[2017] JMCC Comm 15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2013CD00096

BETWEEN	**MARIETTA RIZZA** **(Who claims by her attorney Roberto Rizza)**	**FIRST CLAIMANT**
AND	**ROBERTO RIZZA**	**SECOND CLAIMANT**
AND	**CONTINENTAL GARAGE**	**THIRD CLAIMANT**
AND	**CAPITAL SOLUTIONS LIMITED**	**FIRST DEFENDANT**
AND	**WILLIAM MASSIAS**	**SECOND DEFENDANT**

IN OPEN COURT

Lord Anthony Gifford QC and Glenroy Mellish instructed by Glenroy W Mellish & Company

Christopher Dunkley and Jahyudah Barrett instructed by Phillipson Partners for the first defendant

Conrad George and Adam Jones instructed by Hart Muirhead and Fatta for the second defendant

May 26, 28, 30, July 9, 10, November 25, 2014, June 23 and 28, 2017

BREACH OF CONTRACT – WHETHER COMPANY REPRESENTING OR PERMITTING PERSON TO HOLD THEMSELVES OUT AS AGENT OF COMPANY - ACCOUNTING FOR MONEY GIVEN TO INVEST – WHETHER COMPANY CAN RELY ON PAYMENT TO INVESTOR AS PROPER ACCOUNTING WHEN COMPANY NOT ACCEPTING THAT MONEY WAS PAID ON ITS BEHALF

SYKES J

A mother's email, the son's emails, the Valentine's Day letter and the sequence of unfortunate events

[1] Mr Roberto Rizza, the son, and Mrs Marietta Rizza, the mother, ('the Rizzas') have sued Capital Solutions Limited ('Cap Sol') and Mr William Massias for moneys, that they claim, Cap Sol has not returned to them and has not satisfactorily accounted for. Cap Sol was and is licensed, as an investment advisor and securities dealer, under the Securities Act, by the Financial Services Commission ('FSC') to accept money from members of the public, make investments for and advise member of the public on investments. Mr William Massias was also licensed under the same Act to advise members of the public on investments. At one point Mr Massias was at least an 85% shareholder of Cap Sol. It is also the case that prior to 2008 was president and Chief Executive Officer ('CEO') of Cap Sol.

[2] The Rizzas are claiming three distinct sums of money. The claim against Cap Sol is the amounts of (a) US$360,882.63; (b) US$570,962.52 and (c) US$27,623.43. The claim at (c) is no longer being pursued.

[3] The Rizzas were customers of Cap Sol and it is agreed that they handed over US$1,370,964.07 to Cap Sol to be invested. It appears that Cap Sol had full discretion on how the money was invested. From the court's conclusions and findings, this sum was for 'on-book' investments. The phrases 'on-book' and 'off-book' permeate this case. Based on the evidence in this case, 'on-book'

transactions were those invested in repurchase agreements (Repos) and commercial paper transactions (CPTs). By contrast, the court understood 'off-book' transactions to mean those transactions that arose spontaneously and were taken advantage off because there was money lying around which was used to participate in these investments. The court was assured that it the distinction lay not in what was legal or illegal. The court was also assured that the primary advantage of the 'off-book' transactions was that they attracted a higher rate of return, generally, than the 'on-book' transactions. The distinction between the two is important to Cap Sol's defence to the claim because as far as Cap Sol is concerned 'off-book' transactions were the product of the close personal relationship and friendship between Mr Rizza and Mr Massias and therefore any loss suffered by the Rizzas should not be laid at the door of Cap Sol but should be resolved between the two men.

[4] According to Mr Rizza, he and Mr Massias were friends for quite some time. It was the case, says Mr Rizza, that the friendship caused him to accept the advice and suggestions of Mr Massias regarding investments. Mr Rizza said that from time to time Mr Massias would advise him and his mother on what Mr Massias considered good investments and they would agree for Mr Massias to invest the funds in the suggested deals. These investments Repos and CPTs. By all accounts, Mrs Rizza authorised her son to manage her investments and it appears that the overwhelming majority of the funds under management was hers. Mrs Rizza was and is living in the United States of America and her son is living in Jamaica.

[5] The events leading up to this litigation all began with a rumour and a mother's email. This is how this particular story unfolded. Mrs Rizza's ears began to receive some unpleasant news regarding her investment and in light of what she heard she began pressing her son for answers, or at the very least, reassurance that her investment was safe. Mrs Rizza had heard that her son had lost '1.8m with Ricky.' In light of this discomforting news, she emailed hers son for an explanation or at least some reassurance that her money was safe.

[6] Mrs Rizza began her quest to get answers about her money from before February 7, 2008. Her son, Mr Roberto Rizza wrote to Mr Massias on February 7, 2008 (time stamped at 8:36am) saying that his mother had received numerous calls indicating that he had lost her money. He told Mr Massias in the email that '[s]he called the other day very concerned.' She pointed asked her son why was it that she was not able to see anything on 'Cap Sol letter' showing how much money she had with Cap Sol. Mr Rizza closed the email by asking Mr Massias to put his mother's mind at rest by sending her a statement on Cap Sol's letter head showing the money she had.

[7] Mr Massias' response came on February 7, 2008 at 7:18 pm in which he said that '[w]e need to go over this schedule before [he] can put this on Capsol [in original] letter head.' He said that once 'we have agreed the figures 'reconciling amounts that is on books and off the books) then we can send the statement to her on Capsol (in original) letter head.' This email represented that Mr Massias was president and CEO of Cap Sol.

[8] Mrs Rizza was not to be appeased. By February 8, 2008 Mrs Rizza send another email (time stamped 12:13pm) to her son. She was of the view that the money she had with Cap Sol was more than US$1,601,350.69. She was adamant that the figures given to her by son 'really has (sic) no credence at all.' She stated that 'it is imperative that I get ASAP sent by email or fax a detailed S/M with all investment Nos (sic) etc on CSL's headed paper stating all my investments with them.' She told her son in the email that she 'could not sleep last night thinking about this.' Mrs Rizza set a deadline of 'today' meaning February 8, 2014 to receive her 'S/M.'

[9] Such is the power of an irate mother. Mr Rizza wrote to Mr Massias and copied to his mother assuring her that he had spoken to Mr Massias who would give the matter priority when he returned 'from his trip next week.' Mr Massias responded by saying that the statement would be out the following week. This email represented that Mr Massias was President and CEO of Cap Sol.

[10] What has just been said is the background to the Valentine's Day letter of February 14, 2008, on a Cap Sol letter head from Mr Massias to Mrs Rizza. In that letter he listed under the caption 'off balance sheet accounts' various sum totalling US$702,754.50. The letter referred to other investments. These investments were not identified as either 'on-book' or 'off-book' transactions. They were referred to as were bonds, local registered stock and some kind of real estate investment. The letter had the usual brief analysis of the economic environment. The letter was written Cap Sol's letter head. It ended with the representation that Mr Massias was President and CEO of Cap Sol.

[11] The date of the letter is important for these reasons which will be explained further when dealing with the claim for US$570,962.52. It is in the month of February 2008. Mrs Vanceta Ramsay, now CEO for Cap Sol told the court that Mr Massias was not president and CEO of Cap Sol at that time. The letter has that the foot that Mr William Massias was the managing director. This was a representation to at least one member of the investing public that Mr Massias was not only a director but managing director of Cap Sol. Mrs Rizza was also being told that Mr Massias, in February of 2008, was still president and CEO of Cap Sol. This must be of great significance given that her insistence was for official communication from Cap Sol, on Cap Sol's letter head, about her investments with Cap Sol. This letter was the response to her request.

[12] There are emails in June 2008 and July 2008 showing Mr Massias **had stopped** describing himself as President and CEO, but was representing that he was speaking on behalf of Cap Sol. It did not state what office, if any, that he held. In an email of June 21, 2008, Mr Massias spoke of getting into 'the off balance sheet agreement' which he identified in the email.

[13] On September 4, 2008, Mrs Vanceta Ramsay addressed a letter to Mr Robert Rizza in which she set out Cap Sol's understanding of the investments that it had as part of Mr Rizza's portfolio. This letter was on Cap Sol's letter head and still listed Mr William Massias as managing director. Mrs Ramsay noted that Mr Rizza

had corresponded with Mr Massias by missives dated August 19, 2008 and September 3, 2008. She referred to Mr Massias as 'Director [in original] William Massias.' She does not refer to him as president and CEO of Cap Sol but surely the designation of 'director' would convey that Cap Sol is saying that Mr William Massias has a very important function in the organisation and if not managing director, at the very least a director. Mrs Ramsay was writing in her official capacity of acting CEO of Cap Sol. This means that among the representations that she made, one of them was that Mr Massias was a director. Mrs Ramsay's evidential protestations against the obvious are not accepted. Mr Dunkley's submissions on this point were not persuasive.

[14] This letter is important for another reason. Mrs Ramsay is using the expression 'off-book' transactions in the context of accepting 'contingent liability' even though she sought to give the impression that those things were anaethema to Cap Sol. She wrote the following:

> *Your queries also led us to research an item of **US$105,000.00** [bold in original] which was transferred from your account on November 25, 2005 under instructions of Mr William Massias. He has also acknowledged this item and although this item is removed from our books we are prepared to recognise this contingent liability as an **off book transaction** [this emphasis added] owed to you whilst our research takes place.*

[15] As to what the board of Cap Sol knew, she writes the following:

> *Firstly, we do apologize for the delayed response however as we mentioned in our telephone conversations your requests have brought about the need for further detailed investigations into your portfolio here at Capital Solutions Limited and **became a matter for the Board's attention.*** (emphasis added)

[16] While the letter of September 4, 2008 does not detail the board's knowledge what the letter show is that they were aware that Mr Rizza had concerns about his investments and that he was seeking information about them. The letter also shows that Mrs Ramsay, acting CEO, at the time of the letter, was alerted to the

possible existence of ‘off-book’ transactions between Mr Massias and Mr Rizza and that Cap Sol was prepared to countenance at least one particular amount as owing to Mr Rizza even though it was ‘off-book.’

