IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2018CD00432

BETWEEN	**BRILLIANT INVESTMENTS LIMITED**	**CLAIMANT**
AND	**JENNIFER MESSADO**	**1ST DEFENDANT**
AND	**JENNIFER BRAHAM**	**2ND DEFENDANT**
AND	**RORY CHINN**	**3RD DEFENDANT**

IN OPEN COURT

Mrs Georgia Gibson Henlin QC, Ms Zara Lewis and Ms Khadidya Hyman, instructed by Zara Lewis & Co, Attorneys-at-law for the Claimant

Ms Christina Excell Attorney-at-law for the 1st Defendant

Ms Monique McLeod instructed by Pierre Rogers & Associates, Attorneys-at-law for the 2nd Defendant

Mr Michael Hylton QC and Ms Shanique Scott instructed by Hylton Powell, Attorneys-at-law for the 3rd Defendant

Heard: 3rd, 4th, 5th, 6th, 21st June and 26th July 2019

Agency- Whether Attorney-at-law held out as agent of company

Contract – Nature of contract - Whether loan or contract for sale of land with option to purchase

Company law – Duty of care owed by nominee director

Real Property- Whether purchaser who registered his legal interest had knowledge of fraud by agent of vendor

LAING, J

The Background

[1] The Claimant, Brilliant Investments Limited is a limited liability company incorporated on or about 7th June 2005 under the laws of Jamaica with its registered address at No.15 Norwood Avenue, Kingston 5 ("Brilliant").

[2] The 1st Defendant, Mrs Jennifer Messsado ("Mrs Messado") was an Attorney-at-law at the material time and she effected the incorporation of Brilliant pursuant to the instructions of her client Mr Paul Morrison ("Mr Morrison").

[3] The 2 Defendant Mrs Jennifer Braham ("Ms Braham") was at all material times an employee of the firm of Jennifer Messado & Co a law firm of which Mrs Messado was a Partner. Mrs Braham had been employed to that firm for approximately 40 years in different capacities, but at the time of incorporation of Brilliant she was Mrs Messados' Personal Assistant.

[4] Mr Rory Chinn, ("Mr Chinn") is a businessman who was known to Mrs Messado and who had business dealing with her prior to the transactions which are the subject of this claim.

[5] Mr Morrision and Mrs Messado agreed that it would be a good idea to appoint Ms Braham as the sole Director of Brilliant and also as the sole shareholder, with her holding the only issued share. Mrs Messado requested Ms Braham to so act. It was understood by all the parties, including Ms Braham, that she would be acting in both capacities as the nominee of Mr Morrison. Further to Mr Morrison's instructions an additional three shares were issued on 1st July 2016 which were also held by Ms Braham who on that day, executed a declaration of trust confirming that she held all the four shares in Brilliant on trust for Mr Morrison.

[6] Ms Merlita Ellis who was also an employee of Jennifer Messado & Co was appointed as the Secretary of Brilliant at the time of its incorporation but on the instruction of Mr Morrison, she was replaced by his daughter Chanel Morrison

when she was also appointed a director and the Company Secretary on or about 1st July 2016.

[7] On or about the 20th December 2005, Mr Morrison instructed Mrs Messado to represent Brilliant in its purchase of all that parcel of land part of number one hundred and thirty-seven Constant Spring Road now known as number five Grove Park Avenue in the parish of Saint Andrew registered at Volume 1296 Folio 973 , Strata Lot 11, 5 Grove park Avenue (the "Grove Park Property"). A deposit and further payment was made and the Grove Park Property was transferred to Brilliant on the 17th January 2008 in consideration of the sum of Seven Million Five Hundred Thousand Dollars ($7,500,000.00).

[8] In or about October, 2007 Mr Morrison instructed Mrs Messado to represent the 1st Claimant in its purchase properties comprised in Certificates of Titles registered at Volume 1401 Folio 931 Strata Lot 8, Forest Hills, Apartment 23 ("Leas Flats Lot 8") and Volume 1401 Folio 936, Strata Lot 13, Apartment 30 ("Leas Flats Lot 13").

[9] Mrs Messado and Mr Chinn entered into a business transaction, the precise nature of which is an issue which falls for determination in this claim. As a part of that transaction Mrs Messado instructed Ms Braham the director of Brilliant, to execute transfers of land in respect of the Grove Park Property, Leas Flats Lot 8 and Leas Flats Lot 13.Property at Volume 1051 Folio 48 for land part of Bengal St Ann ("the Bengal Property") was also initially included which was in the names of Brilliant and Allan Davis. These executed transfers were provided to Mr Chinn through his Attorney and were used to effect the registration of Mr Chinn as the proprietor of the Grove Park Property and Leas Flats Lot 8 (the "Relevant Properties") on 16th May 2018. It is these transfers which provide the genesis of the Claim.

The Claim

[10] Brilliant and Mr Morrison as first and second Claimants respectively, filed a claim on 18th July 2018 against Mrs Messado, Ms Braham and Mr Rory Chinn seeking a number of declarations and orders in respect of the Properties. Brilliant also

claimed reliefs on a number of heads of claim including fraudulent conversion and breach of trust as it related to Mrs Morrison and Ms Braham, in the case of Mrs Messado only, an additional claim for breach of contract was included.

[11] The essence of the Claim was that the execution of the transfers in respect of the Relevant Property were not authorised by Mr Morrison the beneficial owner of the shares in Brilliant and were fraudulent.

[12] At the date of filing of the claim, it was evident that neither Mr Morrison as the beneficial owner of the shares in Brilliant, nor his daughter and Director Chanel Morrison were aware of the precise sequence of events which led to the Relevant Properties having been registered in the name of Mr Chinn.

Mr Chinn's Summary Judgment Application

[13] On 2 August 2018, Mr Chinn applied for summary judgment on the claim. The application was grounded on what Mr Chinn asserted was a lack of sufficient pleading by the Claimants of facts capable of constituting fraud for purposes of the Registration of Titles Act, which would be sufficient to affect his interest as registered proprietor of the Relevant Properties.

[14] On 15th August 2018, the Claimants filed an Amended Claim Form and Particulars of Claim, expanding the pleadings as they related to Mr Chinn, claiming, *inter alia*, declarations that Mrs Messado Ms Braham and Mr Chinn fraudulently converted and used the Certificates of Title in respect of the Relevant Properties, in breach of trust. The Amended Particulars of Claim also included detailed Particulars of Fraud of the 3rd Defendant Mr Chinn. On 20th September 2018, a Further Amended Claim Form was filed with additional changes which were not substantial.

[15] On 5th October 2018, Mrs Messado filed an affidavit in response to Mr Chinn's application for summary judgment in which she confirmed that the transactions between Mr Chinn and herself in respect of the properties were conducted without giving notice to Mr Morrison "*and in any event without his knowledge or consent*".

[16] On 19th October 2018, I heard and refused Mr Chinn's Application for Summary Judgment and made a number of case management orders geared at having the claim proceed to trial. The factual issues which arose for determination in this trial and the extensive analysis necessary to resolve them, in my opinion, demonstrate the correctness of the fulcrum on which I refused the application, which was that a summary judgment application was wholly inappropriate to resolve the claim against Mr Chinn one way or the other.

Mrs Messado's Defence

[17] On 26th October 2018, Mrs Messado filed her Defence, paragraphs 4 to 6 of which summarise her version of the nature of the agreement between herself and Mr Chinn as follows:

> *"4. In or around 2013, the 1st Defendant received sums from the 3rd defendant as a personal loan. In consideration thereof it was agreed between the 1st and 3rd Defendants that the Claimants' properties comprised in Certificates of Title registered at Volume 1296 Folio 973, Volume 1401 Folio 931 and Volume 1401 Folio 936 of the Register Book of Titles, respectively, would be transferred to the 3rd Defendant and would be registered to the 3rd defendant in the event of default of the loan; and that this was subject to options to purchase by the 1st Defendant*
>
> *5. In pursuance of the loan arrangement, agreements for sale of the said properties and instruments of transfer were executed on behalf of the 1st Claimant on the sole advice and/ or instruction and/or at the sole behest of the 1st Defendant and without reference to the loan.*
>
> *6. In further pursuance of the loan agreement, the 1st and 3rd Defendants entered into option agreements over the said properties. It was agreed between the 1st and 3rd Defendants that upon the loan repayments being made to the 3rd Defendant he would release the properties back to the 1st Defendant."*

[18] Mrs Messado further averred that following repayments, the duplicate Certificate of Title for the property registered at Volume 1401 Folio 936 was released by Mr Chinn to Brilliant early in 2018 and that the total payments to Mr Chinn by or around April 2018 amounted to US$322,000 and JM$17,600.00. Mrs Messado stated that despite the repayment of these sums, after her arrest on 11th May 2018 and before she was granted bail on 15th May 2018, Mr Chinn registered the transfers of the

Relevant Properties in breach of their agreement and without the knowledge and consent of Brilliant and Mr Morrison.

Brilliant's application for summary judgment and striking out

[19] By a notice of Application filed on 30th April 2019, Brilliant applied for summary judgment to be entered in its favour against the Defendants. Unfortunately, due to the Court's calendar the date fixed for the hearing of that application was 27th May 2019 shortly before the scheduled date for the commencement of the trial on 3rd June 2019. For reasons similar to those which made Mr Chinn's summary Judgment application unsuccessful, I found that the claim against Mr Chinn was not suitable for determination on a summary judgment application and that he had made no admissions in his pleadings or affidavit that would have justified judgment being entered against him. I also found that having regard to Ms Braham's defence and her explanation for having executed the documents which led to the Relevant Properties being lost, that the claim against her ought properly to have been resolved in a trial with cross examination.

[20] As it relates to the application for striking out, I did not accept the submissions of Mrs Gibson Henlin Q.C. that the non-compliance of Mr Chinn and Ms Braham with the orders of the Court were so egregious that the Court should strike out their statements of case. In all the circumstances and applying the overriding objective to deal with the case justly, I concluded that the claims should proceed to trial against each of them.

[21] As far as the case against Mrs Messado was concerned, it was clear that the admissions in her Defence and affidavits were sufficient to support summary judgment being entered against her on the claim without the need for resolution of any disputed facts. Accordingly, judgment was entered against her for damages to be assessed.

