



[2013] JMSC Civ.119

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 02350

BETWEEN	SURESH KHEMLANI	CLAIMANT
A N D	RAJU KHEMLANI	1 ST DEFENDANT
A N D	TOPAZ INVESTMENTS LIMITED	2 ND DEFENDANT

CONSOLIDATED WITH

CLAIM NO. 2007 HCV 04473

BETWEEN	SURESH KHEMLANI	CLAIMANT
A N D	RAJU KHEMLANI	1 ST DEFENDANT
A N D	KAY MART LIMITED	2 ND DEFENDANT
A N D	PUBLIC SUPERMARKET LIMITED	3 RD DEFENDANT
A N D	LORD & LADY LIMITED	4 TH DEFENDANT

Richard Small, Mrs. Denise Kitson, Mrs. Suzanne Ridsen-Foster and Mrs. Kimberly McDowell instructed by Grant, Stewart, Phillips and Company for the Claimant.

Bert Samuels and Miss Roxanne Mars instructed by Knight, Junor and Samuels for the first Defendant.

Heard: 30 April, 1, 2, 3, 4 and 11 May, 11, 12, 13, 16 and 17 July, 17 September, 23 October, 2012, 20 February and 11 September, 2013

HIBBERT, J.

[1] In or around 1968 Mr. Madhu Khemlani, an Indian national migrated to Jamaica and started a business of jewellery manufacturing. In 1970 he was joined in Jamaica by his son Suresh and in 1971 they opened a jewellery retail store, called Topaz Jewellers, in Premier Plaza in the parish of Saint Andrew. In 1972 they were joined in Jamaica by the elder son Raju and in 1974 they opened a second store, called Jewellerama, in the Mall Plaza in Saint Andrew. These stores were operated as a family business with Mr. Madhu Khemlani in charge.

[2] In 1976 Mr. Khemlani and Raju relocated to the United States of America where they also started business enterprises. Suresh remained in Jamaica to deal with the stores here. In the absence of his father and Raju, Suresh decided to diversify the business interests and opened a garment retail store in the Mall Plaza.

[3] Mr. Khemlani returned to Jamaica in either 1980 or 1981 and rejoined the family business. In 1982 Topaz Investments Limited was incorporated with a share capital of \$200,000 divided into 200,000 shares, each valued at \$1. Mr. Khemlani held 100,010 shares and Suresh held the remaining 99,990. Through this company, the Khemlanis commenced the development of property situated at 195 Constant Spring Road in Saint Andrew into a shopping complex called Manor Centre.

[4] Raju returned to Jamaica in 1986. During his absence, apart from Topaz Investments Limited, at least two other companies were incorporated. In 1983 Public Supermarket Limited was incorporated with a nominal share capital of \$50,000 divided into 50,000 shares each valued at \$1. Mr. Khemlani held 16,668 shares and Raju and Suresh each held 16,666 shares. Lord and Lady Limited was incorporated in 1984 with a nominal share capital of \$100,000 divided into 100,000 shares, each valued at \$1. Mr. Khemlani held 50,000 shares and Raju and Suresh each held 25,000 shares.

[5] On 24 February 1989 Suresh transferred to Raju 49,995 shares (half of his shareholdings) in Topaz Investments Limited. In October of that year Mr. Khemlani transferred his shares in the company to his sons in equal parts thus making them equal shareholders. On 13 November 1989 Mr. Khemlani passed away leaving Raju as the managing director of the companies jointly owned by the brothers. In 1994 Kay Mart Limited was incorporated with Raju and Suresh holding equal shares. Raju also became the managing director of that company.

[6] Over the ensuing years the group of companies became heavily indebted to financial institutions including National Commercial Bank (NCB) which in 1995 threatened foreclosure and the sale of shops at Manor Centre, over which it held a mortgage, in order to satisfy a debt owed by Topaz Investments Limited. This was prevented by an action which was filed in the Supreme Court by Raju, acting as the managing director of Topaz Investments Limited.

[7] In 1995 there began a series of meetings between representatives of NCB on the one hand and Raju and Suresh on the other concerning the debt owed by Topaz Investments Limited. This led to a compromise agreement being reached in 1997. As a consequence also of these discussions Raju relinquished his position as managing director to Suresh.

[8] In December 2005 Raju wrote to NCB instructing that the bank cease to accept banking instructions from the companies unless they were signed by both directors, thereby revoking previous instructions given by him that the bank could accept the signature of one director. He also filed in the Supreme Court a petition to wind up Topaz Investments Ltd., Kay Mart Ltd. Public Supermarket Ltd. and Lord and Lady Ltd. on the basis that he was being excluded from the operations of those companies.