[17] Whatever happened between February 2008 and September 2008, Mr Massias did not assuage the anxieties of the Rizzas, Mrs Rizza in particular. By September 17, 2008, Mr Rizza is writing, in an email, to Mr Massias explaining that he needed an update on the accounts and querying why it was taking so long. Mr Massias responded, by email, on the same day with the rather discomforting news that he was trying to deal with ‘everything as per priority’ but the number one priority at the time was the auditors. Mr Massias made the rather odd statement that they were ‘trying to get them [meaning the auditors] out of here by Friday’ and that he had ‘to finalise stuff with them so that they can issue our financials which are now late.’ There is even this distressing statement: *We cannot do anything (paying out money until they are out of here so please just hang tight).* Mr Massias did not describe himself as President and CEO on this email. He simply had his name and Cap Sol Ltd.

[18] The narrative shows so far that Mrs Rizza’s insistence on getting information had sparked a chain of events. Mr Massias was under pressure from Mr Rizza to produce accurate and reliable information. Mr Rizza had written to Cap Sol about his investments. The senior management and the board of Cap Sol were now aware of what has happening or had happened between Mr Rizza and Mr Massias.

[19] By October 2008 Mr Rizza’s anxiety increased because Cap Sol failed to repay the funds it was given. Several telephone calls failed to produce the funds. Not even the threat to report the matter to the Financial Services Commission (‘FSC’), the regulator of that part of the financial sector to which Cap Sol belongs, precipitated a return of the money. It seems to this court that it was this build-up of pressure that precipitated that first promissory note issued in November 2008.

[20] Under severe pressure Mr Massias came up with the solution of issuing a promissory note to Mr Rizza. It has turned out to be fool's gold. Mr Massias issued a promissory note dated November 15, 2008 with a maturity date of January 15, 2009. This note was replaced with another issued April 1, 2009 with a maturity date of May 1, 2009. Both notes mentioned only Mr Massias as the promisor There is no mention of Cap Sol in the notes at all. From the evidence, these notes were prepared by Mr Massias and presented to Mr Rizza for signature. He signed.

[21] It should be noted that on March 31, 2009, before the second promissory note was issued, Mr Rizza wrote to Cap Sol, attention Mr William Massias. That letter was captioned in the following manner: **SUBJECT: Loan to William Massias & Island Network Ltd**. The letter asked for a new promissory note, Mr Massias' signature and that of a witness. The letter has these words: *You mentioned that you have some form of document to validate the loan. I would appreciate a copy of that document.*

[22] Mr Rizza stated in that letter that he would be fixing the exchange rate at 18%. He asked that Mr Massias send a promissory note to reflect this. The letter also stated that he was sending the original documents for Mr Andrew Massias of Island Networks Ltd. It is not clear whether Mr Andrew Massias is related to Mr William Massias.

[23] These promissory notes and the letter provided the wind in Mr Dunkley's sail as he attempted to reach the shores of non-liability. Unfortunately, the ship entered the doldrums and there it remained.

[24] Mr Rizza further testified that he forbore from suing because Mr Massias issued promissory notes. The court will add that in respect of the case against Mr Massias, the claim against him was struck out on May 26, 2014. The case against him rested largely on the promissory notes which turned out to be enforceable. The court accepted the submissions of Mr Conrad George on behalf of Mr Massias and struck out the claim.

[25] What does Cap Sol have to say about all this? Cap Sol says (a) it is not liable for the US$570,962.52 because the 'off-book' investments were the product of an exclusively private and personal arrangement between Cap Sol and Mr Rizza; (b) in respect of the US$360,882.63 Cap Sol's response is that Mr Rizza has been repaid all of that money.

[26] The first legal issue to be determined is whether Mr Massias was, at all material time, regardless of position held, the agent of Cap Sol, particularly in relation to the 'off-book' items. The court now addresses the law and the conclusion on liability of Cap Sol in respect of the 'off-book' claim for US$570,962.52.

The legal proposition

[27] Lord Gifford QC relied on three cases to establish his legal proposition that Mr Massias was the agent of Cap Sol. The cases relied on are (a) **ASE Metal NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37; (b) **Freeman & Lockyer v Buckhurst Park Properties Limited** [1964] 1 QB 480 and (c) **New Falmouth Resorts Ltd v International Hotels Limited** [2013] UKPC 11. The court will site passages from **Freeman** mainly because both the Privy Council in **New Falmouth Resorts** and the Court of Appeal of Jamaican in **ASE Metal** have affirmed the continued vitality and applicability of **Freeman**, particularly the judgment of Diplock LJ.

[28] **ASE Metal** Brooks JA held at paragraph 25:

> *There is one other aspect of the substantive law which is relevant… It concerns the reliance that a third party may place on actions done by a representative of a company. The basis of this aspect of the law is that a company, being an artificial entity, can only act through agents. Those agents may have actual authority from the company to bind it. Even where an agent does not have actual authority to bind the company, third parties may, nonetheless, be entitled to rely on acts done by that agent, where the agent is held out by the company to have the requisite authority. That may be done by actual representations to that effect, or by placing the agent in a position which usually carries that authority. The*

resultant authority is said to be an 'apparent' or 'ostensible' authority.

[29] The court found that there was evidence that Exclusive Holiday permitted him to make representations to third parties that he had the authority to bind the company.

[30] In **Freeman & Lockyer** the evidence was that K and H formed a company to purchase and resell a parcel of land. K agreed to put up the running expenses of the company and recoup it from the proceeds of the resale. The two men and a third were appointed directors of the company. Although the articles of association had power for the appointment of a managing director, none was appointed. However K did many things for the company such as (a) instructing architects, (b) apply for planning permission and (c) other connected work. The plaintiffs did work for the company which failed to pay. Judgment was given in favour of the plaintiffs. The trial judge found that the board of directors knew of the activities of K and did nothing to indicate that he did not have the power to do what he had done. The company appealed.

[31] The Court of Appeal accepted that K did not have actual authority to do what he did. The issue was whether he had ostensible authority. On this issue Wilmer LJ held at page 491 – 492:

The doctrine of ostensible authority in relation to a limited company necessarily gives rise to difficult legal problems. For a company can act only through its officers, and the powers of its officers are limited by its articles of association. It is well established that all persons dealing with a company are affected with notice of its memorandum and articles of association, which are public documents open to inspection by all; see Mahony v. East Holyford Mining Co. But by the rule in Royal British Banj v. Turquand re-affirmed in Mahony's case, it was also established, in the words of Lord Hatherley in the latter case, "that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any

irregularities which may take place in the internal management of the company."

[32] In **Freeman**, the main reasons for upholding the judgment were (a) the company's articles in fact made provision for the appointment of a managing director; (b) although none was in fact appointed, that was a matter of internal management which the third party need not concern himself with; (c) K, to the certain knowledge of the board, had engaged in conduct that would have given the impression that was in fact so appointed and did nothing to dispel that notion. The significance of the provision in the articles of association making provision for the appointment of a managing director is that, as Wilmer LJ explained, the articles and memorandum of association are public documents and therefore anyone dealing with a company is obliged to look at them to see what the powers are under these documents. Had it been the case that no such provision was present in the articles the decision would have gone the other way. It went the way it did because had the plaintiff checked it would have seen the power to appoint a managing director and would have been dealing with K who gave all the appearance of a managing director. Thus the plaintiff was entitled to think that he was appointed as the managing director.

[33] Pearson LJ explained the basis of ostensible authority. His Lordship indicated that it is really an application of the estoppel by representation. His Lordship said at page 498:

> *The expressions "ostensible authority" and "holding out" are somewhat vague. The basis of them, when the situation is analysed, is an estoppel by representation. … The company is considered to have made the representation, or caused it to be made, or at any rate to be responsible for it. Accordingly, as against the other contracting party, who has altered his position in reliance on the representation, the company is estopped from denying the truth of the representation.*

[34] Diplock LJ had this to say at pages 503 - 504:

An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority.

The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into.

[35] And at page 505 Diplock LJ stated:

The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the

principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the "actual" authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such "apparent" authority that the agent had authority to contract on behalf of the company.

[36] The evidence is not very clear on when Mr Massias became president and CEO of Cap Sol. Despite this there is no doubt that he was in fact the president and CEO at some point. Mrs Ramsay said he ceased being president and CEO in January 2008. However, as we have seen, in February 2008, Mr Massias was describing himself as president and CEO, that is to say, in the words of Diplock LJ, the agent was representing to persons that he had the authority to do what he was doing. Cap Sol has not sought to say that the articles of association and memorandum prohibited Mr Massias from doing the things he did or making the representations that he did to the Rizzas.