[22] An application for separate trials of the issues of liability and quantum was filed on 30th May 2019 by Brilliant and I made that order because Counsel explained that

Brilliant would not have been in a position to produce evidence relevant to the assessment at the time of the trial, and I concluded that there would have been no prejudice to the Defendants by the adoption of such a course.

Brilliant's application to call Mrs Messado as a witness on its behalf

[23] On 30th May 2019, Brilliant also filed a Notice of Application to have a witness summons issued to Mrs Messado for her to attend the trial and to give evidence on Brilliant's behalf. The Application for the witness summons was not pursued because Mrs Messado was voluntarily present at the start of the trial and evidently was willing to give evidence on behalf of Brilliant without any need for compulsion. Mrs Gibson Henlin submitted that since the issue of her liability had been disposed of, there was no prejudice to Mrs Messado. Furthermore, the documents which Brilliant intended to admit into evidence through Mrs Messado were already disclosed or annexed to an affidavit filed along with a notice of intention to rely on them. Mrs Messado's witness statements were already a part of the parties' preparation. Consequently, Counsel argued that there would be no prejudice to the other parties because

[24] Mr Hylton Q.C., naturally objected to Brilliant's application to call Mrs Messado as a witness on its behalf. He conceded that there was no issue as to the competence of Mrs Messado as a witness. However, he argued that allowing Brilliant to proceed in this way would prejudice Mr Chinn, because, by way of example, if the circumstances had not been changed by the summary judgment and Mrs Messado was still before the Court, Mr Chinn would be at liberty to make a no case submission based on the evidence advanced by Brilliant on its behalf. The evidence of Mrs Messado would not at the point of the close of the Claimant's case be before the Court. Accordingly, it would not be open to Brilliant to respond to the no case submission by asking the Court to await Mrs Messado's evidence to be given in her defence on the ground that it could possibly bolster the case of Brilliant the Claimant. Mr Hylton argued that in the absence of an ancillary claim, Mr Chinn was only obliged to answer the case brought by Brilliant.

[25] Mr Hylton submitted that CPR 29.11 applied. That rule provides as follows:

> *"29.11 (1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.*
>
> *(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8."*

Learned Queen's Counsel argued that there was no good reason provided for not seeking relief from sanction and the Court should refuse permission especially having regard to Brilliant's pattern of non-compliance with the various rules and orders.

[26] Mr Hylton further submitted that if Brilliant had intended to use the evidence of Mrs Messado then it should have taken steps earlier to call her on its case especially since it appeared from the pleadings that she would be a favourable witness to Brilliant and the summary judgment did not change the situation as much it might have appeared at first blush.

[27] I accepted the submission of Mrs Gibson Henlin that rule 29.11 relates to the ordinary situation of a party and the serving of its witness statements in the ordinary course of litigation. I agreed that it did not contemplate the fact situation with which the Court was faced and was inapplicable. In my view this was so because Mrs Messado only became an "*intended witness*" of Brilliant (in the sense contemplated by CPR 29.11) on 29th May 2019 after its successful summary judgment application. I also accepted that notwithstanding the favourable nature of Mrs Messado's pleading and her witness statement it was not unreasonable of Brilliant as a part of its litigation strategy to decide not to call Mrs Messado as a part of its case until after the issue of liability had been conclusively decided by the summary judgment against her. The lateness of the hearing of the summary judgement application was not entirely the fault of Brilliant because of the state of the fixtures.

[28] I granted Brilliant's application to call Mrs Messado on its case, bearing in mind the fact that her two witness statements were already served and the contents would

have been familiar to the Defendants. However, on the other hand, I fully appreciated that the change of course in having Mrs Messado give evidence would have taken Ms Braham and Mr Chinn by surprise since that was not the case they would have been prepared to meet. In view of that fact and in an effort to deal with the case justly I delayed the commencement of the taking of the witnesses evidence in order to allow the Defendants to take such further instructions and make appropriate adjustments to their planned litigation strategy as would have become necessary.

THE 2ND DEFENDANT'S DEFENCE AND SUBMISSIONS

[29] Ms Brahams's defence was that Mrs Messado was exercising or purporting to exercise the authority of the Attorney-at-Law of Brilliant and she was acting pursuant to the instructions of her client, Paul Morrison. Ms Braham argued that Mrs Messado had actual authority to give those instructions to her pursuant to the arrangements between Mrs Messado and Paul Morrison.

[30] Alternatively, it was submitted on behalf of Ms Braham that in any event Mrs Messado had apparent or ostensible authority to give instructions to her on behalf of Mr Morrison.

[31] Counsel representing Ms Braham relied on the case of **Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Limited and another** [1964] 2 QB 480 and Lord Diplock's explanation of the principle of ostensible authority as follows at page 503:

> *"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." (Emphasis supplied).*

Breach of Trust

[32] It was submitted on behalf of Ms Braham that the standard of care required of trustee was discussed by Forte P, in **Crawford and Others v Financial Institutions Services Ltd** (unreported), Court of Appeal, Jamaica, supreme Court Civil Appeal No 64 and 88/1999, Judgment delivered 31 July 2001) where at page 38 of his judgment he stated as follows:

> *"…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."*

It was also submitted on behalf of Ms Braham that she was a lay person with no legal understanding and possessed no special knowledge or experience which would have assisted her in relying on the instructions she received. Furthermore, that the established course of conduct between the parties created circumstances which would allow her to believe that Mrs Messado was authorized to provide her with instructions to exercise her powers on behalf of Brilliant and to cause her to believe that the instructions were given in accordance with the best interest of Brilliant.

[33] It was further submitted that having regard to the general relaxed nature in which Brilliant's business was conducted and the admission by Brilliant that Mrs Messado was indeed its Attorney-at-Law, Ms Braham exercised the requisite duty of care in executing the relevant documents as Brilliant's director.

The duty of care owed by a nominee director

[34] It is important to note at the outset that a claim has not been made against Ms Braham for breach of fiduciary duty. However, it will be demonstrated that an analysis of her conduct in the context of the duty of care she owed to Brilliant as its director is not without any value nor is it purely an academic exercise. It will assist in serving as a backdrop and a barometer against which an assessment of whether Ms Braham committed a breach of trust can be properly made. Hopefully, it will also serve to offer guidance on this area of the law relating to nominees especially having regard to the somewhat unusual facts of this case.

[35] The Privy Council case of **Central Bank of Ecuador and others v Conticorp SA and others** [2016] 1 BCLC 26 is in my view instructive in analysing whether Ms Braham breached her duty of care to Brilliant, particularly because it involved a nominee director and for that reason I feel constrained to examine it in greater detail than I ordinarily would have been inclined to do. In that case, IAMF was established on 21 April 1995 in the Commonwealth of the Bahamas as a mutual fund to attract deposits from Ecuadorian Investors. Its managing shares were at all material times held in the name of Ark Ltd, a nominee company of Ansbacher, the Bahamian branch of an international merchant bank. The Privy Council in its judgment referred to Ark and Ansbacher as "Ansbacher" and I will adopt that usage. The sole director and nominated investment adviser of IAMF was Mr Michael Taylor, a Bahamian Accountant. Mr Taylor acted on the instructions of Ansbacher and on the instructions of the Ortega family respondents. Ansbacher was paid an annual fee of US$50,000 and annual expenses of about the same amount. Mr Taylor on the other hand was paid 2,500 Bahamian dollars a year for his services.

[36] Mr Taylor, as sole director of IAMF, caused it to enter into three transactions pursuant to which it surrendered the bulk of its cash, loan portfolios and shares valued at approximately US$192 million to Conticorp, in exchange for assets the

value of which was not commensurate to the assigned value of the assets IAMF had surrendered and in fact were later found to be nearly valueless.

[37] At paragraph 25 of the Judgment the Privy Council reviewed, with approval, the analysis of the first instance judge as it relates to the liability of Mr Thomas as follows

> *"[25] …..On that basis, the judge examined Mr Taylor's duties as director. He assimilated them to those accepted in England: in short, a director must act bona fide in the best interests of the company; he must positively apply his mind to the question what the company's interests are; he must exercise independent judgment and not fetter his discretion; and a nominee director is in no different position. In the last connection, he cited Lord Denning's statement in* ***Boulting v Association of Cinematograph Television and Allied Technicians*** *[1963] 1 All ER 716 at 723, [1963] 2 QB 606 at 626–627, that there is nothing wrong with a director being nominated by a shareholder to represent his interests—*
>
> > *'so long as the director is left free to exercise his best judgment in the interests of the company which he serves. But if he is put on terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful …'*
>
> *He also cited Ungoed-Thomas J's conclusion in* ***Selangor United Rubber Estates Ltd v Cradock (No 3)*** *[1968] 2 All ER 1073 at 1092–1093, [1968] 1 WLR 1555 at 1577–1578 that a director 'who acts, without exercising any discretion, at the direction of a stranger to the company' is 'fixed with the stranger's knowledge of the nature of the transaction'."*

[38] The Privy Council at paragraph 31 also noted the learned first instance Judge's conclusions as to the remuneration of Mr Taylor and the fact that it was for all intents and purposes immaterial, as follows:

> *"[31] In paras [261]–[263], the judge described the three transactions, and in paras [264]–[267] he reached two significant conclusions. First, he had no doubt, on the authorities, that Mr Taylor was in breach of his statutory and fiduciary duty role in relation to the three transactions – it mattered not 'that his remuneration was $US2500 per annum and that he was a nominee director for many other IBCs as was the usual practice in the industry'. Second, Mr Taylor, called to give evidence at the plaintiffs' behest, had said that he had relied on Ansbacher, and in particular on a Mr Cole, in agreeing and signing the documents to give effect to the three transactions…"*

At paragraph 38 the Privy Council also noted the learned Judge's assessment of Mr Taylor's ability as follows:

> *"**[38]** In relation to the claim in deceit, the judge amplified his previous conclusions that Mr Taylor had acted as a mere functionary, relying entirely on Ansbacher and appearing to lack 'the information or resources necessary to carry out any serious analysis of the transactions', involving companies of which he was in charge but about the detailed operations of which he 'knew very little', and so that he was in the judge's view someone who 'could not know of the elements of the transactions which make it dishonest according to ordinary standards following the test in Barlow Clowes' (para [298])…"*