[9] On 4 July 2006 Suresh filed a fixed date claim naming Raju and Topaz Investments Ltd., as defendants and seeking the following orders:

1. A declaration that the Claimant is beneficially entitled to the 100,000 shares in the 2nd Defendant Company presently registered in the name of the 1st Defendant.
2. A declaration that the 1st Defendant holds 100,000 shares in the 2nd Defendant Company on trust for the Claimant.
3. An order that the 1st Defendant do transfer 100,000 shares in the 2nd Defendant Company presently registered in his name to the Claimant.
4. An Order that the costs attendant on effecting the aforesaid transfer be borne by the 1st Defendant.
5. In the alternative, that the Court order the rectification of the Register of Members of the 2nd Defendant company.
5. Such further or other relief as this Honourable court may deem just.
6. Costs.

This was supported by an affidavit which was sworn to on that date.

[10] On 6 November 2007 Suresh filed a claim naming Raju, Kay Mart Ltd., Public Supermarket Ltd., and Lord and Lady Ltd. as defendants and seeking the following orders:

1. A declaration that the Claimant is beneficially entitled to the 500 shares in the 2nd Defendant Company presently registered in the name of the 1st Defendant.

2. A declaration that the 1st Defendant holds 500 shares in the 2nd Defendant Company on trust for the Claimant.
3. An order that the 1st Defendant do transfer 500 shares in the 2nd Defendant Company presently registered in his name to the Claimant.
4. A declaration that the Claimant is beneficially entitled to the 25,000 shares in the 3rd Defendant Company presently registered in the name of the 1st Defendant.
5. A declaration that the 1st Defendant holds 25,000 shares in the 3rd Defendant Company on trust for the Claimant.
6. An order that the 1st Defendant do transfer 25,000 shares in the 3rd Defendant Company presently registered in his name to the Claimant.
7. A declaration that the Claimant is beneficially entitled to the 50,000 shares in the 4th Defendant Company presently registered in the name of the 1st Defendant.
8. A declaration that the 1st Defendant do transfer 50,000 shares in the 4th Defendant Company on trust for the Claimant.
9. An order that the 1st Defendant do transfer 50,000 shares in the 4th Defendant Company presently registered in his name to the Claimant.

10. An Order that the costs attendant on effecting the aforesaid transfers be borne by the 1st Defendant.
11. In the alternative, that the Court order the rectification of the Register of Members of the 2nd, 3rd and 4th Defendant Companies.
12. Such further or other relief as this Honourable Court may deem just.
13. Costs.

[11] These two claims were filed on the basis of the assertion by Suresh that during the discussions with NCB in 1997, he and Raju orally agreed that Suresh should take over sole responsibility for all the debts owed to NCB and in return Raju would transfer all his shares in the defendant companies to Suresh. By the order of a Judge the two claims were consolidated.

Evidence

[12] In addition to the affidavit which was filed in support of the fixed date claim Suresh gave three witness statements dated 7 October 2009, 15 March 2010 and 16 March 2011. These in addition to *viva voce* evidence, given by way of amplification formed his evidence in chief. His evidence was replete with allegations of recklessness, mismanagement and dishonesty on the part of Raju.

[13] He stated that Raju came to Jamaica in 1972 after a business venture of which he was a part, amassed huge debts and became bankrupt and was wound up. Mr. Khemlani undertook to repay all the debts incurred by Raju.

[14] He stated that Raju was not happy with his lifestyle in Jamaica, so, on the pretext that Jamaica would become a communist country, he persuaded his father to

relocate to the U.S.A. He further stated at paragraph 7 of his statement dated 15 March 2010:

"While in the U.S.A. Raju commenced a campaign of opening stores all over the USA in Florida, California, Washington and also in the Caribbean in the Grand Cayman which he established using profits from the Jamaican stores which cost in excess of four million United States Dollars. My brother's reckless behaviour coupled with his high standard of living compounded by the fact that he would often conceal records and falsify reports served to create a great deal of friction between us but because he was the oldest son and having regard to our culture my father asked me to support him and out of a sense of filial responsibility to my father I continued to support my brother's extravagant lifestyle until 1983 or 1984 when the companies in the USA were put into bankruptcy by the South East Bank and the Bank of Credit and Commerce with the result that all our years of hard work and the assets and money which we had acquired vanished so that even though the Jamaican operations were profitable it had accumulated huge debt to support Raju's reckless spending.