[37] The court would wish to say that having regard to the fact that Mr Massias was at one point president and CEO of Cap Sol, it means that what he thought and did were in fact what Cap Sol thought and did. This is the point made by Moore-Bick LJ (sitting as a trial judge in the Commercial Court of the Queen's Bench Division) in **MAN Nutzfahrzeuge AG and others v Freightliner Ltd and others** [2005] All ER (D) 357. His Lordship said at paragraph 154:

154. One point of importance which emerges clearly from these authorities, perhaps most clearly from El Ajou v Dollar Land

Holdings Plc, is the need to distinguish between several quite distinct sets of rules. The first, to which Lord Hoffmann adverted briefly in the Meridian case, are the rules which relate to vicarious liability under which a person may be held liable for the acts and omissions of those he engages to act on his behalf. Liability in such cases depends on the wrongful act or omission of the agent or employee himself for which his principal or employer is held responsible. It does not depend on the attribution to the employer of another's state of mind. The second set of rules concerns the attribution to one person (natural or juridical) of the state of mind of another whom he has appointed to act as his agent. It is with that question that cases such as In re Hampshire Land Co., Belmont Finance v Williams and El Ajou v Dollar Land Holdings (insofar as it turned on the relationship between principal and agent) are concerned. The third set of rules which governs the attribution of the acts and omission of natural persons to juridical persons such as companies was the subject of discussion in the Meridian case. These rules do not involve so much the attribution of one person's state of mind to another as the identification of the natural person or persons who are to be regarded as representing the juridical person for the purposes of the substantive rule in question.

[38] The point being made was that the court needs to identify precisely the facts and circumstances under examination in order to decide whether one is seeking to determine (a) whether a company is vicariously liable for the acts of human being; (b) whether the statement of mind of a human being should be attributed to the company or (c) the actual statement of mind of the company. In (a) there is no question of attributing any statement of mind of the human being because the vicarious liability does not depend very much on attribution. The liability of the employer does not depend on the employer being at fault. In (b) the issue is whether the statement of mind of the human being should be regarded as that of the company in relation to the matter in question. In (b) the court is not seeking to find out what the company actually thought but whether the thought of the human being in question should be treated as what the company thought. An example of this is found in cases where a statute prohibits the sale of certain items to minors. The check-out cashier at the business place makes such a sale. The issue, in

these types of cases is whether the action of cashier is the act of the company for the purposes of the prohibition. There is no question of the directing mind being involved. Clearly, the cashier could not be the directing mind of the company but nonetheless her action is usually attributed to the company and thus the company can be convicted under such states because it that level of employee who is involved in sales. Situations in which (b) arises are usually those where the person in question is not a director or senior officer of the company. Situation (c) is where the very thought and action of the human is the very thought and action of the company and such persons are usually directors and senior officers.

[39] In the present case, it may be said that when Mr Massias was president and CEO, his thoughts and actions were the very thoughts and actions of Cap Sol. What he thought and did do not require any analysis in order to decide whether his actions and thoughts should be attributed to the company but rather it is the case that from he thought it and did it, the company automatically thought and did it.

[40] This court is saying that if it is the case that Mr Massias, when he was president and CEO of Cap Sol, took money from the Rizzas and decided to invest them in 'off-book' schemes then those actions were the very actions of Cap Sol without further analysis and subject to this the exception about to be stated because Mr Massias in those capacities would be the head, heart and brain of Cap Sol. The exception is that if it can be shown that Mr Massias was acting strictly as a private citizen, that is to say, Mr Massias qua Mr Massias solely and not president and CEO of Cap Sol then Cap Sol can escape liability. There is nothing in the law that prevents the brain of a company from acting in purely private capacity. From the context and circumstances leading up to the Valentine's Day letter it is reasonable to conclude that the 'off-book' investments were made during the time Mr Massias was president and CEO of Cap Sol. The evidence, despites its lack of clarity, points in the direction of, and the court so concludes, that the 'off-book' investments were made before January 2008.

[41] Mrs Ramsay said in cross examination that Mr Massias ceased being managing director in January 2008. Having regard to the crucial nature of this evidence in the case her bare denial is simply not sufficient. Not only was there no documentation supporting the denial but it is very clear that Mr Rizza was never told officially that Mr Massias was no longer managing director. Mrs Ramsay sought to say that Mr Rizza would have been aware of the changes in the management of the company. When pressed under cross examination Mrs Ramsay accepted that no letter was sent to Mr Rizza. She said that the regulators, the FSC, were notified but not Mr Rizza.

[42] Mrs Ramsay was further confronted with evidence that in an email dated March 5, 2008, Mr Massias wrote to employee of Cap Sol and described himself as president and CEO of Cap Sol. The employee was the treasury officer of Cap Sol at the time of the email.

[43] Mrs Ramsay was further confronted with her own letter of September 24, 2008, and she admitted that at late as September 2008, Mr Massias was indeed a director of Cap Sol. She even admitted that she sent a copy of her letter to Mr Massias in his capacity as director of Cap Sol. According to Mrs Ramsay, Mr Massias was told that he was a director only for internal purposes but not for dealing with the public or clients. She said that Mr Massias was forbidden from dealing with clients. But how would members of the public know this without any official communication?

[44] Finally on this, if more evidence is needed, there is a letter dated September 4, 2008, signed by Mrs Ramsay in her capacity of CEO (Ag) to Mr Robert Rizza, in which she writes:

> *Your queries also led us to research an item of US$105,000.00 which was transferred from your account on November 25, 2005 under instructions of Mr William Massias. He has also acknowledged this item and although this item is removed from our books* ***we are prepared to recognise this contingent liability as***

an off book transaction owed to you whilst our research takes place. *(emphasis added)*

[45] The point is the question 'off-book' transactions or recognition of liability in respect of 'off-book' transactions did not appear to be strange even to Mrs Ramsay. There is therefore no reason to accept Cap Sol's view that 'off-book' transactions were beyond the pale as far as it concerns its business practices. This court accepts and finds that when Mr Massias wrote to Mrs Rizza in his Valentine's Day letter that Cap Sol had over US$702,754.50 for her in its 'off-book' accounts it was quite legitimate as far as Cap Sol's operations are concerned. Thus when Mrs Ramsay told Lord Gifford in cross examination that there is no such thing as 'off-balance sheet' in the company, she was not quite accurate given that she herself had used an expression – 'off-book transaction' – which means the same thing. There is also email correspondence between Mr Massias and Miss Debbie Horne where the expression 'off-balance sheet' was used. There is no evidence that Miss Horne queried what was meant.

[46] To put it bluntly, there is no documentary evidence consistent with Mrs Ramsay's assertions that Mr Massias was removed as president and CEO. The very letters signed by Mrs Ramsay in September 2008, nine months after he was supposed to have been removed as president and CEO, had Mr Massias listed as managing director.

[47] Mrs Ramsay accepted that Mr Massias was the most senior officer in Cap Sol until 2008. She accepted that when she joined the company in 2004 Mr Massias was CEO. She said that Mr Massias, as the most dominant person in the company and CEO would deal with the clients who would give him instructions and he would pass on the instructions he received.

[48] What is plain from the cross examination is that Cap Sol, that is to say, the other senior officers and directors knew of Mr Massias' role in the company. They knew that he would get instructions from clients and pass them in his official capacity. The company knew that it had not officially told Mr Rizza, in writing,

about the change in Mr Massias' position. They knew that he was still interacting with clients.

[49] Even if it were to be said that Mr Massias was not the default brain of the company, it is quite clear that Mr Massias was not prevented from representing himself as the president and CEO of Cap So even after January 2008. As Diplock LJ explained in **Freeman**, when the company allowed Mr Massias to represent to clients that he had the authority to invest their fund, the company was in fact exercising acts of management, by not telling Mr Rizza or Mrs Rizza that Mr Massias no longer had the authority he had before. Therefore, it matters not whether Mr Massias in fact had the authority. Once Cap Sol permitted him to make the representations that he did then by that act of management, namely omitting to correct the client's impression, the company in fact represented that Mr Massias had the authority to do what he did. The crucial point is that before January 2008, he had the authority to advise and invest client's fund and when that changed internally in Cap Sol, Mr Rizza and his mother were never told of the changed position and therefore were entitled to believe that he still had the authority that he previously had. Thus Mrs Ramsay's evidence that Mr Massias did not in fact have authority to do what he did is entirely beside the point. By not saying anything Cap Sol was in fact telling Mr Rizza that it was alright to deal with Mr Massias. The 'off-book' transaction in this context was simply another way of Mr Massias carrying out his job and the business of the company. As Mrs Ramsay said, the business of Cap Sol was 'matching borrowing and lending clients as well as organising their participation in a commercial paper investment and also to facilitate 'introductions with borrowers whose business portfolio aligned with that of the first claimant's investment objectives.'

[50] The letter of March 31, 2009 and the promissory notes do not affect this conclusion. The letter was written by Mr Rizza speaking of a loan to Mr Massias and the promissory notes were drawn up to reflect that. However, the court accepts Mr Rizza's explanation that the documents did not reflect the true position.

[51] In respect of this ‘on-book’ and ‘off-book’ distinction it appears that not even Cap Sol itself adhered to it internally. This is bourne out by Mayberry share purchase and resale transaction. It is spelt out in more detail below but what can be said is that Cap Sol wanted to say that that transaction was ‘off-book’ yet it treated money from the proceeds of sale of the shares as being invested in an ‘on-book’ transaction but treating the balance from the share sale as being ‘off-book.’