[39] The Privy Council analysed the difference in the conclusions arrived at by the Judge at first instance and the Bahamian Court of Appeal as to whether Mr Taylor was in breach of fiduciary duty and made the following observations at paragraphs 45 and 46:

> *"**[45]** The Board has the following observations on the judgments below. In relation to Mr Taylor, the judge and Court of Appeal took different views. The judge was, the Board considers, clearly correct in his view of the duty of a nominee director in The Bahamas, as summarised by the Board (in para [25] above), and in his conclusion that Mr Taylor was in breach of fiduciary duty (paras [25], [31] and [38] above). A nominee director is not entitled to forego, or surrender to another, any exercise of his discretion, however paltry the amount he may be paid. Under the International Business Companies Act, s 55, a director must 'act honestly and in good faith with a view to the best interests of the company', and must also 'exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances'. So far as appears, Mr Taylor did nothing presently material except comply with instructions (see paras [31] and [38] above), and the judge found that he lacked any information or resources to be able to do anything more (para [38] above).*
>
> ***[46]** The Court of Appeal's contrary conclusion, that Mr Taylor was not in breach of any fiduciary duty, was based on reasoning which the Board has summarised in para [41] above, but which is, in the Board's view, plainly unsupportable. First, Mr Taylor was in breach of duty in giving effect, blindly and ignorantly, to others' instructions, and this was so whether or not he was, in the event, fortunate enough to receive only instructions which were in IAMF's best interests. It was his duty to understand IAMF's affairs and to apply his own mind to IAMF's interests. Second, it is equally irrelevant to a conclusion that Mr Taylor was in breach of duty as director whether loss was caused thereby to IAMF. The existence of loss goes not to the question whether there was a breach of duty, but to whether it can lead to any relevant relief."*

[40] The essence of Ms Braham's defence to the Claim for breach of trust, is that having regard to her lack of experience and skill and the usual practice of instructions to her flowing from Mrs Messado her employer, she was justified in concluding that the instructions of Mrs Messado emanated from Mr Morrison and that she was therefore entitled to act on those instructions. However, this appears to be the same "*giving effect, blindly and ignorantly, to others' instructions*" which is criticised in **Central Bank of Equador** (supra) and which was found in that case not to amount to a good defence to the breach of duty claim.

Duties of a Director in Jamaica

[41] In Jamaica the duties of a director are set out in detail in section 174 of the Companies act as follows:

> *"174. - (1) Every director and officer of a company in exercising his powers and discharging his duties shall -*
>
> *(a) act honestly and in good faith with a view to the best interest of the company; and*
>
> *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.*
>
> *(2) A director or officer of a company shall not be in breach of his duty under this section if the director or officer exercised due care, diligence and skill in the performance of that duty or believed in the existence of facts that, if true, would render the director's or officer's conduct reasonably prudent.*
>
> *(3) For the purposes of this section, a director or officer shall be deemed to have acted with due care, diligence and skill where, in the absence of fraud or bad faith, the director or officer reasonably relied in good faith on documents relating to the company's affairs, including financial statements, reports of experts or on information presented by other directors or, where appropriate, other officers and professionals.*
>
> *(4) In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates.*

> *(5) The duties imposed by subsection (1) on the directors or officers of a company is owed to the company alone.*
>
> *(6) Where pursuant to a contract of service with a company, a director or officer is required to perform management functions, the terms of that contract may require the director or officer in the exercise of those functions, to observe a higher standard than that specified in subsection (1).”*

Are nominee directors subject to a different duty of care?

[42] The cases of **Boulting v Association of Cinematograph Television and Allied Technicians** (supra) and **Selangor United Rubber Estates Ltd v Cradock (No 3)** (supra) referred to by the first instance Judge in **Central Bank of Equador** (supra), demonstrate that nominee directors do not constitute a separate class of directors, accordingly, they owe the same duty of care to the company and are held to the same standard as other directors.

[43] The prohibition against the nominee director entering into an agreement with his principal which will fetter his future discretion is an extension of the principle that a director must act in the company’s best interest. Although section 174 (4) of the Companies Act allows the director to have regard to, *inter alia*, the interests of the companies’ shareholders (and presumably beneficial shareholders such as Mr Morrison) in determining what are the best interests of the company, there still has to be some consideration, it is not merely an artificial rubber stamping exercise. Therefore, even if the instructions to enter into the transaction with Mr Chinn had been received by Ms Braham directly from Mr Morrison as beneficial shareholder, she was still under a duty as Director to assess the transaction and to not blindly enter into it.

Was it permissible for Ms Braham to accept the instructions she received from Mrs Messado?

[44] The evidence of Ms Braham was that she received instructions from Mr Morrison directly, for example as it related to the payment of utility bills, taxes, maintenance matters and if he wanted her to pay someone for him. As it related to other

instructions, for example the purchasing of property these instructions came from Mrs Messado. This is totally understandable when the relationship between Ms Braham and Mrs Messado is placed in its real world practical context. Ms Braham was employed to Mrs Messado in various capacities since she was eighteen years old, that is, for over 40 years. Mrs Messado as an Attorney-at-law would have had considerable influence over Ms Braham who was at the material time her administrative assistant. It was also evident to me from her demeanour during the trial and the manner of her responses to questions in cross examination that Mrs Messado has a strong, assertive bordering on domineering, personality. Mrs Messado admitted during cross examination that she had control over most of Ms Braham's actions in the office and certainly as it relates to Brilliant. The relationship between Mrs Messado and Ms Braham is clearly reflected in the evidence of Ms Braham (which I accept), that (in respect of the documents relating to the Relevant Properties and the transaction with Mr Chinn) she simply signed documents presented to her.

[45] Mrs Messado was asked by Counsel during cross examination "who asked Ms Braham to sign on as a director of Brilliant?" and she said she was the one who did. I accept Mrs Messado's evidence on this point and although the question was asked and answered specifically in relation to the directorship, I infer from all the evidence that she was also the one who asked Ms Braham to become a nominee shareholder.

[46] It is noteworthy that there was no written agreement outlining the terms under which Ms Braham was to have performed her nominee director and nominee shareholder services. As a consequence, there is no document which evidences what was understood between the parties to be the obligations of Ms Braham in terms of the flow of her instructions or the need for confirmation when instructions came from Mrs Messado as opposed to when they were received from Mr Morrison directly.

[47] There is no evidence that Ms Braham was paid a "*paltry*" sum or any sum for these obligations which she was undertaking. In answer to a question from the Court, Mr Morrison admitted that he did not pay Ms Braham directly for these services. Mrs Messado's evidence was that she did not know of Ms Braham being paid for her services on behalf of Brilliant and only knew of Ms Braham's employment with her and her benefits.

[48] Ms Braham places heavy reliance on section 174 (2) of the Companies Act in that she asserts that she believed that Mrs Messado as the Attorney-at-law representing Brilliant was duly authorised to instruct her to sign the documents to enable Brilliant to enter into the transaction and that these facts (if true) would render her conduct reasonably prudent.

[49] By her own admission Mrs Messado has confirmed that she did not have any authority to enter into the transaction. However, for the purposes of this analysis, I will assume that she did in fact have such authority since this is what Ms Braham said she believed. It is implicit in a director's duties that in making decisions the director has to consider the nature of the transaction and nature of the decision which he or she is making. The nature of the transaction which Ms Braham caused Brilliant to enter into with Mr Chinn is at the heart of this case. Ms Braham's evidence is that Mrs Messado just said "*sign some documents*". It is clear from Ms Braham's evidence that she made no attempt to understand what the transaction was about, on even the most basic level. I do appreciate that having regard to her skill sets she may not have been able to understand the intricacies of the transaction but that is not an excuse not to make a reasonable enquiry. I therefore find that the issue of whether it was reasonable for Ms Braham to conclude that the instructions she received from Mrs Messado were from Mr Morrison or from Mrs Messado's as Brilliant's attorney does not affect the liability of Ms Braham in this case. Ms Braham was in either case under a duty as the sole Director to consider the transaction and could not wholly cede this obligation to Mrs Messado.

[50] I felt constrained to enquire of Ms Braham as to whether she was aware of the duties, responsibilities and/or obligations owed to a Company by its director and her response was that she never really studied it she just signed because they said “sign”. She also advised the Court that it was after everything “*broke out*” that she spoke to Ms Buddington, an Attorney-at-Law, who explained the details so that she could understand everything and that Ms Buddington also explained to her the legal effect of the documents that she had signed. Having regard to Ms Braham’s ignorance of the details of the transaction with Mr Chinn, it is not surprising that, quite sensibly, it has not been advanced on her behalf that in her capacity as sole nominee shareholder she was entitled to authorise Brilliant’s entry into the transaction which resulted in Mr Chinn becoming the Registered shareholder of the Properties.

[51] In **Central Bank of Equador** the Privy Council at paragraph 38 referred to the first instance Judge’s’ assessment that the nominee Mr Taylor had acted as a mere functionary, relying entirely on Ansbacher and appearing to lack '*the information or resources necessary to carry out any serious analysis of the transactions*', involving companies of which he was in charge but about the detailed operations of which he 'knew very little'. I do not think it would be unkind of me to say the same thing about Ms Braham as it relates to Brilliant. Ms Braham had no idea as to what her duties were as a director and this resulted in her acting as a mere functionary executing documents at the behest of Mrs Messado. Mrs Messado in turn acted as the “puppet master” (to borrow the Judge’s use of the phrase), skilfully pulling the strings. Ms Braham’s lack of ‘*the information or resources necessary to carry out any serious analysis of the transactions*’ deprived her of the ability to exercise her best judgment in the interests of the company. Accordingly, she became an easy pawn who was used by Mrs Messado in her scheme which resulted in Mr Chinn becoming the registered owner of the Relevant Properties, to the detriment of Brilliant.

