachie] the following should answer some of your questions.
> You will need to get a few clarification (sic) from Mr. Howell
>
> * COURTS GUARANTEE This is still the investment of the Trust Company.
> * AMOUNTS PAID TO FFC JA LTD. This represents advance made to FFC. Jamaica repayable to the Trust Company.
> * FFC HOLDINGS TO THE HOLDINGS. I need to re-look at it I do not think it belongs to the trust.
> * PAYMENTS TO STANFORD GREEN AND GIBSON RIGBY. **I am not sure**, you need to get further information **I only wired these funds as per instructions**.
> * IAN PHILLIPSON AND COMPANY. **I am not sure**, you need further information, **I only wired these funds based on instructions**.
> * PAYMENT TO DELROY HOWELL. **I am not sure what these funds were used for, I just follow instructions as per letters signed by myself and Delroy**.
> * MONIES TO MASTER CARD Were payments made on behalf of the company who owned master card hence its (sic) an advance to such company.

Kenarthur Mitchell
President/CEO
First Financial Caribbean Jamaica Limited" (Emphasis supplied)

Mr Mitchell, in an affidavit filed herein, on 3 December 2010, sought to downplay the negative impression that these responses would evoke. He said, at paragraphs 4 and 5:

> "4. My response in those emails must be taken against the background that the relevant parties, by that time, were at loggerheads, and I was already incensed by the actions of Mr Donnachie and Ms. Wilchcombe. As such, my response in the said email was not meant literally but as a rebuff to the requests being made.
>
> 5. In any event, the inquiries being made, related to investment payments and Delroy Howell was responsible for making investment decisions, and I would generally defer to his expertise in the area."

As this is not a trial of that issue, I make no finding thereon, except to quote from the judgment of Hoffman LJ in *Bishopgate Investment Management Ltd (in Liquidation) v Maxwell (No 2)* [1994] 1 All ER 261 at page 265 d:

> "…Nor can [director] Mr Ian Maxwell be excused [for co-signing certain documents transferring away the company's property, held in trust,] on the ground that he blindly followed the lead of his brother Kevin [a fellow director]. If one signature was sufficient, the articles would have said so. **The company was entitled to have two officers independently decide that it was proper to sign the transfer.** Mr Ian Maxwell was in breach of his fiduciary duty because he gave away the company's assets for no consideration to a private family company of which he was a director. This was prima facie a use of his powers as a director for an improper purpose and in my judgment the burden was upon him to demonstrate the propriety of the transaction." (Emphasis supplied)

The court of Appeal, in that case, upheld summary judgment given against Mr Ian Maxwell in that case.

In my view the use of the claimant's trust funds, in the ways outlined above, clearly amounts to a breach of the fiduciary duty which, Messrs Howell and Mitchell had, in respect of those funds. Mr Beswick, on behalf of Mr Howell sought to rely on the fact that there was financial support given, from time to time, to the claimant by other members of the group. At paragraph 38 of his written submissions, learned counsel said:

> "There is not a scintilla of evidence that the transfer of any of the funds was done for an improper purpose. To the contrary, it is evident from the unchallenged affidavits of [Mr Howell] that there was an inter company relationship which was to be expected given that [Mr Howell] was the majority owner and chief executive officer of a large group of companies, and that the transfers between companies including the claimant were always accounted for. The existence of this inter company accounting is now borne out by the counterclaim filed by [FFCJ] for repayment in excess of $1.4 million."

I respectfully disagree with this principle being made applicable to trust funds. If these monies were the claimant's assets then this issue would be a triable one, leaving a trial judge to decide on the honesty of inter-company transfers, as in *Extrasure*. These funds, were not, however, the claimant's monies, they belonged to the cardholders. Ironically, learned counsel stressed this latter point when, at an early stage of these proceedings, he criticised the claimant's attempt to rely on the trust funds to support an undertaking as to damages.

What I do find, from Mr Beswick's present description of the situation, is that Messrs Howell and Mitchell were in a position of conflict

when they transferred monies to Mr Howell, to FFCJ and to any of the other companies in the group.

Based on all the above, I find that I cannot properly say, on the issue of breach of fiduciary duty, that these gentlemen have a real prospect of success at trial. They should be required to account for all the payments which they authorised from the trust monies, then held by the claimant.

In order not to further lengthen an already long judgment I shall only say that I agree with the submissions made by counsel for the defendants that an order giving judgment for a specific sum, representing all the trust monies said to have been received from Leadenhall, would be wrong. There are assets said to be in the name of the claimant. Not only must the defendants account for the monies used to acquire them but they must thereafter be valued and, as a separated exercise, the value credited to the claimant.