[52] Cap Sol wants to say that in respect of the US$360,882.63 claim it repaid Mr Rizza all the sums it had under management. Curiously, Cap Sol wants to take credit for some payments to Mr Rizza from accounts in Mr Massias’ name. Why would Cap Sol want to take credit for these repayments when it simultaneously wants to say that Mr Rizza and Mr Massias had an exclusively private arrangement about which it knows nothing? Why accept the credit of repayment from a private account which Cap Sol shuns when asked to account for the balance in the same account? The most reasonable explanation for this is that this alleged firm division sought to be established by Mrs Ramsay between ‘on-book’ and ‘off-book’ was more apparent than real. Internally, when it came to repayment of money, Cap Sol drew no distinction between Mr Massias the purely private citizen doing is own business with Mr Rizza and Mr Massias, senior officer of Cap Sol. This is the point being made by this cross examination:

> *MRS. RAMSAY: CROSS-EXAMINED BY LORD GIFFORD*
>
> *BY LORD GIFFORD:*
>
> *Q. To my understanding you have been trying to make sense out of a rather tangled history?*
>
> *A. Yes, sir. It has been a long history, sir.*
>
> *Q. And what you have done in this table is to identify a large number of payments which were paid either through you or to the benefit of Mr. Rizza?*
>
> *A. That's correct.*

Q. For over a period of some four years. And many of these payments were made on the instructions of Mr. Massias?

A. Yes, sir.

Q. I think it is already clear that Mr. Massias and Mr. Rizza had a very close relationship, financially?

A. Yes.

Q. And Mr. Massias would, at the time, instruct you to take the money out of a particular account?

A. Yes, sir.

Q. One of the accounts which you were instructed to debit was his Mayberry Profits Account?

A. Yes.

Q. So although his personal account was being debited the beneficiary you say was Mr. Rizza?

A. Yes.

Q. And sometimes Mr. Massias was telling you to pay Mr. Rizza, but to debit your current account, Capsol's Account?

A. He would have used that term, yes.

Q. He would have -- well, how would he have said it when it is coming out of Capsol's running funds, operating funds?

A. He would have said whether it's from his -- if it's not his account he would say Director's Account.

Q. Director's Account?

A. Yes.

Q. Would you agree that that is rather irregular?

A. It is a Director's account so he can request it, the approval now --

MR. DUNKLEY: May it please you, My Lord, I object on the basis that this witness has given evidence already and she is a --

HIS LORDSHIP: Hold on. Hold on. I know that the questions are unfair, but I am trying to understand something here, so allow the question.

BY MR. DUNKLEY:

Q. Was it not rather irregular for sums to be paid out of the Director's Account rather than to debit Mr. Rizza's account directly?

A. Well, I did make the distinction that Mr. Rizza's account is illiquid; he is tied up into a nonperforming asset. So we would have recognized that we are making the extra effort to accommodate Mr. Rizza from instructions of the Director.

Q. Basically lending him money?

A. Advancing the funds. Advancing is more it because you would certainly have to collect it back when you are able to, it is not intended to stay there. And I think Mr. Massias says that, I have seen it in e-mails where to debit Mr. Rizza from the Director's Account.

Q. Help me on this, in this table wherever Mr. Rizza has received money, from whatever accounts, it is being debited and it is being retrospectively applied to either his Repo or his Cane River Account?

A. To be clear, not with retrospect, there was a point where we corrected these items.

Q. These figures weren't generated at the time, they have been generated since?

A. Well, as I said, you can't look at the time in question and apply the accounting for it to make sense, because -- I am reminding you that there is a point where Mr. Rizza is made privy to items building up on our side that was for his benefit, and we need to adjust his account now. He gave us those that he, Mr. Rizza, confirmed that we could go ahead now and adjust his Repo balance or whatever account there is to be adjusted.

Q. And we will look at the e-mails in a moment, but there were a number of e-mails in which Mr. Rizza asked for money?

A. Yes.

Q. And Mr. Massias approves it and orders you to pay it out?

A. (Witness nods.)

Q. And that covers some of these items, these debit items here?

A. (Witness nods.)

HIS LORDSHIP: I am sorry, you have to answer --

THE WITNESS: Yes, sir. I am sorry.

HIS LORDSHIP: -- so the reporter can record it.

Q. Although you have debited it with the debits, do you agree that you have not credited him with money that he brought in and which was paid over to the William Massias account, in particularly the Mayberry money?

A. No, but that is not in an accounting exercise. I have captured from that when how -- if Mr. Rizza brought in any money that is what I am being told now, but when the monies came in they were accounted for. So they are placed in an account. If he…

The claim for US$572,960.52

[53] At this point the court will deal with the claim for US$572,960.52. Cap Sol's defence to the claim for this sum is that this was a loan to Mr Massias and therefore Cap Sol should not be held liable. It was a private arrangement. The court disagrees and these are the reasons.

[54] Based on the reasoning already outlined, Cap Sol is liable for this sum. This court concludes on the preponderance of the evidence that this sum was handed over to Cap Sol before January 2008. It was received by Mr Massias. Curiously, none of the emails from Mr Massias referred to this sum as a loan and it appears

that in the Valentine's Day letter this sum was included as part of the total under the heading 'off-balance sheet account.'

[55] The Valentine's Day letter told Mrs Rizza that her money was invested in a bond, local registered stock and real estate. Certificate numbers for each of these investments are given. Inferentially these were the 'on-book' investments. There is a second set of investments called 'off-balance sheet accounts.' These have no certificate number. The total stated of these 'off-book' investments is US$702,754.50. The pleaded case of the claimants asserts that the US$572,960.52 was part of this larger amount. The claimants further allege that the first defendant 'has failed and refused despite demands to pay the said sum of US$572,960.53 or any part of it to the claimant.'

[56] Mr Massias was being pressured to come up with the money having told Mrs Rizza about the investments in the Valentine's Day letter. If the money were loaned to him why not tell Mrs Rizza this from February 2008?

[57] A curious feature of the case is that for all of 2008 the claim for this sum of US$572,960.52, it was being treated as an 'off-book' investment by Mr Massias in his representations to Mrs Rizza. The money was not forthcoming during 2008. Suddenly in November 2008, there is a promissory note issued by Mr Massias in which no reference is made to Cap Sol. This first note expires and between the two notes Mr Rizza writes a letter dated March 31, 2009 that the sum claimed is a loan. Interestingly, there is no evidence that Mr Rizza ever told his mother that he loaned Mr Massias the money and equally, there is no evidence that Mr Massias told Mrs Rizza that over half a million dollars was loaned to him by her son. Why? Both men were under pressure from Mrs Rizza to come up with the money. It does seem odd that both men should suddenly treat that money outstanding as a loan when there is no evidence that either of them ever treated it as a loan. Thus when Mr Rizza says that the promissory note and the letter did not accurately represent the transaction he was correct. It was a 'fake loan' quite likely designed to appease Mrs Rizza that there was some hope of recovery of

the money. For this fake loan to be made, Mr Rizza and Mr Massias would have had to come up with this scheme. It is so convenient that the letter came into existence to fit neatly into the hiatus between the first promissory note and the second. The court accepts Mr Rizza's evidence that the documents did not represent the true nature of the agreement. The motivation for Mr Rizza to help his long standing friend was quite likely bourne out of the fact as far as his mother was concerned, he was under a cloud in that she was not satisfied with his stewardship. She had left her money in his charge to manage with his friend Mr Massias and no satisfactory explanation for its delayed presence was forthcoming.

[58] The court cannot help but note that Cap Sol is faced with a claim (taking both sums into account) of nearly one million dollars United States currency and it has failed to call Mr Massias, the former over 80% shareholder, the former president, the former CEO and former managing director and not explanation has been forthcoming. The transactions revolve around him and his conduct and somehow he is not called to explain his role in the case. Quite remarkable.

The Mayberry share purchase and resale/Cane River transactions

The claim for US$360,882.63

[59] The claim for this sum has to examine against the backdrop of what the court calls the Mayberry share purchase and resale transaction and the Cane River CPT.

[60] The court will therefore begin its examination of the evidence relating to these transactions with the evidence of Mr Rizza. Mr Rizza purchased shares in Mayberry Investments Limited ('MIL') for J$42,000,000.00. From what is now known it is palpable that Mr Rizza did not and never had all the evidence surrounding the transaction. What he thought was at odds with what is. The court will set out Mr Rizza's understanding and then correct his erroneous view.

[61] In February 2005 was offered 9,590,000 shares in MIL at a price of J$4.38 per share in a private placement. He said that he was only willing to purchase half of the offered shares. He then invited Mr Massias to participate in the venture with him. According to Mr Rizza, the total sum needed to purchase the shares was J$42,000,000.00. Actually, to be punctilious, the correct sum would be J$42,003,200.00. He says that he instructed Mr Massias to take his (Rizza's portion) of JA$21,000,000.00 from his (Rizza's account) account. This instruction was given on the premise that he (Rizza) would purchase half of the shares offered to him and Mr Massias would purchase the other half. He says that on February 23, 2005 he was given a cheque for J$42,000,000.00 drawn in favour of Mayberry. At the time when he got the cheque he, apparently, did not realise that all the money was taken from the principal sum of the 'on-book' investment (ws dated December 10, 2013).

[62] Shortly after Mr Rizza purchased the Mayberry shares he sold them. He says that he sold them for a total in excess of $44,437,822.00. The evidence is that Mr Rizza received four cheques naming him as the payee. These four cheques totalled J$38,094,299.70. The difference between the four cheques and the total sale price need not concern us because Mr Rizza said that that difference was used for some other purpose.