[52] I find that Ms Braham unwittingly became caught up in Mrs Messado’s scheme in which the Relevant Properties of Brilliant were misused. However, the authorities

make it clear that that her lack of intention is not a defence to a claim for breach of duty of care in circumstances such as these. Ms Braham is the author of her own misfortune. She willingly consented to become a nominee director and nominee shareholder of Brilliant and it is not an adequate response for her as a director to say I did not know what I was doing, I was simply blindly following instructions of the Company's lawyer. Accordingly, on the facts of this case, Ms Braham would be guilty of a breach of fiduciary duty to Brilliant, however as previously indicated this was one of the heads of claim against her.

Breach of Trust

[53] It is not disputed that there was a trust relationship between Ms Braham and Mr Morrison in respect of the share in Brilliant which she held on his behalf. However, there is no need for the Court to determine whether there was a breach of this trust relationship because Mr Morrison in no longer a party making a claim. The issue is whether she breached her obligations of trust towards Brilliant.

The Relationship between breach of fiduciary duty and breach of trust

[54] In considering the issue of whether a director can be in breach of a trust it is necessary to give an overview of the relevant law. The case of **Imperial Hydropathic Hotel Company Blackpool v Hampson** (1882) 23 Ch.D 1 is a useful starting point where Bowen L.J, drew attention to the difference between directors and trustees. At page 12 His Lordship stated:

> *"I should wish in the first instance to begin by remarking this, that when persons who are directors of a company are from time to time spoken of by Judges as agents, trustees, or managing partners of the company, it is essential to recollect that such expressions are used not as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered - points of view at which they seem for the moment to be either cutting the circle or falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall pro tanto within the principles which govern that particular class."*

[55] Similar sentiments were echoed by Lord Porter in the judgment of **Regal (Hastings) Ltd v Gulliver and Others** [1967] 2 AC 134 at 159 as follows:

> *"Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon a breach of duty but upon the proposition that a director must not make a profit out of property acquired by reason of his relationship to the company if which he is a director."*

[56] In Palmer's Company Law 28th edition Volume 2 at paragraph 8.405 the learned author states:

> *" For most purposes it is sufficient to say that directors occupy a fiduciary position and all powers entrusted to them are only exercisable in this fiduciary capacity.*
>
> *As agents they stand in a fiduciary relationship to the company as principal. The fiduciary relationship imposes upon directors duties of loyalty and good faith, which are akin to those imposed upon trustees properly so called. As agents, directors are also under duties of care, diligence and skill, but these duties are very different from the duties to be cautious and not to take risks which are imposed upon many trustees proper."*

[57] What is clear from an examination of the authorities is that although it is widely accepted that directors are not trustees in the strictest of sense, they can nevertheless be held liable for a breach of trust. This is made clear in Halsbury's Laws of England/Companies (Volume 14 (2016) Liabilities of Directors/631 as follows;

> *Although the directors of a company are not properly speaking trustees, they have always been considered and treated as trustees of company money or property which comes into their hands or which is under their control. A director who has misapplied or retained or become liable or accountable for any money or property of the company is treated as having committed a breach of trust and must make good the money or property so misapplied and account for any gains made by him.*

Paragraph 579 of Halsbury's Laws of England (supra) provides that;

> *A company's directors are trustees of the property of the company that is in their hands or under their control but they are not trustees for individual shareholders or creditors of the company nor are they in the same position as trustees of a will or settlement. A director must account for all of the company's*

It is settled law that the powers to dispose of the company's property which is conferred on a director by the memorandum and articles of association must be exercised by the directors for the purposes and in the best interest of the Company. Fiduciary duties are owed to the Company in relation to the exercise of those powers and it is a generally accepted principle that directors who dispose of the Company's property in breach of these fiduciary duties are usually treated as a having committed a breach of trust. Authority for this proposition may be found in the case of **Belmont Finance Corporation v Williams Furniture Ltd and others (No 2)** - [1980] 1 All ER 393 at 405 in the judgment of Buckley LJ where he stated as follows:

> *"A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust (**Re Lands Allotment Co** ([1894] 1 Ch 616 at 631, 638, [1891–94] All ER Rep 1032 at 1034, 1038), per Lindley and Kay LJJ)."*

Conclusion in respect of the breach of trust claim

[58] In my analysis above I have demonstrated why Ms Braham committed a breach of fiduciary duty although she was a nominee director. I am of the opinion that in the circumstances of this case her conduct in facilitating the disposal of the Relevant Properties also amounts to a breach of trust. The authors of Bullen & Leake & Jacob's Precedents of Pleadings 14th Edition Volume 2 at 54-04 note as follows:

> *"Breaches of trust are of many different kinds. A breach of trust may be deliberate or inadvertent; it may consist of an actual misappropriation or misapplication of the trust property or merely of an investment or other dealing which is outside the trustee's powers: it may consist of a failure to carry out a positive obligation of the trustees or merely of a want of skill and care on their part in the management of the trust property; it may be injurious to the interests of the beneficiaries or be actually to their benefit. A deliberate breach of trust is not necessarily fraudulent: Armitage v Nurse [1998] Ch. 241."*

I am of the view that, notwithstanding the fact that I am assessing Ms Braham's conduct as a director and not as a trustee in the purest legal sense, her conduct,

which I have previously identified, amounts to a breach of trust notwithstanding the fact that I have not found that she acted fraudulently. Accordingly, I find that the Claimant has proved its claim against Ms Braham on a balance of probabilities as it relates to this head of claim.

THE CASE AGAINST MR CHINN

[59] The case against Mr Chinn is that by his dealings with Mrs Messado and Ms Braham, he fraudulently transferred or caused the Relevant Properties to be transferred to him. It is on the strength of these allegations that a number of consequential reliefs are sought. Both Queen's Counsel were agreed on the law relating to the application of fraud under the Torrens system and this is a convenient juncture at which to address those salient features.

Fraud under the Torrens System

[60] Mr Hylton further submitted that Mr Chinn's title to the Relevant Property may only be defeated by fraud subject to section 70 of the Registration of Titles Act ("RTA").

> *'70. Notwithstanding the existence in any other person of any estate or interest, whether derived 'by grant from favour of the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser…'.*

[61] Both Queen's Counsel are agreed that that "*fraud*" under the RTA is actual fraud. This requires some element of dishonesty and therefore constructive or equitable fraud will not suffice. This fraud can be inferred from the acts or conduct of a

defendant. The appropriate law is contained in the Privy Council case of **Assets Company Ltd v Mere Roihi & Others** [1905] AC 176 and in particular page 210 of the Judgment where Lord Lindley delivering the Judgment of the Court stated as follows:

> *"Passing now to the question of fraud, their Lordship are unable to agree with the Court of Appeal. Sects 46, 119, 129 and 130 of the Land Transfer Act, 1870, and the corresponding sections of the Act of 1885 (namely, ss. 55, 56, 189 and 190) appear to their Lordships to shew that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents, Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquires for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."*

[62] In **Harley Corporation Guarantee Investment Company Limited v Daley and others** [2010] JMCA Civ 46, the Court of Appeal considered the requirement of fraud in the context of RTA. Harris JA at paragraphs 51 and 52 provides the following analysis:

> *"51. As earlier indicated, sections 70 and 71 of the Registration of Titles Act, confer on a proprietor registration of an interest in land, an unassailable interest in that land which can only be set aside in circumstances of fraud. In **Fels v Knowles** (1906) 26 NZLR 604 the New Zealand Court of Appeal in construing statutory provisions which are similar to sections 70 and 71 said at page 620:*
>
> > *"The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he*

> *takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute." ("By statute" would be more correct.) "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered."*

[52] The true test of fraud within the context of the Act means actual fraud, dishonesty of some kind and not equitable or constructive fraud. This test has been laid down in ***Waimiha Sawmilling Company Limited v Waione Timber Company Limited*** *[1926] AC 101 by Salmon LJ, when at page 106 he said:*

> *"Now fraud clearly implies some act of dishonesty. Lord Lindley in* ***Assets Co. v. Mere Roihi*** *(2) states that: 'Fraud in these actions' (i.e., actions seeking to affect a registered title) 'means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."*

The test has been followed and approved in many cases including ***Stuart v Kingston*** *(1923) 32 CLR 309; and* ***Willocks v Wilson and Anor*** *(1993) 30 JLR 297."*

[63] These principles are settled and have been previously applied by this Court. I therefore do not think it is necessary to expound on them any further. At this stage what is required is an analysis of the evidence in the context of those principles. The Claimant has pleaded a number of particulars of fraud, some of which were not pursued. I will address those on which the Claimant relied.

Did Mr Chinn know of or participate in the fraud of Mrs Messado?

[64] The summary judgment against Mrs Messado was based on her statement of case and the admissions she made in her affidavits. Brilliant's case against Mr Chinn is that he was a party to the fraud committed by Mrs Messado. The Claimant's case rested in large measure on the evidence of Mrs Messado, because without this evidence it would not have been able to positively assert many of the facts on

which it relied, but would have been constrained to ask the Court to draw reasonable inferences from the limited facts it could have proved without her evidence.

The evidence of Mrs Messado

[65] Mrs Mesado's evidence was that in or around 2013 she was indebted to Mr Chinn in the sum of US$190,000.00 arising from a deposit he had paid on a property, the sale of which was not concluded. She wished to borrow an additional J$10,000,000.00 and said it was agreed between them that in consideration of the existing debt and the additional loan of $10 million: (1) a property registered at Volume 1051 Folio 48; (2) a property registered at Volume 1401 Folio 931: (3) a property registered at Volume 1401 Folio 936; and (4) a property at Volume 1051 Folio 48 all properties owned by Brilliant, would be registered and transferred to Mr Chinn in the event that she defaulted on payments of the loan. The property at Volume 1051 Folio 48 was removed from the transaction because it was discovered that there was a co-owner registered on the Certificate of Title together with Brilliant. It is clear from the evidence that a search of records relating to the properties ought to have revealed this co-ownership, however no explanation was given to the Court as to why it did not and the parties did not make this to be an issue of any major significance.

[66] It was rather curious that Mrs Messado gave no details of the terms of the agreement for the loan, that is to say, no evidence was given as to the duration of the loan, the amount or schedule of payments, the applicable interest rate or what constituted a default on this loan agreement. This is a point highlighted by Mr Hylton and is a matter to which I will return.