[15] He further stated that while Raju and their father were in the USA he expanded the business in Jamaica and acquired property at 195 Constant Spring Road, on which the Manor Centre complex was subsequently built. This he did alone until his father's return. He stated that although in Raju's absence shares were allotted to him in Public Supermarket Ltd., and Lord and Lady Ltd., none were allotted to him in Topaz Investments Ltd., This, he said, was because of Raju's irresponsible ways.

[16] Suresh also stated that Raju's return to Jamaica was as a result of the companies in the USA being declared bankrupt in 1984. In order to please his parents and to continue to live by their Indian culture he handed over the management of the distribution business as well as the design construction of Manor Centre to Raju. He further stated that he transferred half of his shares in Topaz Investments to Raju but he was never paid for them. Shortly before the death of their father, the shares held by their father in Topaz Investments Ltd., were transferred to Raju and Suresh in equal portions. At the time of their father's death therefore, Raju and Suresh each owned 50% of the shares in Topaz Investments Ltd., Public Supermarket Ltd., and Lord and Lady Ltd., He also stated that when Kay Mart Ltd. was incorporated he caused 50% of the shares to be allotted to Raju without payment merely because the provisions of the Companies Act, at that time required that there be at least two shareholders in the formation of the company.

[17] Between 1989 and 1991 Raju was the managing director of all of the defendant companies. During this period, Suresh stated Raju again moved substantial sums of money from the Jamaican companies and used them for his personal benefit. This, he said, caused the various companies to encounter serious financial difficulties. Topaz Investments Ltd. was so seriously indebted to Mutual Security Bank that, even with financial assistance from other companies in the group, it could not service its debt. Consequently the shopping complex at Manor Centre was put up for public auction "but was later withdrawn as the parties reached an agreement."

[18] Suresh further stated that in 1997, in order to alleviate the debt burden of Topaz Investments Ltd. he and Raju attended numerous meetings with financial institutions, primarily Mutual Security Bank/NCB. He said that Raju advised the banks that he was not opposed to a takeover of the shopping complex and invited several investors to take over the combined debt in exchange for the complex. He, Suresh, however, commenced serious negotiations with the financial institutions and was able to secure a compromise agreement with NCB on the condition that he

would take over the management of the group of companies and ensure that payments were made in accordance with the agreement. This condition, he added, was attached because the bank's management, through its Deputy Chairman, Mr. Dunbar McFarlane, stated that it had no confidence in Raju's management and leadership. Additionally the bank was not comfortable in dealing with Raju who kept insisting that the size of the debt was as a result of the bank's alleged exorbitant interest rates.

[19] Suresh also stated that Raju expressed doubts as to whether it was possible to service the loans and eventually advised him that he had no intention of being a part of the repayment plan or the restructuring exercise. Raju then agreed to transfer all his shares in the defendant companies to him in return for being relieved of his debts servicing obligations. Additionally, Raju would take over the Jewellerama store in the Mall Plaza. Consequent on this agreement he instructed DBO Jamaica, the group's auditors to prepare the necessary share transfer certificates for execution by Raju.

[20] Suresh further stated that between 1997 and 2005 Raju showed no interest in the operation of the defendant companies and operated the Jewellerama store at the Mall Plaza separate and apart from the other entities. He also stated that despite several reminders by him and Raju's assurances that he would forward the executed certificates of transfer to the auditors, the transfers were never made.

[21] Suresh stated that upon the sale by Raju of premises at Upper Mark Way in Saint Andrew, which was owned by Topaz Investments Ltd. he insisted that Raju turn over half of the proceeds to satisfy demands being made against Topaz Investments Ltd., Raju refused to do so and this is what, he opined, triggered Raju's letter to NCB and the filing of the petition to wind up the defendant companies.

[22] During cross-examination Suresh agreed that their father was a shareholder in the companies which were incorporated in the U.S.A. He however, stated that he

was not sure whether or not he was a shareholder. He also stated that based on their family culture sons inherit from their father, and that before their father died he assigned the ownership of Topaz Investments Ltd to him and Raju in equal shares. Later, however, he disputed the transfer of half of his father's shares to Raju although he admitted that the documents, by virtue of which the transfer was made to him, were signed at the same time as the documents pertaining to the transfer to Raju.

[23] Suresh further, in cross-examination, stated that he transferred half of his shares to Raju after the death of their father because Raju told him that that was their father's wish. He maintained that the transfer was made after his father's death although admitting that his signature was on the stamped transfer which was dated 24 February 1989 and to which was attached a certificate from the Stamp Commissioner dated 16 March 1989 and which showed that Mr. Madhu Khemlani held 100,010 shares.