For those reasons also, FFCJ must account for any trust monies transferred to it by the claimant. It has admitted owing J$146,361,580.00 to the claimant as a result of those transactions. Judgment on admission may be given in respect of those sums, but a full accounting must be given and any amount found due thereafter paid to the claimant. In so far as its counter claim is concerned, that may be separately pursued. As presently framed,

that counter claim does not appear to me to disclose a cause of action; but that decision is for another time and depends on submissions by both sides.

Whether the monies which were transferred to Mr Howell in his personal capacity

The amounts transferred to Mr Howell's accounts have already been detailed. Mr Howell, unless he is a cardholder, cannot justify any personal entitlement to any of the trust monies. He, as demonstrated above, well knew what was required of a trustee of these funds. What was done with these monies, it seems to me, requires an accounting. That accounting must be given as a part of any accounting for the entire trust monies.

The claim for mesne profits

The defendants have asserted that the Bay Roc property was never occupied by them or any of them and therefore no liability for use and occupation arises. In respect of the Dumfries Road property, the averment is a bare denial that the defendants have failed to account to the claimant for the use of the property. There was affidavit evidence, however, that there was an agreement that FFCJ would carry out certain improvements to the property on the basis that it would occupy it rent-free. These are matters for trial.

The benefit to the claimant of the expenditure

Mr Howell's assertions that the expenditure benefited the claimant and that the titles to the assets purchased, reflected the interest of the claimant therein, are matters for accounting. Trustees must account for the monies under their control. Whether the monies were properly spent, is an issue which may or may not arise after the accounting has been made. In my view, the question of whether the money was spent, and in what way, must first be determined. That enquiry need not utilise the scarce trial resources of this court.

Conclusion

Although there is a degree of subjectivity in the test concerning whether a director has acted honestly in transactions involving the company's assets, I find that the first and second defendants must be deemed to have known the nature of the trust monies they had oversight of and the manner in which they ought to have been used. In light of the fact that I find that the use of the trust funds to assist FFCJ, the transfers to Mr Howell's accounts, and the absence of accounting of other sums, were in breach of trust, I find that the defendants Messrs Howell and Mitchell have no defence to the claim that their actions were in breach of their fiduciary duty to the claimant.

FFCJ, having admitted that it is indebted to the claimant, must have judgment on admission against it in that sum. It had no entitlement to any of the trust funds. The monies were transferred to it in breach of trust and it must, therefore, account for all the trust monies coming into its hands.

The claim against Messrs Howell and Mitchell and against FFCJ, in respect of *mesne* profits, are matters for trial, and they are granted leave to defend the claim in that regard.

Based on the above reasoning the orders are as follows:

1. Summary judgment for the claimant against the first and second defendants for equitable compensation to be assessed for breach of their fiduciary duties.

2. For the avoidance of doubt, equitable compensation shall include, but is not limited to:

    a. The first and second defendants accounting to the claimant for all trust monies expended by the claimant between 15 March 2002 and 12 April 2010,
    b. The sale of all assets purchased with trust funds held by the claimant and the payment to the claimant of all of the proceeds of sale; and,
    c. The payment, by way of compensation, of any loss realised by the trust fund as a result of the investment;

3. Case management orders in respect of the above orders are:

    a. The assessment of equitable compensation is set for 20 and 21 July 2011, for 2 days;
    b. The claimant, first and second defendants shall make standard disclosure on or before 26 May 2011;
    c. Inspection of the documents so disclosed shall take place on or before 3 June 2011;

d. The claimant, first and second defendants shall file and serve witness statements on or before 17 June 2011;
e. The first and second defendants shall provide the accounting required by order 2a above on or before 24 June 2011;
f. The claimant, first and second defendants shall file and exchange listing questionnaires on or before 30 June 2011;

4. Summary judgment for the claimant as against the third defendant to include:

    a. judgment on admission in the sum of J$146,361,580.00;
    b. an order that the third defendant shall account to the claimant on or before 24 June 2011 for all sums received by it from the claimant; and,
    c. the payment by the third defendant to the claimant, within 30 days of the said accounting, of any other monies found due to the claimant by the third defendant;

5. The question of interest payable on the said sum of $146,361,580.00 shall be the subject of further submissions by the parties; such submissions shall be made on 11 May 2011 at 9:00 a.m.;

6. The claim shall proceed to mediation as against the first second and third defendants in respect of the claim for *mesne* profits and as against the fourth, fifth and sixth defendants generally, pursuant to part 74 of the Civil Procedure Rules 2002;

7. Costs to the claimant to be taxed if not agreed;

8. Special costs certificate for one counsel;

9. Application for costs to be taxed immediately, refused;

10. Leave to appeal granted

11. Liberty to apply.