[63] The four cheque payments were as follows: (a) Mayberry cheque number 000863, drawn on Bank of Nova Scotia, payable to Roberto Rizza, dated April 18, 2005 in the sum of J$24,159,973.83 (US$396,065.14); Mayberry's cheque number 407905, drawn on National Commercial Bank, payable to Roberto Rizza, dated May 30, 2005 in the sum of J$6,668,213.55 (US$108,074.77); Mayberry's cheque number 410235, drawn on National Commercial Bank, payable to Roberto Rizza, (date unclear from exhibited copy), in the sum of J$531,615.41 (US$8,517.23); Mayberry's cheque number 410207, drawn on National Commercial Bank, payable to Roberto Rizza (date unclear from exhibited copy), in the sum of J$6,734,467.21 (US$107,889.57). The total US dollar of the J$38,094,299.70 was US$620,546.71.

[64] All cheques were eventually posted to two internal accounts of Cap Sol. Mrs Ramsay states that she was aware that Mr Rizza and Mr Massias had their own arrangements. The JA$24m cheque was posted to internal account number 010362101-45. The other three were posted to internal account number 010371301-45.

[65] How did the cheques end up in Cap Sol's internal accounts in the name of William Massias? Mr Rizza was still labouring under the illusion that he only owned half the shares because he thought that his account had only put up 50% of the purchase price. In cross examination he explained that when he got the cheques he gave them to Mr Massias because half of the money belonged to either him or Cap Sol. This is the evidence:

> *THE WITNESS: NO, CHRIS BERRY WAS A FRIEND OF MINE -- 44 OR 42 MILLION WORTH OF SHARES AND I COULDN'T*
>
> *HIS LORDSHIP: SO HOLD ON. SO MR. BERRY SAID TO YOU, I AM OFFERING YOU $44,000,000 WORTH OF SHARES.*
>
> *THE WITNESS: YES.*
>
> *HIS LORDSHIP: AND YOU SAID WHAT?*
>
> *THE WITNESS: I CAN ONLY -- WELL IN MY MIND I WAS ONLY ABLE TO -- I WOULD ONLY LOOK AT HALF OF THE SHARES.*
>
> *HIS LORDSHIP: 22 MILLION?*
>
> *THE WITNESS: AND I CAME TO WILLIAM, OFFER HIM, SAYING THAT, YOU KNOW, I'VE BEEN GIVEN THIS AMOUNT OF MONEY, BUT I WOULD NOT BE USING ALL, ARE YOU INTERESTED IN THIS TRANSACTION?*
>
> *HIS LORDSHIP: OKAY.*
>
> *THE WITNESS: AND HE SAID YES.*
>
> *HIS LORDSHIP: SO, AT THAT TIME WHEN YOU WERE SPEAKING TO WILLIAM, WHEN YOU WENT TO HIM, MR. BERRY COMES TO YOU AS A FRIEND OF YOURS?*

THE WITNESS: YES.

HIS LORDSHIP: AND YOU GO TO WILLIAM.

THE WITNESS: YES.

HIS LORDSHIP: YOU WERE SPEAKING, IN THAT FOR HIM, WILLIAM, THE INDIVIDUAL -- HOLD ON --TO TAKE UP THE OTHER 22 MILLION, OR WERE YOU SAYING IN YOUR BRAIN, YOU WERE SAYING THAT YOU ARE INVITING CAPITAL SOLUTIONS AS AN ENTITY, AS A COMPANY NOW, TO JOIN YOU IN THIS JOINT VENTURE -- DON'T ANSWER YET -- OR IS IT THAT YOU WERE BORROWING $22,000,000, AN ADDITIONAL 22 MILLION TO MAKE IT 44? SO YOU NOT BORROWING?

THE WITNESS: I WASN'T BORROWING, NO. I WAS OFFERING WILLIAM/CAPSOL THIS POSSIBILITY.

HIS LORDSHIP: I SEE.

THE WITNESS: THAT'S ALL IT WAS.

HIS LORDSHIP: I SEE WHAT YOU MEAN. SO AS FAR AS IN YOUR BRAIN NOW, WHEN THE 44 MILLION -- THIS 44 WAS PAID OUT...

THE WITNESS: FORTY-TWO OR 44.

HIS LORDSHIP: INVESTED IN MAYBERRY, AS FAR AS YOU WERE CONCERNED...

THE WITNESS: HALF OF IT WAS MINE.

HIS LORDSHIP: ONLY HALF WAS YOURS.

THE WITNESS: YES, ALL THE TIME.

HIS LORDSHIP: I SEE AND SO WHEN THE MONEY CAME BACK -- BECAUSE I THINK...

THE WITNESS: CHEQUES CAME BACK TO ME AND I SIGNED OVER AND GAVE IT BACK TO WILLIAM.

HIS LORDSHIP: THAT IS THE FULL?

THE WITNESS: IT WASN'T FULL, IT WAS -- REMEMBER, IT STARTED OFF WITH A CERTAIN AMOUNT AND THEN AFTER WE STARTED SELLING, I CALLED HIM BACK ON THE SHARES, SELLING IT AND GIVING IT BACK TO WILLIAM AND CLOSED IT OFF.

HIS LORDSHIP: SO HOW MUCH MONEY DID YOU

GET BACK?

THE WITNESS: I THINK IT'S LIKE 38 MILLION AND THERE WAS A DIFFERENCE THAT – WHAT HAPPENED, THE INVESTMENT WASN'T GOING AS I WAS HOPING IT WOULD GO AND PART OF THAT MONEY THAT WE GOT BACK WAS INVESTED WITH RICKEY AZAN.

HIS LORDSHIP: SO BEFORE WE GET THERE. SO WHEN YOU GOT BACK THE 38...

THE WITNESS: I GAVE IT TO HIM.

HIS LORDSHIP: NO, NO, IN YOUR BRAIN NOW, OF THAT 38, ONLY 22 WAS YOURS?

THE WITNESS: HALF OF THE 38.

HIS LORDSHIP: HALF OF THE 38?

WITNESS: YES.

HIS LORDSHIP: THAT'S 19?

THE WITNESS: YES.

HIS LORDSHIP: BECAUSE WHY NOT 22? WHY 19

AND...

THE WITNESS: TWENTY-TWO WAS MINE, IT WASN'T...

HIS LORDSHIP: I AM JUST SAYING. WHAT I WANT TO FIND OUT, ARE YOU SAYING THAT THE INVESTMENT DID NOT

WORK OUT, SO THE VALUE OF IT CAME DOWN TO 38? THAT'S WHAT I AM TRYING TO FIND OUT.

THE WITNESS: I WILL HAVE TO GO BACK --

NO, BECAUSE THAT IS WHAT WE GOT BACK. THAT'S WHAT I GOT BACK AND THAT WAS GIVEN TO WILLIAM.

HIS LORDSHIP: SO IN OTHER WORDS, WHAT --

SO HOW...

THE WITNESS: THERE WAS A DIFFERENCE.

HIS LORDSHIP: JUST A MOMENT. HOW DID YOU COME TO GET BACK THE 38, IS IT THAT MAYBERRY OWED YOU 6 MILLION OR IS IT -- LISTEN CAREFULLY NOW, THAT THE VALUE OF THE INVESTMENT WENT DOWN TO 38, SO WHEN IT WAS EVENTUALLY SOLD, YOU WERE ONLY EXPECTED TO GET BACK 38, THAT'S WHAT I AM TRYING TO FIND OUT.

THE WITNESS: NO, IT WASN'T LIKE THAT, I AM TRYING TO REMEMBER EXACTLY WHAT IT WAS, BUT IT WASN'T.

HIS LORDSHIP: BECAUSE WHAT IS PUZZLING ME, I AM TRYING TO FIND AN EXPLANATION. IF 44 MILLION IS INVESTED...

MR. DUNKLEY: 42, SIR.

HIS LORDSHIP: FORTY-TWO AND YOU END UP WITH 38, I SUPPOSE THERE IS ONE OF TWO WAYS, USUALLY, FOR THAT. EITHER YOU SAID, OKAY, THIS INVESTMENT IS NOT GOING WELL, IT IS LOSING VALUE, SO LET ME MINIMIZE MY LOSSES AND GET OUT OF THIS AND AT THE TIME WHEN YOU SELL IT YOU ONLY GOT BACK 38 OUT OF THE 42, SO THE4 MILLION IS REALLY A LOSS ON THE INVESTMENT. YOU UNDERSTAND WHAT I AM SAYING?

THE WITNESS: I DO UNDERSTAND.

HIS LORDSHIP: SO WAS IT THAT KIND OF SITUATION?

THE WITNESS: NO, THAT WAS DIFFERENT, THAT WE PUT WILLIAM.

HIS LORDSHIP: SO WHERE IS THE 4 MILLION?

THE WITNESS: IT WAS PUT TO ANOTHER INVESTMENT.

HIS LORDSHIP: SO THAT 4 MILLION NOW WAS WHOSE? WAS IT WILLIAMS' OR YOURS?

THE WITNESS: HALF OF IT WOULD HAVE BEEN WILLIAMS' AND HALF MINE.

HIS LORDSHIP: OF THAT 4 MILLION?

THE WITNESS: YES, OR CAPSOL.

HIS LORDSHIP: OH, THAT IS WHAT YOU ARE SAYING?

THE WITNESS: YES.

HIS LORDSHIP: SO THIS 4 MILLION, THAT WAS AN ARRANGEMENT BETWEEN YOU AND WILLIAM TO DEAL WITH THE 4 MILLION IN THAT WAY?