[24] Also during cross-examination Suresh stated that he heard Raju tell bank officials that he would transfer his shares to Suresh. He maintained that that was what Raju agreed to do and that Raju would have nothing to do with the companies and would not be liable for their debts. He, however, admitted that Raju signed the restructuring agreement with the bank as Director of all the companies and gave his personal guarantee with the bank. He also agreed that in order for this personal guarantee to be removed there would have to be an amendment to the agreement with the bank. This was never done so Raju is still liable to the bank on his personal guarantee.

[25] Suresh also admitted that he was aware of the provisions of Section 3 of the Companies Act which then required that there be at least two shareholders in a registered company. The transfer of shares in the companies from Raju to him would therefore be in breach of this provision and would have prejudiced the compromise agreement.

[26] Suresh also agreed that Jewellerama Company Ltd. in which himself and Raju were equal shareholders owned two stores - one at the Mall Plaza which was operated by Raju and the other at Manor Centre which he operated. This, in his witness statements, was the agreement reached between himself and Raju. To support this he made reference to the fact that the stores advertised separately and were separately insured. When cross examined about the benefit to be derived by Raju, Suresh then stated that it was Jewellerama Company Ltd. that should have been transferred to Raju.

[27] When he was cross-examined about his delay in seeking to have Raju's shares transferred to him, Suresh stated that he never believed that Raju would renege on his agreement. In 2000 he decided to give instructions to DBO to prepare the transfers after he and Raju received letters from Refin Trust Ltd., demanding that they, as guarantors of the loan by NCB to Topaz Investments Ltd., settle the indebtedness. He stated that upon receipt of this letter Raju reminded him of the agreement which was made in 1997, consequently he instructed that the transfers be prepared.

[28] During cross examination about the instructions given to DBO Suresh agreed that although the agreement allegedly made between Raju and himself did not involve transfers to Suresh's sons, he instructed that transfers also be made to his sons Chirag and Vikram who were then six and four years old respectively. He agreed that Topaz Investments Ltd., was set up as a family business and hence the transfer of shares were strictly controlled by the Articles of Association. When he was shown Article 25 which stated:

"No share shall be issued or transferred to any infant,
bankrupt or person of unsound mind."

he said he then realized that transfers to his sons would be in breach of that article. He was not sure whether or not the Articles of Association of the other companies contained similar restrictions.

[29] He further admitted that he was alerted to the fact that the ages of his sons would be an important factor when he received letters from DBO with the draft transfers. These letters requested that the draft transfers be signed and returned with the Taxpayer Registration Numbers (TRN) of all the parties. The letters also requested a copy of the birth certificate of any party who was under 17 years of age as it would be needed for the presentation of the documents for stamping. He said he signed the drafts on behalf of himself and his sons and sent them to Raju for his signature. They were, however, not returned to him. He denied the suggestion that he was being untruthful when he said he sent the drafts to Raju.

[30] Suresh also stated that he took no action to enforce the agreement between himself and Raju between 1997 and 2005 because he always thought that Raju would honour the agreement. Although he made several requests orally, even before the drafts were prepared, none was made in writing. He further stated that it was not until 2005 that he formed the view that Raju was dishonest.

[31] Mr. Dunbar McFarlane gave evidence on behalf of the claimant. He is a banker who was employed to Barclays Bank Jamaica Ltd. In 1994 he became the CEO and Deputy Chairman of NCBJ. In the 1990s the shares of Mutual Security Bank (MSB) to which the Khemlani Group of Companies was indebted were acquired by NCB Group Limited and Mr. McFarlane was appointed Chairman of MSB in 1994. The two banks merged in 1996.

[32] He stated that by virtue of his position he became aware of the debts owed by the Khemlani Group of Companies and ongoing law suits between MSB and the Khemlani Group of Companies which disputed the amount of the debts. Consequently, in an effort to resolve the issues, he commenced discussions with Raju and Suresh Khemlani to explore the possibility of arriving at an acceptable compromise and ultimately ending the litigation between the parties.

[33] Mr. McFarlane further stated that during the course of negotiations Raju Khemlani did not appear to display an attitude towards the debt which would inspire NCB to continue to extend financial support to the Group. He was of the view that Raju Khemlani showed a lack of interest in the survival of the business of the Group and advocated the sale of the real estate assets of Topaz Investments Ltd. Because of the business confidence engendered by Suresh Khemlani, however, the NCB Board of Directors approved the writing down of the indebtedness by \$75,000,000.

[34] During cross examination Mr. McFarlane stated that the bank was not concerned with the share ownership of the Khemlani Group of Companies and that since his understanding was that the law would not allow a company to operate with one director he would not have agreed to such a proposal.