[67] Agreements for Sale were prepared in respect of each property by Ms Tracy Long, Attorney at law for Mr Chinn, and were executed on behalf of Brilliant and by Mr Chinn. Blank Instruments of Transfer were also executed on behalf of Brilliant in

respect of each of the properties. Mrs Messado and Mr Chinn also entered into option agreements in respect of the four properties.

[68] Mrs Messado stated that the essence of the Agreement with Mr Chinn was that of a loan therefore when she made the loan payments to him she could "repurchase" the properties and Mr Chinn would release the Properties to her. She said that Mr Chinn and herself worked together to achieve the loan payments and keep the payments current. Mrs Messado asserted that the loan agreement was extended and there were several revisions to the options agreements. Payments were made by Mrs Messado and in 2017 the duplicate Certificate of Title in respect of Volume 1401 Folio 936 – apartment 30 was returned to her.

[69] It is noteworthy that the agreements granting the options to purchase land were not between Brilliant and Mr Chinn but were between Jennifer Messado and Mr Chinn so the availability of the option cannot be properly characterised as an option for Brilliant to "*repurchase*" the properties.

[70] Mrs Messado's evidence was that by around April 2018 she had repaid Mr Chinn US$322,000.00 and J$17,600,000.00 and was surprised to discover that in May 2018 Mr Chinn had registered and transferred the Grove Apartment and Apt 23 Leas Flats to Himself without notice to her or without the knowledge and consent of Brilliant or Mr Morrison, in breach of their agreement

Mr Chinn's Defence

[71] Mr Chinn's evidence was that sometime in 2013 Mrs Messado approached him seeking financing and suggested that she could provide four properties registered in the name of Brilliant as collateral because she controlled and could speak for Brilliant.

[72] He indicated that he sought legal advice from his Attorney at law, Ms Tracey Long of the law firm Hart Muirhead Fatta and based on that advice he advised Mrs Messado that he would not be prepared to make a loan to her or to Brilliant but

would be prepared to purchase the properties and grant her an option to purchase them from him at an agreed price and within a fixed period.

[73] Mr Chinn averred that based on the legal advice he obtained and the representations made by Mrs Messado he entered into four separate agreements for sale in respect of the properties as follows, Volume 1401 Folio 936 for US$70,000; Volume 1051 Folio 48 for US$140,000; Volume 1296 Folio 973 for US$80,000; and Volume 1401 Folio 931 for US$70,000. At the time of entering into the Agreements for Sale with Brilliant he also entered into four agreements granting an option to purchase each property to Mrs Messado within a specified time.

[74] On 20th December 2013 Mr Chinn said he paid the full purchase price for the four properties and received a letter from Mrs Messado confirming receipt of the purchase price for the properties and four instruments of transfer executed by Ms Braham on behalf of Brilliant and witnessed by Ms Lanza Turner Bowen an Attorney- at- law who is now deceased.

[75] Mr Chinn's evidence is that by mutual agreement between himself and Brilliant, the Agreement for Sale in respect of Volume 1051 Folio 48 was cancelled in February 2014 because of the discovery that the property was jointly owned,(a matter alluded to earlier), and the agreement for sale in respect of 1401 Folio 936 cancelled in November 2017. The property that was released was released after payment had been made, but the evidence of how much was paid is unclear. The evidence does not indicate that it was in accordance with the exercise of the option as contemplated by the option agreement. The Court also notes that there is no evidence that Ms Braham had any knowledge or involvement in these cancellations and the inference I draw from this statement by Mr Chinn is that he assumed that this was an agreement reached between Brilliant and himself, when in fact, the cancellation was based on an agreement between himself and Mrs Messado.

[76] Mr Chinn said that between 2013 and 2017 he granted Mrs Messado a series of options for the Relevant Properties the last two of which were granted on 21st November 2017 and expired on January 2018. He said that no further options were granted and Mrs Messado having not exercised the options, he proceeded to register the instruments of transfers in respect of the Relevant Properties on 16 May 2018 after he learnt of the arrest of Mrs Messado.

[77] A significant portion of the trial was consumed with the issue of whether the transaction was a loan as asserted by Mrs Messado or a sale with an option to purchase as Mr Chinn had asserted. It is Brilliant's case, that the agreements for sale, options to purchase and signed blank instruments of transfer were merely structured to mask the true nature of the transaction which was a loan to Mrs Messado. It was also submitted that Mr Chinn knew that there was no intention by Brilliant or anyone on its behalf to divest itself of its interest in the Relevant Properties. The nature of the transaction is therefore an important element on which Brilliant relies to prove this knowledge on the part of Mr Chinn and it is therefore necessary to analyse in almost painstaking detail the various components of the transaction which are called into question and or which are offered as being supportive of the Claimants Case. I wish to note however that although I have considered all the points raised by counsel, I have concentrated on and addressed only the more salient ones.

Was the transaction a loan to Mrs Messado with the Relevant Properties held as security or a sale by Brilliant to Mr Chinn with an option for Mrs Messado to purchase?

[78] The Claimant's case is that the true nature of the transaction was that of a loan to Mrs Messado which was secured by the Agreements for Sale, the Transfers executed on behalf of Brilliant and the Registered Certificates Titles in respect of the properties. On the Claimant's case, the agreements by which Mrs Messado was given the option to purchase the properties was merely a tool by which the loan was to be repaid.

[79] Mr Chinn's case is that he did not grant a loan to Mrs Messado but purchased the Properties, evidenced by the Agreement for sale, the Transfers executed on behalf of Brilliant and the registered Certificates of Title. However, he also entered into concurrent options for Mrs Messado to purchase the Properties.

[80] Mrs Gibson Henlin QC submitted that there are a number of unusual features of the transaction between Mrs Messado and Mr Chinn which supports Brilliant's position that it was a loan and these are addressed as follows:

(a) *There was no resolution or other document authorising a loan.*

[81] I agree with the submission by Mrs Gibson Henlin that if the transaction was indeed a loan as is asserted by Mrs Messado, the absence of any authorising resolutions or documents relating thereto could be the result of an effort on the part of Mrs Messado and Mr Chinn to mask the nature of the transaction and is evidence capable of leading to the inference that Mr Chinn knew of or was a participant in Mrs Messado's fraud. However, I am equally of the view that if the transaction was a sale, the absence of any authorising resolutions would not be conclusive that Mr Chinn knew of a fraud or was a participant.

[82] Ms Long was asked why she did not require a corporate resolution and she explained that it is not usual conveyancing practice to request a corporate resolution in these circumstances particularly where the transfer is signed by the director and secretary because generally speaking it is not required. Ms Long's evidence on this point was not challenged by any evidence to the contrary and I accept that it is accurate. Whereas generally it may be prudent practice to obtain an authorising shareholders' or directors' resolution, in the circumstances of this case, since Ms Braham was the sole director of Brilliant. I accept Ms Long's evidence that a request for a corporate resolution would not have been the usual practice and I find that the absence of one would not serve to impugn a sale of the Relevant Properties. I also do not find that the absence of a resolution is supportive of the position that the transaction was a loan.

(b) *The properties were not advertised for sale, they were tenanted or otherwise occupied.*

[83] Having regard to the fact that there was a prior relationship between Mrs Messado and Mr Chinn I do not find that there would have been anything unusual in a sale transaction in which the Relevant Properties were not offered for sale by advertisement. Similarly, I do not find that the fact that they were tenanted was a major factor affecting the nature of the transaction.

(c) *The Agreements for sale were prepared by Ms Long who was Mr Chinn's attorney at law and not the Vendor's Attorney at law additionally the Registered Titles for the Properties were sent to her before the Agreements for sale were signed.*

[84] Ms Long admitted that it was unusual but said it was not unknown for a vendor to release their title to the purchaser prior to the full payment of the purchase price or an assurance of payment by a bank or Attorney-at-law. She explained that it depended on the relationship between the Attorneys involved and the parties involved in the transaction.

[85] Ms Long admitted that in a real estate transaction such as a sale of real property it is usual for the names of the Vendor's Attorney and the Purchaser's Attorney to be inserted in the Agreement for Sale. She admitted that she drafted the Agreements for sales and that her name was not stated as the Attorney acting for Mr Chinn. She explained that she had been retained to advise Mr Chinn on the purchase of the Properties but not to do the usual conveyancing work associated with that. Therefore, her role was limited to advising Mr Chinn on the issues relating to the Titles and ownership as well as drafting the Agreements for Sale. Accordingly, she said that she would not have included her name or her firm's name if she were not acting in all respects. Her explanation appears to me to be reasonable in the circumstances.

(d) *Mr Chinn did not register his interest in the properties by lodging the transfers with the Registrar of Titles for over 4 years and five months.*

(e) *Mr Chinn did not take possession of the Properties or did not even visit the Properties*

(f) *Mr Chin did not take over the payment of the taxes or maintenance payments which continued to be made for and on behalf of Brilliant;*

(g) *Mr Chinn did not give the tenant notice nor did he adopt the tenant or collect rent from the tenant.*

[86] The evidence of Ms Long is that the Agreements for Sale were lodged at the Stamp Office on or about 2nd January 2014 but Mr Chinn admitted that he only registered the transfers after having heard of the arrest of Mrs Messado. This evidence as to the time of the registration of the Transfers is capable of supporting the Claimant's assertion that the transaction was a loan. However, I prefer Mr Hylton's submission that Mr Chinn's holding the transfers and not registering them was equally consistent with him trying to facilitate the exercise of the option agreements while they remained open.

[87] Mr Chinn in not taking physical possession of the Relevant Properties or the rents derived therefrom is marginally more consistent with the true nature of the agreement being that of a loan. So too is the fact that he did not meet the usual obligations and expenditures related to the Relevant Properties such as maintenance payments. The evidence does not disclose an explanation for these facts and these are matters which I will consider when all the facts are considered globally and weighed in order to determine which type of transaction was more likely on a balance of probabilities.