THE WITNESS: SURE, YES, TO PUT IT TOWARDS -- WHEN I WAS GIVING IT IN, WE DECIDED TO PUT IT TOWARDS ANOTHER INVESTMENT TO TRY AND BRING BACK ANY LOSSES OR WHATEVER, THAT WAS MADE TO PUT IT BACK TO CAPSOL AFTER.

HIS LORDSHIP: THAT 4 MILLION?

THE WITNESS: THAT DIFFERENCE, YES.

HIS LORDSHIP: I SEE, AND THEN NOW, WHEN THE 38 CAME BACK NOW, AS FAR AS YOU WERE CONCERNED, ONLY 19, BECAUSE -- AND THE REASON WHY IT'S ONLY 19 OF THE 38 IS THAT OF THE $4,000,000, THAT'S THE DIFFERENCE BETWEEN THE 38 AND THE 42, $2,000,000 OUT OF THAT WAS YOURS?

THE WITNESS: YES, SIR.

HIS LORDSHIP: AND THE OTHER 19 WAS YOURS?

WITNESS: YES, SIR, WAS MINE.

HIS LORDSHIP: AND SO, THIS 19, 21, 22 MILLION, NOW -- LISTEN CAREFULLY NOW – THAT 19 TO 22 MILLION JAMAICAN DOLLARS, THAT SUM WAS INVESTED AGAIN, THAT IS YOUR PORTION NOW, OR YOU DON'T KNOW?

THE WITNESS: NO, I DON'T KNOW WHAT -- WILLIAM TOOK IT AND HE SAID 'I WAS PUTTING IT BACK TO TAKE CARE OF THE LOAN, OR THE INTEREST' OR CERTAINLY HE WOULD HAVE TAKEN MY PORTION FROM, FROM MARIETTA RIZZA. WHEN I AM GIVING BACK THE FUNDS AT THE TIME AND HE SAID THERE WAS SOMETHING ELSE THAT HE HAD, THAT WAS...

HIS LORDSHIP: BECAUSE I GATHER FROM WHAT YOU ARE SAYING, MR. DUNKLEY, THIS 19 TO 22 MILLION, THAT IS WHAT WENT TO CANE RIVER?

MR. DUNKLEY: CANE RIVER WENT TO -- IT WAS 22 MILLION, M'LORD.

[66] In this extract he also explained what became of the rest of the money from the Mayberry share sale. Thus the Cane River investment sum came out of the sale of the Mayberry shares.

[67] The evidence is that virtually simultaneously with the arrival of the J$24m cheque, an investment was made in Cane River Pictures Limited, via CPT, to the tune of J$22,001,995.00 (US$360,668.44). This came out of the internal account that had the J$24m. This left J$2,157,978.83 and when added to the other three cheques give us J$16,092,304.70 (US$259,858.27). This latter sum is the total left after the Cane River CPT is taken out of the Mayberry money.

[68] Mrs Ramsay has explained that in order to make the payment of J$42,000,000.00 to MIL, it had to seek sum funds from another institution to make up the shortfall. It is now known that the full purchase price was taken out of the Rizza's accounts. We now know that the Rizza' account was over debited

by the sum of US$101,024.36 because the wrong exchange rate was used by Cap Sol. The exchange rate should have been J$61.65 and not J$53.69 which was the rate used. This error has now been acknowledged by Cap Sol. Thus the US dollar that should have been taken out was US$681,265.20 and it should not have been US$782,289.56.

[69] The court now summarises what has happened so far in respect of the Mayberry/Cane River transactions. From the totality of the evidence the following is now beyond doubt:

(a) in February 2005 Mr Rizza was offered 9,590,000 share in Mayberry;

(b) the price was U$4.38 per share;

(c) a cheque dated February 23, 2005 in the sum of J$42,000,000.00 was drawn in favour of Mayberry and used to pay for the shares;

(d) the Rizza's account was held in United States of America currency which means that when the cheque was drawn in Jamaican currency and not US currency, a conversion was done;

(e) the conversion actually done resulted in the Rizza's account being depleted by US$782,289.56;

(f) the sum that should have been taken out was US$681,265.20;

(g) Cap Sol used an exchange rate of J$53.69:US$1.00 when it should have used US$61.65:US$1.00;

(h) all the money for the purchase came from the Rizzas;

(i) Mr Massias did not contribute to the acquisition of the shares;

(j) Mr Rizza began selling the shares in February;

(k) cheques drawn by Mayberry with Mr Rizza as the payee were endorsed over to Cap Sol and deposited in Cap Sol's accounts during the period February 2005 to August 2005;

(l) three cheques totalling J$13,934,326.17 were lodged to account number 01037301-45 which was an internal account in Cap Sol opened by Mr Massias on which he was the sole account holder. These cheques were paid in between February 23, 2005 and August 17, 2005;

(m) a cheque for J$24,159,973.83 was received on April 21, 2005 in Cap Sol's account 010362101-45, the second Cap Sol account in the name of Mr Massias alone.

(n) the money for the Cane River investment was taken out of the J$24,159,973.83 on the same day it arrived in Cap Sol's accounts;

(o) the Cane River investment was stated to be J$22,001,995.00 (US$360,668.44);

(p) when the Mayberry and Cane River transaction were completed there was J$16,112,305.53 (US$259,858.27) that was not used to do anything which is to be accounted for.

[70] The court will pause the narrative of the Mayberry/Cane River transactions and turn to the sum said by Cap Sol to be the total sum is had on its books, excluding the Cane River CPT. It is common ground that the principal sum representing the total 'on-book' investments was US$1,370,984.07 and this was for the period 2000 – 2003. The sum was divided between repurchase agreements ('Repos') and commercial paper transactions ('CPTs).

[71] Cap Sol placed before the court the affidavit of a Mrs Venetia Scott dated February 23, 2010, who was the Vice President of Strategic Planning. Her affidavit has several tables. Table 1 of Mrs Scott's affidavit indicates that Repos

totalled US$1,139,827.43 and CPTs totalled US$231,156.64 the sum of which gives the principal of US$1,370,984.07. Mrs Scott's affidavit has five tables. In December of 2004, US$250,000.00 was taken out of the principal and this would leave US$1,120,984.07. This was the sum in the 'on-book' account as at February 2005 when Mr Rizza purchased the Mayberry shares.

[72] It is common ground that interest was being paid to the Rizza's over the period and there is no claim for accrued interest. The claim is for the principal.

[73] There was a suggestion by Cap Sol that at the time of the Mayberry transaction the Rizza's had no money in their 'on-book' accounts. Mrs Ramsay testified that Cap Sol took a loan to make up the purchase price of the shares. However, the evidence is that sufficient funds were in the Rizza's 'on-book' port folio to cover this transaction.

[74] This means that the court does not accept Mrs Scott's statement that at the end of the Mayberry transaction the Rizzas were indebted to Cap Sol. Mrs Scott's statement is predicated on the premise that the Rizzas did not have sufficient funds available in the 'on-book' transactions to make the purchase.

[75] Based upon Mrs Scott's affidavit and adjusting for the erroneous exchange rate this should have been the position with the Rizza's 'on-book' investments.

(a) The total under management as of 2003 was US$1,370,984.07;

(b) In December 2004, US$250,000.00 was removed by Mr Rizza and is not part of this claim;

(c) In February 2005 before the Mayberry transaction the sum would be US$1,120,984.07;

(d) Using the correct exchange rate the sum that should have been taken out was US$681,265.20;

(e) The sum left would be US$439,718.87. This is why the court says that Cap Sol's suggestion that at the time of the Mayberry share purchase, the Rizza's had no money in the account is incorrect;

(f) The Mayberry shares are sold and the total amount that came back between February 2005 and August 2005 was US$620,546.71;

(g) The total sum under management should now be US$1,060,265.58;

(h) This amount has to be adjusted for the Cane River CPT of US$360,668.44;

(i) This means that as of August 2005 the total 'on-book' investment in Cap Sol by the Rizzas was US$699,597.14;

The payouts

[76] At heart of the defence to this claim for US$360,882.63 is the assertion that over time various sums were paid out to the Rizzas – to mother, to son and to a Mr Giovanni Rizza – which eventually exhausted the entire 'on-book' port folio of US$1,370,984.07.

[77] The court now examines the evidence to see if Cap Sol has made good its defence. Several tables were produced by the defendant and put to Mr Rizza. The will refer to the tables and exhibits where necessary.

[78] Mrs Ramsay begins in 2003 and shows US$1,370,984.07 under management by Cap Sol regarding the 'on-book' investments. Exhibit 4 shows the sum total of what Table 1 of Mrs Scott's affidavit has as US$1,139,827.43 (Repos) and US$231,156.64 (CPTs). Exhibit 4 next shows the payment out of US$250,000.00. Mrs Ramsay's exhibit 4 has the date as February 1, 2005 whereas Mrs Scott's Table 3 shows it as December 2004. We know that it is the same sum and not a double count because the arithmetic of Mrs Ramsay shows the total balance as US$1,120,984.07 as of February 2005 which is correct.

[79] The next known deduction is amount used to purchase the Mayberry shares (US$681,263.21). She has the correct amount and not the error in Table 5 of Mrs Scott's affidavit. The deduction of US$681,265.21 from the total balance leaves US$439,718.86.