[35] Mr. McFarlane also stated that he was aware of the court order in November 1995 barring the bank from selling Manor Centre and this could have triggered the commencement of negotiations which led to the compromise agreement in 1997. The negotiations, he stated, were also with a view to bring the litigations to an end as Raju Khemlani was insisting that the size of the debt was as a result of substantial interest charges by the Bank.

[36] He stated that the compromise agreement was arrived at and signed in April 1997 by both Raju and Suresh Khemlani on behalf of the Khemlani Group of Companies. He further agreed that at no time did Raju Khemlani display an attitude that he was giving up ownership of the companies to Suresh Khemlani. He also agreed that because of the personal guarantee given by Raju Khemlani, he could not distance himself from the debts of the group.

[37] Ms. Rowena Victoria Buddington also gave evidence on behalf of the claimant. From January 1995 to December 2007 she was employed as Manager of the Company Secretarial Services Department of DBO Jamaica (formerly Ernst & Young), the auditors for Topaz Investments Ltd., She stated that on or about 1 July

2000 she received instruction from Mr. Suresh Khemlani to prepare documents to effect the transfer of shares registered in the name of Mr. Raju Khemlani. She further stated that she prepared the documents and on or about 6 July 2000 sent them to Mr. Suresh Khemlani for execution by Mr. Raju Khemlani.

[38] Ms. Buddington was also subjected to cross-examination. She stated that the instructions she received relative to the transfer of shares were given orally. She said that the draft transfers were sent by bearer to Mr. Suresh Khemlani with covering letters in which she registered that the transfers be signed by the parties and returned with the TRN of all parties. She further requested a copy of the birth certificate of any of the transferees who had not yet attained the age of seventeen years. She stated that what was requested was never supplied.

[39] She further stated that she did not know Mr. Suresh Khemlani's sons and agreed that at their age in 2000 they could not have received TRNs and hence the Stamp Commissioner would not have processed the transfers. She also agreed that transfer of shares to Mr. Suresh Khemlani's sons would be in breach of the Articles of Association of Topaz Investments Ltd.

[40] Also giving evidence on behalf of the claimant was Mr. Devon Tapper, an Audit Senior in DBO Jamaica. He stated that in or about June 1997 he was assigned as auditor of the Issar Group of Companies which included Topaz Investments Ltd. Public Supermarket Ltd., Kay Mart Ltd., and Lord and Lady Ltd. As the auditor he was presented with the financial records of the companies from which he prepared financial statements from 1994.

[41] During cross-examination he said he had noted that the balance sheets in relation to Topaz Investments were signed by Suresh Khemlani alone although there was space provided for the signature of Raju Khemlani.

[42] Ms. Angella Bailey next gave evidence on behalf of the claimant. She stated that she was employed to the Jewellerama store at the Mall Plaza since October 1990. The store was then managed by Suresh Khemlani and she was happy with the way it was managed. She said that after Raju Khemlani took over the management of the store its operations deteriorated and was eventually closed in 2007. Consequently she applied to Suresh Khemlani for a job and was employed as the Assistant Sales Manager at the Manor Centre store. During cross-examination she stated that Suresh Khemlani was a good manager Raju Khemlani was not. She could not recall when Raju Khemlani took over management of the store.

[43] Raju Khemlani, in his evidence stated that in 1976, at the request of his father he went to the U.S.A. where he operated businesses on behalf of the family. He denied that those business ventures failed because of his mismanagement. Instead, he said, because of certain financial developments in the USA which led to the investigation of banks from which the companies had secured loans the loans were called in. This led to the companies being declared bankrupt.

[44] He stated that at his father's request he returned to Jamaica in 1986 and assumed the management of Topaz Investments Ltd, he stated that he was not initially made a shareholder as he was away from the island and it was desired to form the company quickly. He further stated that it was always his father's wish that he would become a shareholder and as a consequence 50% of Suresh's shares were transferred to him on 24 February 1989. He exhibited a copy of the stamped transfer which was signed by himself and Suresh and dated 24 February 1989 and indicated that shares numbered 49996-99991 were being transferred in consideration for the payment of \$49,995 which was paid by Raju. Later that year his father transferred his shares in equal proportions to Suresh and himself.

[45] He stated that in 1989 while Topaz Investments Ltd. was still undertaking the construction of Manor Centre interest rates on construction loans began to escalate and resulted in an increased debt burden on the company. In order to alleviate the

debt issues, he and Suresh entered into negotiations with NCB. This led to a compromise agreement which was reached in 1997 and in which he provided personal guarantees. Having concluded that Suresh's management style would be better suited to the management of the various companies he decided to hand over management to Suresh. He denied that he even agreed with Suresh to transfer any shares to him or that he showed no interest in the affairs of the companies. He merely allowed Suresh to have a free hand in the management.