(h) *(iii) Mr Chinn initially said he paid for the properties and later admitted that a portion of that alleged payment was a prior debt obligation of Mrs Messado to him arising from another transaction*

[88] Mrs Gibson Henlin highlighted the fact that in Mr Chinn's response to the Claimant's request for information which he filed on 16th April 2019 in which he stated that, "…*The purchase price was paid to the 1st Claimant's attorneys-at-law, Jennifer Messado & Co in a lump sum by way of a set off of a debt that was previously owed to the 3rd Defendant by Jennifer Messado & Co.*" This she argued was his first acknowledgment that there was a pre-existing debt owed to him by Mrs Messado, since his earlier position in paragraph 7(d) of his defence was that he paid the full purchase price. I accept that he did not mention the existing debt earlier but I do not find that this is an omission which betrays an intention to deceive or is evidence that the transaction was a loan. The pre-existing debt was acknowledged by Mrs Messado and she also admitted the additional money paid to her, so this evidence of an omission is not by itself (or combined with the other evidence) helpful in moving the Court to support the Claimant's case.

[89] It appears to me that in any event, the nature of the transaction will not be determinative of the claim. If it was a loan to Mrs Messado with Mr Chinn having the right to transfer the Relevant Properties to himself in the event of a breach of the loan agreement, there would have been an obvious advantage to Mr Chinn in using the properties as securities but not in the traditional sense of having a mortgage or charge registered on the respective Certificates of Title.

[90] By structuring a loan in this manner, this would have meant that in the event of a breach arising from a failure to repay the loan, there was no need for Mr Chinn to embark on what is often seen in the courts to be a cumbersome process to enforce the security, unnecessarily drawn out by the borrower intent on not losing his/its property. There could be no legal dispute as to the validity of the security documents or the loan agreement for that matter, since in any event there was no formal written loan agreement. Mr Chinn would have had the option of simply registering the duly signed transfers. The option agreements in this type of arrangement could be used as a tool by which the period of the loan is extended and not a true option to purchase. It is a mechanism to obtain almost unassailable

security for a loan, it is “brilliant” in its simplicity and effectiveness, but not novel or unusual and certainly not evidence that he knew of Mrs Messado’s fraud.

[91] The unchallenged evidence of Mrs Messado is that Mr Chinn had used this type and structure of loan arrangement before and she had participated in it. This was in a transaction which was done over ten (10) years ago involving a property located at Montague Heights, Spanish Town in the parish of St Catherine and property located at Main Street, Ocho Rios in the parish of St Ann. She stated that in relation to the Montague Heights property she organized a loan from Rory Chinn in the sum of approximately $15,000,000.00 to $20,000,000.00 to assist with the deposit for the purchase of a property and the Montague Heights property was granted as security. She went on to state that the Sales Agreement and Transfer were sent to her by Tracy Long and she sent it back with the title. In this transaction the money was not paid and the property was transferred to Rory Chinn Company Malori Properties at the time. There was no assertion that there was anything improper with that transaction. The most that this evidence could establish is that it was used before but that would not be evidence that the same transaction type was used in relation to the Relevant Properties or that Mr Chinn knew of or was participating in a fraud.

[92] However, on the other hand, if the transaction was a true sale with the Option for Mrs Messado to purchase the Properties, Mr Chinn would have been in a similarly advantageous position because he had the executed transfers and was therefore protected by his ability to lodge the transfers if the option was not exercised for the consideration stated in each iteration of the agreement.

[93] Therefore, resolving the nature of the transaction, by itself does not resolve the issue as to whether Mr Chinn knew that Mrs Messado was not authorised to deal with the Relevant Properties as she did.

Were the payments by Mrs Messado payments of the cost of the option agreements?

[94] One would expect that if this were a true sale to Mr Chinn with Mrs Messado having the option to purchase, as a knowledgeable Lawyer with commercial experience intent on exercising the option, she would have held unto the cash she had until she had accumulated the required amount. Then, having acquired it, she would at that point give written notice to Mr Chinn that she is exercising the option pursuant to paragraph 3 of the option agreement. The option agreement provides that the sale price shall be "*payable by way of the full Sale Price therefor on the exercise of the option, together with all sums paid by the Grantor for its costs under the Land Sale Agreement*. There is no provision in the option agreement for periodic payments and so the question is raised as to what was the nature of the payments that were being made by Mrs Messado. Mrs Messado said that Mr Chinn on his visits to her office to collect money would ask whether there was any "sugar for the baby", a phrase which he admitted using. So the question is, for what transaction was this "sugar", payment?

[95] When Mr Chinn was asked if he received the sums indicated in the statement of account (page 160 of the bundle) Mr Chinn curiously said "*I wouldn't know because I haven't revised it. It has no relevance or no significance in my negotiations. Its of no importance to me*". He was pressed by Mrs Gibson-Henlin as to whether he had received or seen the statement of account at page 243 and he said "*No I have seen no account from her*." He was asked by counsel if he was saying that he was only seeing the accounts for the first time on the previous day and he said: "*Yes I am saying that. I am not acknowledging any account. I paid no attention to refundable payments*". In an effort to ensure that he was not misunderstanding the question posed, I repeated it and he corrected himself by saying "*No I am not saying that. I am saying if I got them before I did not look at them.*"

[96] Mr Chinn also admitted that Ms Messado made a number of payments but stated that she did not exercise the option to purchase the Properties. As a consequence of that, he said that the payments were non-refundable and therefore there was no need for him to be concerned with the accounts. Paragraph 4 of the Option

Agreements provides that “The Option Money shall be non-refundable”, “Option Money” being the cost of the option.

[97] I note that the initial price of the option is rather odd. J410,000.00 or the options of 20th December 2013 and 13th February 2014. However, the price seems to have increased dramatically to US$6,000.00 for the options dated May 2014 (for the option period to 31st August 2014). Furthermore, the option of September 2014 (for option period to 31st December 2014 was for US$16,000.00.)

[98] Mr Hylton submitted that Mr Chinn’s response that he was not concerned with the accounting of the payments and that he was only concerned with whether Mrs Messado had exercised an option was understandable when one considers the nature of the transaction (on his assertion as to its nature) and Mrs Messados’ own letters. Mr Hylton further submitted that the evidence is consistent with the payments by Mrs Messado having been made in exercise of the options. He argued that because we do not have all the option agreements we do not know the total due under the agreements over the relevant time and accordingly one cannot say that the payments were not payments for the options. Counsel conceded that if there were payments well in excess of the amount for the various options then a question might be raised as to the nature of the payments, but in the absence of that evidence, the case of the Claimant is not assisted. I find tremendous merit in these submissions although it is surprising that all the option agreements covering the relevant period have not been produced to the Court, and no explanation was given from either side for the absence of some of the option agreements.

The letters referring to a loan

[99] Mrs Henlin Gibson submitted that Mr Chinn did not provide or give any evidence of the link between the payments made by Mrs Messado and the option agreements, whereas Mrs Messado on the other hand exhibited several letters enclosing cheques that she clearly stated were on account of loan payments in relation to the loan made by Mr Chinn.

[100] Mrs Messado in cross examination admitted that Mr Chinn said that he would provide the money but structured as a sale and option to purchase and not as a loan but said "*He knew that I treated it as a loan as per the correspondence*". This evidence is quite important because it is an admission by Mrs Messado of Mr Chinn's expressed intention as to how the transaction would be structured and this was fully supported by the documents which he had drafted by Ms Long.

[101] Therefore, the weight to be attached to Mrs Messado's statement that Mr Chinn knew that she was treating it as a loan and those items of correspondence referring to a loan is minimal, because there was no acknowledgment by Mr Chinn of his agreement to a loan or his agreement to Mrs Messado's treatment of the transaction as a loan. Furthermore, there was also correspondence from Mrs Messado over the relevant period, for example her letter dated 24th September 2015 asking Mr Chinn to acknowledge a non refundable option payment of US$10,000.00 granting an extension of the option to repurchase inclusive to 30th October 2015. Mrs Messado's evidence is further compromised because she has also not sufficiently accounted for which payments she says were towards the option agreements and which were in respect of the loan she alleged was made.

The statements of account

[102] It appears to me that if the arrangement was in the nature of a loan as Mrs Messado asserted, then the issue of the accuracy of the statements would have been critically important and there would have been more meaningful attempts at periodic reconciliation by the parties in order to ascertain how close they were to full repayment of the indebtedness. However, the evidence suggests that the statements of account were not treated with that kind of importance. By way of example, there was no follow up by Mrs Messado in relation to the statements that she said were sent to Mr Chinn to determine whether he received them and if he did, whether he accepted them as accurate and if he did not, what were the points of dispute. I am led to the conclusion that the treatment by the parties of the payments made by Mrs Messado tends to suggest that the transaction was not a

loan in the manner she described but were non-refundable payments pursuant to the option agreements.

The third party correspondence and mention therein of a loan

[103] Mrs Gibson Henlin appeared to seek some support for the position that the transaction was a loan, from the fact that Mrs Messado was shopping the idea of a loan to persons including Mr Gordon Tewani. It is not disputed that Mrs Messado approached Mr Chinn for a loan and the fact that she may have approached other persons with a similar proposal is not of any assistance to the Court in determining whether Mr Chinn's evidence that he refused to enter into such a transaction is to be believed.

[104] Heavy weather was also made by Mrs Gibson Henlin of a letter from Mr Donovan Jackson of the law firm Nunes Scholefield DeLeon & Co dated 19th November 2015, the material portion of which is as follows:

> *"We refer to the captioned matter, your letter dated 14 November 2015 and our discussion (Long/Jackson) and confirm that we act for Gordon Tewani who has instructed us that he is willing to grant short term financing to Brilliant Investments Limited to settle the indebtedness to you on the security of certain properties including the property comprised in the two Certificates of Title currently held by your client against which there are caveats claiming an interest".*

In cross examination, Ms Long indicated that she spoke to Mr Jackson but would not characterise the transaction as he did and her understanding was more in line with her letter to which Mr Jackson referred (which did not mention a loan or security). Ms Long admitted that she did not feel the need to correct Mr Jackson's misconception because her understanding was that monies were to be paid for the properties in exchange for the titles and it did not appear to her that it was necessary for her to correct any misapprehension that Mr Jackson had in regards to the arrangement.