[80] The court wishes to point out that exhibit 4 prepared by Mrs Ramsay does not record the sum coming back to Cap Sol because of the Mayberry share purchase and sale. On other words These figures do not include an incoming amount of J$38,094,299.70 (US$620,546.71). Needless to say exhibit 4 does not show that after the money was taken out of the Mayberry share sale and placed in Cane River CPT the amount J$16,112,305.53 (US$259,858.27) was left. The explanation for this from Mrs Ramsay was that this Mayberry share purchase and resale was a private transaction. But this begs the question, why then record Cane River CPT as an 'on-book' transaction when it was established by money coming from this alleged 'off-book' transaction involving the Mayberry shares? Also why take money from the 'on-book' portfolio to purchase the Mayberry shares but say that the transaction was 'off-book.' Cap Sol says that the money from the sale of the shares ended up on two internal accounts in which Mr Massias was the sole signatory and wants to use this to say this shows that this was an 'off-book' transaction but in the same breadth treat the establishment of the Cane River CPT with funds from one of these accounts as an 'on-book' transaction.

[81] Mrs Ramsay's next figure in exhibit 4 shows the Cane River CPT of US$360,668.44. As noted, she does not show that J$38,094,299.70 (US$620,546.71) came back into Cap Sol but she records the Cane River CPT as a deduction. This is the evidence.

> *Q. Could you read paragraph 7?*
>
> *A. Paragraph 7 says: "The First Defendant's research has identified the following: Three cheques totalling Jamaican dollar 13,954,326" --*

HIS LORDSHIP: 13 million.

A. I am sorry. "13,954,326.17 posted to the said..." in quotation..."William Massias Mayberry Profits Account, over the period February 23, 2005 and August 17, 2005. And item B speaks to a cheque of Jamaican dollar 24,159,973.83 received on April 21st 2005 posted to Account No. 010362101-45 also in the name of the second defendant."

Q. Why do those items not appear in your table which you now produced today?

MR. DUNKLEY: My Lord, that's not a proper question.

HIS LORDSHIP: Hold on.

MR. DUNKLEY: That is not a proper --

HIS LORDSHIP: Hold on. Yes. So Queen's counsel is asking you if these sums here, are they accounted for in your document here?

THE WITNESS: I have here captured by whether the instructions from Mr. Massias or Mr. Rizza to take it from specific accounts.

HIS LORDSHIP: No, what he is saying is that it is a payment in -- what Queen's counsel is asking you is -- well, firstly, in respect of what is stated at paragraph 7, would you accept that those are payments in to whatever account that Mr. Rizza will have?

THE WITNESS: No, sir. Those payments we addressed are read as put into an account with William Massias Mayberry Profits and William Massias Special Account.

HIS LORDSHIP: So these cheques here at paragraph 7, are they accommodated in this?

THE WITNESS: There are some cheques here that Mr. Massias instructed us to take from his account, William Massias Mayberry Profit, and make it payable to the payee, to Roberto Rizza.

HIS LORDSHIP: No, that's not the question. These cheques here, are they accommodated here?

THE WITNESS: No, sir.

HIS LORDSHIP: And so the question that Queen's counsel is asking you, if it's not accommodated in this table that you produced this morning, why is that so?

THE WITNESS: Those items are credited to Mr. Massias, that is how I approached it. I am capturing here Mr. Rizza's Repos and CPTs, the owner on that account is Mr. Massias. In circumstances here Mr. Massias asked us to debit his account, of which item seven is referring to, and make it payable to Mr. Rizza.

HIS LORDSHIP: Say that again.

THE WITNESS: We are capturing here payments paid out to the Rizzas.

HIS LORDSHIP: That is in this table?

THE WITNESS: That is in this table.

HIS LORDSHIP: Payments out?

THE WITNESS: Yes, sir.

HIS LORDSHIP: So what Queen's counsel is asking you about now, what about payments in? How would you accommodate payments in, in all of this?

THE WITNESS: Because all I have done here is to speak to the figure that was accepted in these proceedings of a total of 1,370,984.07, plus when we were told that there is another investment of 360,688.44. Those are the two credits that I would say that I add to the benefit of Mr. Rizza. Of these two amounts on our custody, we are deducting items he requested and reducing that balance.

[82] What she did after that was to divide the sum into to two parts. The Repos were said to be US$439,718.87 and Cane River CPT US$360,688.44. This figure of US$439,718.86 was the balance left after the Mayberry shares were purchase. To keep track of this recall that the ‘on-book’ amount is US$1,370,984.07. In December 2004, US$250,000.00 is deducted leaving US$1,120,984.07. The next

sum out is the Mayberry share purchase. The correct figure is now agreed at US$681,265.20.

[83] According to Cap Sol as of April 2005 there were Repos of US$439,718.87 and Cane River CPT of US$360,688.44. Again, these figures do not include the J$16,092,304.70 (US$259,858.27) which is the balance of the Mayberry money after the Cane River CPT is established.

[84] Table 3 of Mrs Scott's affidavit shows that a total of US$809,591.92 was deducted between December 2004 and September 2009. However, to avoid double deduction, the sum of US$250,000.00 which was taken out in December 2004 is already accounted for in the court's calculation. Thus the total deduction of US$809,591.92 must be reduced by US$250,000.00. To repeat, Mr Rizza is not complaining about lack of receipt of interest on either the Repos or the Cane River, The case is about accounting for the principal.

[85] The court should point out that Mr Rizza by his pleaded case has accepted that US$809,591.92 was deducted between December 2004 and September 2009 because the pleaded figure of US$561,382.15 in paragraph 17 of the further amended particulars of claim can only be derived by subtracting US$809,591.92 from US$1,370,984.07. The pleaded figure is out by US$10.00 while Mrs Scott's Table 5 has US$561,392.15 but there is no doubt that both sides have the same figure in mind. This US$561,382.15 is the figure Mr Rizza says was the 'on-book' balance as of September 2009.

[86] If US$250,000.00 is subtracted from US$809,591.92, the sum left is what was paid out to the Rizzas between November 2005 and September 2009, according to Table 3 of Mrs Scott's affidavit. This sum would be US$559,591.92.

[87] The sheer arithmetic tells us that if US$559,591.92 were paid out over the period identified, then they must be paid against some source of funds which would permit Cap Sol to be paying out this sum. Excluding the balance of the Mayberry transactions and excluding the 'off-book' amounts the only source of funds would

be either the Repo and the Cane River CPT. From this stand point, this means that the payouts were against the Repo alone then that figure would exhausted since obviously US$559,591.92 is greater than the Repo of US$439,718.86. The same would apply if the payouts were made against the Cane River CPT. If the payouts were against the Repo alone, the payouts would leave a negative US$119,873,05. Even this negative amount would still have to be against a source of funds which at this point would be the Cane River CPT. If this were done then the Repo would have been exhausted and the sum left in the Cane River CPT would beat US$240,795.39.

[88] If the payouts of US$559,591.92 were done against Cane River alone there would be negative US$198,903.48 which would have to come out of the Repo which would mean an exhausted Cane River CPT and a Repo amount reduced to US$240,815.39.

[89] At this point the task is to see whether Cap Sol has proved that if repaid to Mr Rizza or his mother US$241,000.00 which is the approximate amount if either balance is rounded up. This will be the balance used for the rest of the analysis of the evidence.

[90] It is agreed that Mr Rizza received an additional sum of US$35,001.89 arising from a summary judgment granted by Frank Williams J (Ag) (now Justice of Appeal). This leaves US$205,998.11.

[91] This is now an important part of the case. The court has reread this aspect of the cross examination of Mr Rizza several times and the court will eventually set out the relevant part of the evidence and then indicate its position. Cap Sol is saying that it paid Mr Rizza an additional US$118,922.62. Mr Rizza accepts that he received US$34,696.04. Mr Dunkley had pressed the court to say that he received the entire amount a repayment of principal and not part principal (US$34,696.04) and part interest (US$84,226.58). According to Cap Sol's case this US$34,696.04 is part of a larger additional payment of US$118,922.62. The difference between the two is US$84,226.58. Mr Rizza acknowledged that he

received the US$84,226.58 but he claims that it was interest and not principal. The reason he advances for this is that the there was a constant figure of US$9,900.00 being paid. He did agree however that this figure of US$9,900.00 was to avoid scrutiny from the United States authorities.

[92] This is the relevant part of the cross examination.

> *Q. OKAY, FINE. SO I AM FIRSTLY SUGGESTING TO YOU THAT THOSE MONEYS YOU RECEIVED -- YOU GOT THEM, THAT'S THE ONLY THING. I AM NOT GOING TO SAY FROM CAPSOL OR FROM MR. MASSIAS BUT YOU GOT THEM?*
>
> *A. THAT'S WHAT YOU ARE SAYING?*
>
> *Q. YES, I AM ASKING YOU TO AGREE THAT YOU GOT IT.*
>
> *A. MOST OF THEM I RECOGNIZE, SOME OF THEM I DON'T*
>
> *SO I CAN'T SAY YES, BUT I CAN SAY PARTIALLY OF SOME OF THE FIGURES I SEE, I UNDERSTAND, SO OTHERS, I DON'T HAVE RECORDS TO SAY YES. THAT'S ABOUT IT.*
>
> *HIS LORDSHIP: SO WHAT ABOUT THE 9,900?*
>
> *THE WITNESS: YES, I AGREE WITH ALL OF THOSE.*
>
> *HIS LORDSHIP: ALL OF THE 9,900S?*
>
> *THE WITNESS: I DO, YES, I AGREE WITH THOSE BUT, THE SMALL FIGURES, I NEED TO SEE. THE 1400, 2400...*
>
> *Q. THAT'S GOOD ENOUGH FOR ME. SO MR. RIZZA, WILL YOU AGREE WITH ME THAT THE ONLY THING LEFT TO DO NOW, IS TO WORK OUT WHICH OF THESE FIGURES IN THE GREEN COLUMN, CAPITAL SOLUTIONS SHOULD GET THE*

CREDIT FOR, ROUGHLY 84,000 BECAUSE YOUR LAWYER HAS ADMITTED ON WEDNESDAY. DO YOU UNDERSTAND THE QUESTION, SIR?