[46] He stated that matters came to a head in 2005 after repeated requests from him to Suresh for information about the operations of the companies were not complied with. Consequently he wrote to NCB instructing that no financial transactions should be entered into between the bank and the companies without the approval of both directors. He also filed petitions for the winding up of the defendant companies. He denied that his actions had anything to do with a dispute over the proceeds of sale of property at Upper Mark Way in St. Andrew. He claimed that although Topaz Investments Ltd was the registered owner of the property, he was the beneficial owner and so was entitled to the entire proceeds of sale. He further opined that the claims which were filed by Suresh were concocted as a result of the petitions which were filed by him.

[47] In response to questions during cross-examination Raju stated that although the family business in the USA was closed as a result of Chapters 7 and 11 bankruptcy he was not declared a bankrupt. He stated that he got married in February 1986 and returned to Jamaica in April of that year. He then resided at Abbey Court in St. Andrew with his parents, brother and wife. His wife returned to the USA in August 1994 but he remained in Jamaica while residing at 37 Upper Mark Way. He returned to the USA in late 2007.

[48] Regarding the Jewellerama store in the Mall Plaza, Raju disagreed with suggestions that that store was the flagship store in his father's business enterprise or that it financed the expansion into the USA. He further disagreed with the

suggestions that that store seeded the entire group of companies and that it funded the purchase of property at Belmont road in St. Andrew, Upper Mark Way or 195 Constant Spring Road upon which the Manor Centre was built. He also disagreed with suggestions that that store financed the Lord and Lady stores in Mall Plaza and Manor Centre and Kay Mart Ltd. He however, agreed that it financed the Jewellerama stores at Manor Centre and at the Norman Manley Airport.

[49] Regarding the sale of shops at Manor Centre, Raju disagreed with the suggestion that a sale of all the shops would not have cleared the indebtedness to the bank. He stated, however, that it was never his intention to sell all the shops and denied that Suresh had brought to an end the strategy of selling the real estate. He stated that the sale of shops at Manor Centre commenced in 1993 and denied that by then 30% of the shops were already sold.

[50] Raju also denied that the real problem that the group of companies faced was his mismanagement and refuted the suggestion that his recognition of this short coming caused him to back out of the management of the companies. He stated that he appointed Suresh as managing director and agreed that under Suresh's management the indebtedness of the group of companies was partially brought under control. He emphatically disagreed with the suggestion that in 1997 he agreed to transfer his shares in the defendant companies to Suresh and in exchange would take over the Jewellerama store at the Mall Plaza. He stated that he took over the management of the Jewellerama store in 2000 and not in 1997 as was suggested. He refuted the suggestion that after 1997 he did not participate in the management of any of the defendant companies. He denied receiving transfers from Suresh and denied being asked by Suresh to complete the transfers.

[51] In respect of the sale of the premises at Upper Mark Way, Raju denied giving varying answers in order to cover up his misappropriation of the proceeds of sale. He stated that the premises were owned by his parents and that he was the beneficial owner. He denied that Suresh asked him to pay over half of the proceeds of the sale

and that triggered his seeking to wind up the company. He agreed that Suresh received a letter dated 3 March 2005 concerning the debt owed by Topaz Jewellers but disagreed that upon the receipt of that letter they both agreed to sell the premises at Upper Mark Way to reduce the debt.

[52] Raju further disagreed with the suggestion that his approach between 1994 and 1997 was to walk away from the responsibility of repaying the debt to NCB. He said that he agreed to all that was in the compromise agreement which brought about a significant reduction in the claimed indebtedness and also in the interest to be applied.

[53] Raju agreed that he received a letter from Refin Trust Ltd. which was similar to the one received by Suresh and dated 10 April 2000. It concerned the indebtedness of Topaz Investments Ltd to NCB. He stated that after receiving that letter he met with Suresh constantly. He, however, denied that at any of those meetings he urged Suresh to put in place the separation agreement that they arrived at in 1997. He further denied that subsequently Suresh presented the transfers to him.

Issues

[54] The claims which were brought by the claimant named, in addition to the first defendant, four other defendants which were companies owned equally by the claimant and the first defendant. There was no indication that any of these defendant companies was served with the claims and they took no part in the proceedings. No doubt they were named as defendants because the orders which were sought by the claimant, if granted, would impact upon them. Issue was really joined between the claimant and the first defendant and this raised two questions. Firstly, was there an agreement between the claimant and the first defendant whereby the first defendant would be relieved of all responsibility for the debt owed to NCB by the defendant companies in exchange for the transfer of all of his shares in the defendant

companies to the claimant? Secondly, if there was such an agreement, what legal consequences flowed from this agreement?