[105] The Court has to be rather cautious in attaching much or any weight to this letter. Ms Long explained that Counsel was under a misapprehension as to the nature of

the deal. Mr Jackson was not called as a witness and so there was no opportunity to test the basis of his assertion and the accuracy of his characterisation of the circumstances under which the Certificates of Title were being held especially because Ms Long's letter does not support his statement. It may have been prudent for Ms Long to respond to his letter by clarifying the position as she understood it, but she was under no obligation to do so. The important thing is that the transaction did not proceed as proposed by Mr Jackson and so there was nothing further which transpired which could have served as being corroborative of his statement which was based on his opinion of the reason for Mr Chinn or Ms Long holding the Titles.

[106] Attorneys-at-law not responding to non-binding correspondence is not unusual in practice and in these circumstances I find that Ms Long's failure to respond is not, without more, sufficient proof of Mr Jackson's assertions. Mrs Henlin Gibson submitted that Mr Jackson had no interest to serve other than that of the alternative lender from whom the security was sought and I agree with her that that is so. However, that does not mean that his conclusions as expressed are necessarily accurate or that they ought to be given any greater weight bearing in mind the absence of sufficient context or any additional evidence from him.

[107] I have considered the statement of Mr Jackson among the numerous facts which have been presented to the Court for consideration in order to determine whether their combined effect may be to support the submissions advanced by Mrs Gibson Henlin. However, I agree with Mr Hylton's submissions that whereas the transaction documents are all unambiguous (at least on the face of the documents), the correspondence is not and the nature of the transaction and the true interpretation of a commercial agreement must be determined as at the time of the transaction.

[108] In support of his submissions Mr Hylton relied on two decisions which I find accurately reflect the law on this issue. The first was the decision of the House of Lords in **James Miller and Partners Ltd v Whitworth Street Estates**

(Manchester) Ltd 1970 AC 583 at page 603 and the observation of Lord Reid as follows:

> *"I must day that I had thought that it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."*

[109] Counsel also relied on the English Court of Appeal case of **Brian Royle Maggs t/a BM Builders (A Firm) v Guy Anthony Stayner Marsh, Marsh Jewellry Co. Ltd**.[2006] EWCA Civ 1058 and in particular the judgment delivered by Lady Justice Smith where in referring to the **James Miller** case (supra) said as follows:

> *"The rationale of the well-established rule in Miller's case is this. The parties have made a complete record of their agreement at the time, in writing. The written words must be objectively construed or interpreted. Such construction is a matter of law. As Lord Hoffmann said in Investors Compensation Scheme Ltd v West Bromwich Building Society [1198] 1 WLR 896 at page 912, the question is what meaning the document would convey to a reasonable person having all the background knowledge which would reasonably been available to the parties in the situation in which they were at the time of the contract. It is therefore irrelevant to call evidence of how one party behaved after the event. That only sheds light on what that party subjectively thought he had agreed."*

The documentary evidence and allegation of a sham transaction

[110] Mr Hylton submitted that the Court should not find that the transaction which Mr Chinn asserts to be a sale is a sham. He relied on the statement of Lord Diplock LJ in **Snook v London and West Riding Investments Ltd** [1967] 2 QB 786 where at page 802 he stated as follows:

> *"… for acts or documents to be a "sham", with whatever legal consequence follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating…"*

[111] Mr Hylton also submitted that the transaction is not a sham because all the parties, Mrs Messado, Mr Chinn and Brilliant, did not have a common intention to create different legal rights and obligations from the ones provided for in the Agreements

for Sale and Option to purchase. This is an important point because the legal effect of the Agreements for Sale and Transfers which were properly executed on behalf of Brilliant is clear. Notwithstanding the fact that all the option agreements were not exhibited, some were produced to the Court and they also speak for themselves.

The absence of evidence as to the terms of the Loan

[112] In stark contrast to the documents supporting the existence of a sale and option transaction, is the absence of any evidence as to the terms of the alleged loan. Mr Hylton's submission on this point, which I find to be quite sound is that if there was a loan one would have expected some evidence of its terms.

[113] Agreement on the interest payable is always an important element of a loan agreement for reasons which are easily discerned. As stated in Chitty on Contracts 23rd Edition 1115:

> *" At common law, the general rule is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect."*

Mrs Messado and Mr Chinn are both persons with significant commercial knowledge. I would have expected that for them to have reached a legally binding contract for the provision of a loan, they would have discussed and aqreed the basic elements such as the duration of the loan and the schedule of payments. Having regard to the nature of this loan agreement and the possibility of a dispute arising as to its terms, I would also have expected that the agreed terms would have been reduced to writing. However, even if the entire agreement was not reduced to writing, I would certainly have expected that critical elements such as the interest rate payable, (which obviously is quite important to commercial persons), would have been agreed and this would have been among the matters of which Mrs Messado would have given evidence. I therefore find that the absence of any evidence from Mrs Messado as to the terms of the loan she

alleges, is strong evidence which indicates that there was no such agreement and that the nature of the transaction is as Mr Chinn asserted.

The advice of Ms Long to Mr Chinn

[114] I accept the evidence of Mr Chinn as contained in his witness statement that he obtained legal advice from his attorney at law Tracey Long and based on that advice he informed Mrs Messado that he would not be prepared to make a loan to her or Brilliant but would be prepared to purchase the Properties and grant her an option to purchase them from him at an agreed price within a fixed period.

[115] Ms Long's evidence was that she was asked by Mr Chinn to conduct searches which revealed that Brilliant was the owner of the Properties. As I indicated earlier the fact that it was not discovered at the outset that the Bengal Property was jointly owned is curious but nothing turns on that fact. Her searches also revealed that Ms Braham was the sole director and shareholder of Brilliant and Merlita Ellis was the company's secretary. She stated as follows in her witness statement:

> *"9. Based on that information and on my advice Mr Chinn declined to lend Mrs Messado any money but instead entered into four separate agreements to purchase the properties from Brilliant on December 20, 2013. I acted as attorney for Mr Chinn in the purchase of the properties and based on my research, the agreements and the instruments of transfer appeared to be executed by the persons with the authority to do so."*

[116] In amplification of her witness statement, Ms Long stated that both Ms Braham and Ms Ellis were known to her to be employees of Mrs Messado and therefore she assumed that Mrs Messado owned Brilliant. Ms Long indicated that prior to this, she was not aware of a case in which an attorney's employees were the director and shareholder of a company on behalf of a client and neither did she subsequently become aware of such a case. I felt it necessary to ask Ms Long if, despite what she has said, whether she appreciated that there was a possibility that Brilliant was being held on behalf of a beneficial owner who was a client of Mrs Messado. She responded by saying she did, but considered it to be a remote possibility since it was not something she would do or counsel to be done. Ms

Long stated that she has practiced corporate commercial law and that she is not exclusively a conveyancer. She rejected Mrs Gibson Henlin's suggestion that in corporate commercial practice the use of employees as nominee shareholders and directors is not unusual. She explained that it is unusual for secretaries and attorneys to hold positions as directors and shareholders for any length of time. This is because, although Attorneys will for expedition form a company lending themselves and their staff as officers for purposes only of having the company formed, the best practice is that immediately after formation the names are removed and particularly before the company acquires any property.

[117] Arrangements in which persons act as nominee shareholders or nominee directors are fraught with danger unless carefully managed as this case is serving to demonstrate. The dangers is considerably increased where the same person is both the sole director and sole nominee shareholder. In the absence of any evidence to the contrary I accept the evidence of Ms Long on this issue and this suggests that in Jamaica the use of the staff of employees as nominee directors and shareholders of active companies especially those holding assets is not the "*usual practice in the industry*" as it is in jurisdictions which are offshore financial centres such as The Bahamas, (see for example the position of Mr Taylor in **Central Bank of Equador** (supra)).

[118] In my view, Ms Long's evidence does not sufficiently explain why she advised Mr Chinn not to enter into a loan agreement with Mrs Messado but I find that it is reasonable to infer from her evidence that it had something to do with the fact that the Director and Secretary of Brilliant were employees of Mrs Messado. Mrs Gibson Henlin raised an interesting point which was, what was it which would have made the loan not advisable, but the sale prudent? If it was the issue of the nominee director and shareholder how so?

[119] Mrs Gibson Henlin submitted that Ms Long's advice not to lend Mrs Messado any money is not consistent with an assumption that she is the beneficial owner of Brilliant. This is so she said because if Mrs Messado were the beneficial owner of

Brilliant that would mean that she controlled the company and could cause the company to "do her bidding" (my formulation). I fully agree that if there was the belief that Mrs Messado was the beneficial owner of Brilliant, there is no evidence as to why that would have influenced the advice not to lend on the security of the properties, but to do a sale with an option to purchase instead.

[120] Mrs Gibson Henlin submitted that it is not true that the assumption was made that Mrs Messado was the beneficial owner of Brilliant. Whereas I fully accept that it is not clear on the evidence exactly why that fact influenced the nature of the transaction, having regard to the other evidence of Ms Long as to the use of employees as nominees for client's companies, the facts do not favour a conclusion that such an assumption was not made and advice given in the terms as Ms Long indicated. The reasonableness of the conclusion that Mrs Messado was the beneficial owner of the shares in Brilliant and as a consequence was also entitled to represent it must be viewed in the context of all the facts. Importantly, it must be appreciated that Mrs Messado's assertion that her capacity was that of the beneficial owner of Brilliant was seemingly substantiated by her ability to obtain the appropriate documents signed by its sole director and secretary. In other words, she demonstrated an ability to have Brilliant do her bidding and this cannot be discounted when analysing the impact that this was likely to have on persons interacting with her in relation to Brilliant. It also cannot be discounted that the Director and secretary were her employees.

Was Mrs Messado held out by Brilliant to be Brilliant's agent?

[121] The Court of Appeal case of **ASE Metal NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37 is applicable to the facts of the instant case. In **ASE Metal** Brooks JA commented as follows:

> *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."*

[122] It is in this context that I am unable to accept Mrs Gibson Henlin's submission that Mrs Messado had no authority to conduct business on behalf of Brilliant because Brilliant did not hold her out as its agent and the persons dealing with her ought not to have accepted her assertion of her capacity without more. It is necessary in relation to this point to reinforce the fact that that the company is not Mr Morrison. He is the beneficial shareholder and may even be considered a shadow director but Ms Braham was at all material times the sole shareholder and director. I do not think it can be robustly challenged on the evidence, that Ms Braham by executing the documents in the manner in which she did, clearly created a situation in which any person in the position of Mr Chinn could have reasonably concluded that Mrs Messado did have the apparent authority to act on behalf of Brilliant in a transaction involving Brilliant's properties.