A. YOU ARE SAYING THAT YOU SHOULD GET CREDIT?

Q. NO, LOOK THIS WAY, SIR. I AM ASKING YOU...

A. UM-HMM.

Q. ...TO AGREE WITH ME, AND MAYBE I WILL PUT IT ANOTHER WAY. I AM ASKING YOU TO THINK ABOUT IT AND THEN YOU AGREE WITH ME, THAT SEEING AS THESE ARE NEW, SO THEY DON'T FALL IN THE TABLES THAT YOU PREVIOUSLY AGREED TO. THESE ARE NEW AND YOU RECOGNIZE FOR THE PURPOSES OF THE QUESTION, ALL OF THEM AS HAVING COME TO YOU OR YOUR MOTHER, THAT THE DISPUTE BETWEEN THE PARTIES IS HOW MUCH OF THIS 118, CAPITAL SOLUTIONS CAN CLAIM THE CREDIT FOR IT, THAT THEY PAID DOWN TO CANE RIVER AND HOW MUCH WAS SOMEBODY ELSE GIVING YOU MONEY THROUGH THEIR FINANCIAL SERVICES. PUT SIMPLY, ACCORDING TO 24 YOUR LAWYERS ON WEDNESDAY, YOU RECOGNIZE 34,000, SO THEREFORE 84,000 WAS VERY MUCH SENT TO YOU FROM CAPSOL BUT NOT FROM THE FUNDS OF CAPSOL BUT FROM ANOTHER SOURCE OF MONEYS. DO YOU AGREE WITH THAT?

A. NO.

[93] The court will delay its analysis of this part of the evidence until it deals with another part of the evidence which was similar in nature with the only difference being the sum involved. At the eleventh hour, Mrs Ramsay found yet additional payments made to Mr Rizza totalling US$113,028.88. Cap Sol adopted a curious

approach to this issue. It said that while it was not claiming these as its repayment, the fact is, Cap Sol said, Mr Rizza got them and thus exhaust all sum owed to Mr Rizza including the J$16,112,305.53 (US$259,858.27), the balance from the Mayberry share sale. If Cap Sol is not claiming that these payments were part of its repayment to Mr Rizza why should the court recognise them as part of payment Cap Sol is making to Mr Rizza? The source of the payments is not known. In this age of proceeds of crime legislation and terrorism financing it is indeed quite extraordinary that a licenced financial institution can say that it made a payment but was actually doing so as a conduit for some unidentified third party.

[94] The court declines to recognise these alleged additional payments and they will not form part of the court's computation of repayment of the principal sum to Mr Rizza. Cap Sol is saying that it is functioning like a courier who has no property in the money except in so far as the courier can maintain an action for trespass or against a thief if he is robbed but the courier has not legal or equitable title in the money. This is how the court understands Cap Sol's position. Cap Sol is saying that it has no property rights in the money paid over and was simply passing it on from an undisclosed party to Mr Rizza. In this state of affairs Cap Sol has not paid over money owing to Mr Rizza.

[95] In the normal course of things Anglo-Jamaica law recognises good title, until the contrary is proved, from the fact of possession. Anglo-Jamaican law has no concept of absolute title to chattels. What it knows is relative title and so if the court decides as between two claimants that one has a better title than the other, that is not a declaration that the winner of that context necessarily has a better title than a third claimant who may be able to show that he has a better title. This is the explanation for not questioning title when money is paid over: the person is possession is prima facie the legal and equitable owner. However, in this case, Cap Sol has disclaimed any legal or equitable title to the US$113,028.88 it claims to have handed over to Mr Rizza. If it has not legal or equitable title and is a mere

conduit or courier on what legal basis can it be claiming credit for the payment of US$113,028.88?

[96] If nothing else this last minute discovery of additional payments proves the point made earlier that it is indeed remarkable that a licenced financial institution is struggling to prove that it has repaid money to a client. Cap Sol has been making 'new discoveries' as the case has progressed. While the court accepts that Mr Rizza should have kept better records but surely there cannot be the same latitude for a licenced financial institution not being able to unearth all of its records in eight years of litigation. The Proceeds of Crimes Act Regulations requires licenced financial institutions to keep all records for at least six years from the date of the last transaction. This dispute arose well within that time period and it speaks volumes that Cap Sol has only produced some evidence of payouts during the cross examination of its sole witness.

[97] The reasons given for not accepting the US$113,028.88 applies equally to the non-recognition of the payment of US$118,922.62. To this court it is incomprehensible that a licenced financial institution faced with a significant claim for over US$300,000.00 dollars responds by saying that it paid out over US$200,000.00 but is not claiming that it paid out those funds from its own resources thereby giving Mr Rizza a safe title to the money and immune from any possible claim down the road from a third party who may wish to use constructive trust or unjust enrichment principles to lay a proprietary claim to the money in Mr Rizza's hands. Cap Sol is really saying that it is not giving any warranty of any kind that the money received by Mr Rizza cannot be claimed by a third party. As it presently stands this is the risk to which Mr Rizza is exposed because Cap Sol is not standing behind the payments and saying these are from its resources. Cap Sol is saying it is simply a conduit through which the money flowed. In this court's mind this is not proper accounting and despite the fact that Mr Rizza received these sums they are not really Cap Sol's money.

[98] The court should indicate that during the cross examination of Mr Rizza a Table 7 was presented and said to be a revised Table 4 (which was from Mrs Scott's affidavit). According to Cap Sol this Table 7 uses the Cane River CPT as the principal from which deductions are made. Table 7 shows existing payments as running from January 21, 2005 to November 1, 2008 and that gives a total of US$115,207.50. The additional payments of US$118,922.62 have been addressed and dealt with above. The court's understanding of the evidence is that this US$155,207.50 was already part of the larger figure of US$809,591.92 which was the total payout between December 2004 and September 2009. In other words, based on the court's calculation above this US$155,207.50 was already taken into account when the court deducted the US$809,591.92.

[99] There was cross examination about interest but the court understands this case to be about accounting for the principal sum since the interest was always paid and Mr Rizza has not asserted that any interest is owed to him. There is no evidence that the interest was added back to the principal thereby increasing the principal for the next round of calculation of interest.

[100] The conclusion then is that Cap Sol has not accounted for US$205,998.11 of the 'on-book' investments and neither has it accounted for the J$16,112,305.53 (US$259,858.27). This latter figure did not form part of the claim but the evidence in the case is that this sum is still outstanding.

The delay

[101] The court apologises to the parties for the long delay in completing this matter. This is regretted. The delay occurred because the final portion of the transcript was not delivered until June 2016. After the transcript was received the exhibit bundles were mislaid.

Findings

[102] The court is satisfied on a balance or probabilities of the following:

(1) in respect of the claim for US$570,962.52:

(a) Mr Massias at some point during the material time was President and CEO of Cap Sol and in that capacity he ‘spoke’ for Cap Sol in that when he engaged in ‘off-book’ transactions while holding these posts there was no distinction between Mr Massias a private citizen and Cap Sol licenses under the Securities Act;

(b) if Mr Massias was not the directing mind of Cap Sol at the material time, his actions should be attribute to Cap Sol in respect of these transactions because he was in fact engaged in the line of business he and Cap Sol were licenced to do albeit, in some instances, in an ‘off-book’ manner;

(c) the court concludes that what Mr Massias was doing in respect of ‘off-book’ transactions did not raise any alarms in Cap Sol because it appears from email correspondence and Mrs Ramsay’s letter that dealing with matters ‘off-book’ was not unknown or even unusual;

(d) Mr Rizza was never informed by Cap Sol, officially or unofficially, that Mr Massias was not permitted to engage in ‘off-book’ transactions;

(e) Cap Sol represented that Mr Massias could engage in ‘off-book’ transactions by permitting Mr Massias to manage and conduct Cap Sol’s business in the way that he did;

(f) Mr Massias did represent to Mrs Rizza that he had over US$702,754.50 in ‘off-book’ transactions and this necessarily includes US$572,960.52 under management in ‘off-book’ transactions;

(g) the court concludes that because the US$572,960.52 were ‘off-book’ the documentation, that is to say, the promissory notes and the March 31, 2009, letter were drafted to give the impression that they were loans to Mr Massias but they were really ‘off-book’ transactions;

(h) It is no defence for Cap Sol to say that this transaction was purely private and therefore a matter between Mr Rizza and Mr Massias because it was not;

(i) Mr Rizza, through his attorneys at law, say that the sum claimed should be reduced by US$168,860.11 in order to avoid double recovery. This leaves US$404,100.41;

(j) Cap Sol has not accounted for US$404,100.41 and is therefore liable to pay the same with the appropriate level of interest to be determined when further submissions are made;

(2) in respect of the US$360,882.63:

(a) the claimant has proved that US$205,998.11 is outstanding.

(3) in respect of the US$27,623.43, this sum was not being pursued.

(4) interest is awarded under the Law Reform (Miscellaneous) Provisions Act at 6% from date of service of further amended claim to date of judgment.

(5) Costs to the claimants to be agreed or taxed. The two claimants are to be treated as if they were a single claimant and thus one sum awarded for both because there is no evidence that any legal work done was so unique and peculiar to either of them so as to require separate costs for each.

(6) Execution stayed for six weeks.