[55] During my review of the evidence, for ease of reference and clarity, and without meaning any disrespect to either the claimant or the first defendant, reference to them were made by using their first names.

Submissions Relative to the first question

[56] In written submissions on behalf of the claimant, the court was asked to accept as truthful and reliable, the evidence presented on his behalf. It was submitted that the first defendant's arrival in Jamaica in 1972 after the failure of his business ventures in Kowloon and his return to Jamaica in 1986 after his business in the USA were declared bankrupt showed a history of the first defendant walking away from failed business ventures. This mismanagement of his business affairs and his otherwise irresponsible behaviour, it was submitted, caused his father to initially exclude him from ownership in Topaz Investments Ltd., the umbrella company through which investment were channelled.

[57] The court was also urged to accept that the first defendant, between 1994 and 1997 displayed an attitude which suggested that he no longer had any interest in holding onto the properties owned by the defendant companies and was willing to hand them over to the bank. It was further submitted that this attitude together with his absence from many of the meetings with bank officials which led to the compromise agreement clearly indicated that he wished to distance himself from the debt owed to NCB. It was also submitted that by relinquishing control of the defendant companies, the first defendant acknowledged the existence of an agreement made between himself and the claimant. Additionally, it was submitted that another reason for the first defendant's desire to rid himself of the debt burden was the fact that in the compromise agreement, after 1998 the interest rate would likely be increased from 20% which was the agreed rate for the period 1997 to 1998.

[58] On behalf of the claimant it was also submitted that his delay between 1997 and 2000 in seeking to have the shares transferred was due to the fact that he had orally requested that the first defendant execute the transfer as he had promised and that he had expected the first defendant to honour the agreement. The court is also asked to accept that the draft transfers were prepared in 2000 after receipt of letters from Refin Trust Ltd. and the first defendant's reminder to the claimant of the agreement.

[59] The court was further asked to accept the evidence of the claimant that the further delay between 2000 and 2006 when the first claim was filed was caused by his belief that the first defendant would not renege on his promise, and that he only became aware of the first defendant's dishonesty when a dispute arose about the use of the proceeds of sale of premises at Upper Mark Way. This, he said, triggered the first defendant's action in writing to the bank instructing that no transaction should be conducted without the signature of both directors, and the filing of the winding up petitions.

[60] The court was further asked to accept the evidence of the other witnesses called on behalf of the claimant and to find that their evidence would support a finding that there was in fact an agreement made between the claimant and the first defendant.

[61] On behalf of the first defendant it was submitted that the court should reject the evidence of the claimant that there was any agreement between himself, as he stated, and the first defendant. The court was asked to accept that the indebtedness of the defendant companies was not as a result of the first defendant's mismanagement, but as a result of the economic climate at the time and the high interest rate charged by the bank.

[62] The court was asked to reject the submission made on behalf of the claimant that it was never intended that the first defendant would be made a shareholder in

Topaz Investments Ltd., The court was instead asked to accept the first defendant's account as to the reason for his initial omission and to accept that, in accordance with his father's wishes, 50% of the claimant's share were transferred to him long before his father's death and that he had paid for them. The court is also asked to accept that, before his death, his father had transferred his shares to himself and the claimant in equal shares.

[63] It was further submitted that it was incorrect to suggest that between 1994 and 1997 the first defendant exhibited an attitude which suggested that he wished to give up possession of the defendant companies. This, it was submitted, would be inconsistent with the filing of a suit in 1995 which resulted in the barring of the bank from selling properties of the defendant companies and which led to discussions which resulted in the compromise agreement.

[64] It was further submitted that no transfer was submitted to the first defendant for his signature. The following reasons for this submission were proffered:

- i) there was never any suggested agreement to transfer shares to the claimant's sons;
- ii) the claimant, as he admitted, was aware, from at least the time of the receipt of the draft transfers and the letter from Ms. Buddington, that the ages of his sons would be a bar to the transfers being made to them;
- iii) the first defendant would have no reason to refuse to sign if he was like one who was seeking to have the transfers made.

[65] It was also submitted that the claims filed by the claimant were merely retaliatory and was intended to thwart the actions taken by the first defendant.