[123] Similarly, because Mrs Messado was held out as Brilliant's agent by the conduct of its director Ms Braham, the argument that Mr Chinn did not pay the purchase price of the properties to Brilliant does not assist the Claimant's case. Mr Chinn did provide the consideration to Mrs Messado who represented herself as the beneficial owner of Brilliant and its attorney, a representation which Brilliant through its director Ms Braham facilitated by her execution on Brilliant's behalf of the relevant documents utilised by Mrs Messado in accomplishing the fraud. Brilliant did not receive any consideration because Mrs Messado fraudulently kept the consideration for her own use and benefit.

[124] On the issue of consideration, Mrs Gibson Henlin also submitted that because a part of the consideration which Mr Chinn said he provided was the previous indebtedness of Mrs Messado to him in the sum of US$190,000.00 this could not have amounted to consideration. However, as Mr Hylton correctly submitted,

Brilliant was at liberty to transfer its property in satisfaction of Mrs Messado's debt if she were in fact its beneficial owner and the transferee would not be guilty of fraud. In this case, it would only be fraud on the part of Mr Chinn if he knew of Mrs Messado's fraud, which is an issue on which Brilliant's case depends.

[125] In support of his submission that Brilliant's arguments in respect of the absence of consideration were unfounded, Mr Hylton also relied on Section 38 of the Registration of Titles Act which I find to be applicable and which states as follows:

> *"38. The production by a Solicitor -*
>
> *(a) of a certificate of title issued in the name of a purchaser as a nominee; or*
>
> *(b) of an instrument having in the body thereof or endorsed thereon a receipt for consideration money, or other consideration, the instrument being executed or the endorsed receipt being signed by the person entitled to give a receipt for that consideration; or*
>
> *(c) of a certificate of title endorsed with a memorandum of an instrument of transfer, mortgage, lease, or other dealing for pecuniary or other consideration (whether or not such instrument may have contained or been endorsed with a receipt as aforesaid), shall be sufficient authority to the person liable to pay or deliver the same for the payment or delivery of the consideration money, or other consideration, to the, Solicitor, notwithstanding that the solicitor does not produce any separate or other direction or authority in that behalf from the person who is entitled to receive the consideration money, or other consideration, for the land mentioned in the certificate of title or from the person who signed the instrument or receipt."*

The Court's assessment of the evidence of Ms Long

[126] Ms Long maintained that her statement that Mr Chinn declined to lend Mrs Messado any money is correct. Mrs Gibson Henlin suggested to her that it was not correct because at the time of entering into the arrangement there was already an indebtedness of Mrs Messado to Mr Chinn in the sum of US$190,000.00. I do not accept that this prior indebtedness meant that Ms Long's statement was false. In the first place, it was common ground that that indebtedness was a result of money paid to Mrs Messado in respect of a failed transaction and which she had not returned. It was not Mrs Messado's position that she received it initially as the

proceeds of a loan. Furthermore, Ms Long's statement must be construed in the context of the earlier portions of her evidence relating to Mr Chinn speaking to her about Mrs Messado's request for a loan. I understood Ms Long to be simply saying Mr Chinn did not thereafter grant a loan to Mrs Messado by giving her money pursuant to her request for a loan.

[127] It was suggested to Ms Long "*that the Sales Agreements, the Options to Purchase and the Transfers were merely vehicles for securing Mrs Messado's indebtedness to Mr Chinn"*. It was also suggested to Ms Long that she held the Certificates of Title as security for that Indebtedness. Ms Long denied these suggestions. I have found the evidence of Ms Long to be consistent and credible. Her responses were straightforward and clear and by her demeanour she appeared to me to be sincere. I have commented earlier about the absence of an explanation as to why Mr Chinn was advised not to lend money to Mrs Messado, but that omission is as much the fault of Counsel as it is Ms Long's. Ms Long simply was not asked to amplify that point, nor was she cross examined on it. That evidence by itself or taken together with the other evidence in the case is not sufficient for me to find that Ms Long is not a credible witness and I accept her evidence that the transaction was not one for a loan with the properties being used as security as is being alleged by the Claimant.

Did Mr Chinn know that Mrs Messado was not authorised to deal with the Properties?

[128] Mr Hylton pointed out that there was no evidence coming from Mrs Messado by way of a positive assertion that she had told Mr Chinn that Mr Morrision was the true beneficial owner of the Company or that he had not authorised the sale of the Properties. Counsel submitted that this was unlikely having regard to the steps taken to keep Mr Morrison's beneficial ownership undisclosed. I accept Mr Hylton's submission that on the evidence of Mrs Messado and Mr Morrison the reason for using Ms Braham as nominee Director and nominee Shareholder were to keep Mr Morrison's involvement secret. However, the reason for the secrecy is unknown

and it is not clear from whom it was desired to keep this secret so this would not necessarily be inconsistent with disclosure to Mr Chinn.

[129] The second reason advanced by Mr Hylton, and one which I find to be of considerable weight, is that disclosing Mr Morrison's interest would have been contrary to the improper scheme which Mrs Messado intended to execute which included the unauthorised use of Brilliant's assets. The disclosure of Mr Morrison's interest to any person whom Mrs Messado wished to rope into her scheme would make the involvement of such person exponentially more difficult. This is because she did not in fact have authorisation to use the Relevant Properties and such a person would need to be a knowing and willing participant in the fraud. Not only would such a person need to be a willing participant, but such a person would also need to be a person willing to participate in a high stakes fraud in which they stood to lose any sum advanced to Mrs Messado pursuant to any arrangement they had, if their knowledge was proved.

The Court's conclusion on the nature of the transaction and the state of knowledge of Mr Chinn

[130] Having analysed the evidence of the witnesses in this case, and for the reasons indicated previously in this judgment, I have preferred the evidence of Mr Chinn and Ms Long on a balance of probabilities as it relates to the question of whether the transaction was a loan or sale with an option to purchase. I accept the submissions of Mr Hylton that in any event even if the transaction was a loan, that without more, would not amount to fraud unless Mr Chinn Knew Mr Morrison was the beneficial owner of Brilliant and that Mrs Messado was not authorised to deal with the Properties. I keenly observed the demeanour of Mr Chinn as he gave his evidence and I accept his evidence that Mrs Messado said that she was the beneficial owner of Brilliant and that he believed her when she said so. I also find that this governed his decisions and his conduct thereafter. I accept his evidence that he did not know of Mr Morrison's involvement with Brilliant. I concluded that he was a shrewd businesman but that he was also cautious. This was evidenced

by the fact that he prudently involved Ms Long and obtained her legal advice. Mr Chinn clearly had an interest in making money, (like most entrepreneurs), to borrow his phrase - the "*sugar for the baby*". However, the oral and documentary evidence, viewed in its totality, does not convince me, on a balance of probabilities, that he was a knowing participant in Mrs Messado's fraud or any other fraud, which would affect his registered interest pursuant to the Registration of Titles Act.

The Claim in conversion

[131] Mrs Gibson Henlin has submitted that the Ms Braham and Mr Chinn are also liable in the tort of conversion because conversion is a tort against possession. Counsel argued that by taking the Certificates of Title and causing his name to be endorsed on them for a loan that was personal as between himself and Mrs Messado, Mr Chinn committed conversion. Counsel relied on the case of **Midland Bank v Reckitt** [1933] AC 1 in which there was conversion of a cheque and argued that the same principle applies to the Certificates of Title in this case.

[132] In support of her submission that a claim for conversion could still arise in the context of the Torrens system where Mr Chinn was not found liable in fraud, Counsel referred to the following passage in **Frazer v Walker** [1967] 1 All ER 649 at 655 where Lord Wilberforce opined as follows:

> *"First, in following and approving in this this respect the two decisions in **Assets Co., Ltd v. Mere Roihi**, and **Boyd v. Wellington Corpn**., their lordships have accepted the general principle, that registration under the Land Transfer Act, 1952, confers on a registered proprietor a title to the interest in respect of which he registered which is (under s. 62 and s. 63) immune from adverse claims, other than those specifically expected. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the courts of New Zealand and of Australia (see, for example, **Boyd v. Wellingston Corpn**. per ADAMS, J., and **Tataurangi Tairuakena v. Mua Carr** per SKERRETT, C.J.).*
>
> *Their Lordships refer to these cases by way of illustration only without intending to limit or define the various situations in which actions of a personal character against registered proprietors may be admitted. The*

principle must always remain paramount that those actions which fall within the prohibition of s. 62 and s. 63 may not be maintained."

[133] During Mrs Gibson-Henlin's submission, I indicated to Counsel that in the absence of any other authority, I doubted whether such a fundamental principle which goes to the heart of the registration of titles regime could be founded on such an almost obscure paragraph. Having now considered the matter more fully, I am fortified in my conclusion that a claim for conversion cannot be maintained against either Ms Braham or Mr Chinn. As it relates to Mr Chinn in particular, having regard to my finding that he had not committed a fraud and that he had received documents which on their face were properly executed, I am of the view that a claim in conversion is bound to fail. Mr Hylton in his response on this issue submitted that under the Torrens system of land registration as we have in Jamaica, a duplicate certificate of titles does not pass legal title to land. He further submitted that the legal title only vests on registration and accordingly unlike the non-torrens based systems where title deeds operate differently and arguably may be converted, Certificates of Title would not be so in our Torrens system. Mr Hylton's submissions in this regards are aligned with my own views and I accept them as being accurate.

Conclusion and disposition

[134] For the reasons contained herein I make the following orders:

1. Judgment for the Claimant against the 2nd Defendant on the claim for breach of trust.

2. Judgment for 3rd Defendant on the Claim.

3. The issue of the award of cost will be considered by the Court after receipt of the parties' written submissions to be filed and exchanged on or before the 31st July 2019.