Analyses and Conclusions

[66] Was it the intention of Mr. Khemlani that the first defendant should be excluded from ownership of shares in Topaz Investments? The claimant has so asserted and have said that the first defendant acquired shares after his father's death because he was able to convince the claimant that their father had wished it. This assertion, however, is inconsistent with other evidence which was presented to the court. There was, exhibited to the court, a stamped transfer of shares in Topaz Investment Ltd. from the claimant to the first defendant for monetary consideration. This transfer was dated 24 February 1989, long before Mr. Khemlani's death in November 1989, and was signed by the claimant. He denied signing the transfer in February 1989 but could offer no explanation as to the presence of his signatures, which was not denied, on the transfer which was dated 24 February 1989.

[67] The claimant also challenged the authenticity of the transfer of shares from their father to the first defendant. While accepting that the transfers from their father were made in the same document and claiming the transfer made to him to be valid, conflictingly challenged the validity of the transfer to the first defendant.

[68] Several reasons were given for the first defendant wishing to enter into the agreement with the claimant:

- i) he wanted to hand over properties belonging to Topaz Investments Ltd to the bank in order to rid himself of their indebtedness;
- ii) in return for his shares in the defendant companies the claimant would relieve him of his debt burden;
- iii) he would be given the Jewellorama store in the Mall Plaza;
- iv) concern about interest rate after 1998.

[69] Each of the reasons given has raised questions. Why would the first defendant in 1995 bring an action to successfully bar the bank from achieving what, it was said, was desired by the first defendant? If, as is alleged, the first defendant entered into the agreement with the claimant before a compromise was reached with the bank, why would he become a party to the compromise agreement by signing as a director of the companies and giving his personal guarantee for the loans? Since the Jewellerama store at the Mall Plaza was one of two such stores operated by Jewellerama Ltd. in which he was a 50% shareholder what benefit would he have gained when the other store at Manor Centre was fully controlled by the claimant? It is to be noted that the interest rate charged by the bank prior to 1997 was between 40% and 50%. In paragraph 11(c) of the compromise agreement the interest rate from April 1, 1998 was stated as follows:

- (c) From April 1, 1998 to the repayment of the Debts Interest shall be at such rate (within the range of normal commercial lending rates of National Commercial Bank (Jamaica) Limited) as is determined by the Lenders for any given period and advised to the Borrowers.

If the 1st defendant was concerned that the interest rate would be increased significantly, why then did he sign the compromise agreement

[70] The conduct of the claimant also raises questions. Knowing, at least from 1994 when he incorporated Kay Mart Ltd. that there must be at that time at least two shareholders for a company to exist, why did he make an agreement which would make him the sole shareholder?

If there was in place the agreement which was said to have been made between the claimant and the first defendant why did the claimant allow the first defendant to be a party to the compromise agreement and to give his personal guarantee? Knowing that for the first defendant to be relieved of the responsibility for the debt to the bank, the compromise agreement would have had to be amended why was there no real effort made to effect this? Knowing that the ages of his sons could be a bar to the

transfer of shares to them why did the claimant send the transfers to the first defendant for signing? If there was the agreement between the claimant and the first defendant why did the claimant not take steps to fulfill his obligations at the same time as he requested the transfers, or at all? Why did the claimant wait until 2006 to seek to enforce the agreement?

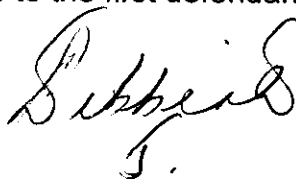
[71] The claimant attempted to explain his delay in seeking to enforce the agreement by stating during cross-examination that it was not until 2005 that he became aware of the first defendant's dishonesty. This, however, was in conflict with his previous testimony during which he painted the first defendant as an irresponsible and deceitful person.

During cross-examination the claimant also sought to show a benefit to the first defendant in the acquisition of Jewellerama by stating that what was intended was a transfer of Jewellerama Ltd to the first defendant. Nowhere, however, was that stated in any of his written statements or previous *viva voce* evidence in which reference was only made to the store at the Mall Plaza.

[72] The questions to which no reasonable answers have been provided and other unexplained circumstances have created doubts about the agreement allegedly entered into between the claimant and the first defendant.

[73] Having carefully assessed all of the evidence and noted the demeanour of the witness I find that the claimant has failed to satisfy the court on a balance of probabilities that the agreement which was claimed was in fact entered into between the claimant and the first defendant.

[74] Having found that the claimant has failed to satisfy the court that the agreement was entered into between himself and the first defendant there would, therefore, be no need to address the second question as to the legal consequences which might have flowed from the agreement. Accordingly, the claims brought by the claimant are dismissed with costs to the first defendant to be taxed if not agreed.

A handwritten signature in black ink, appearing to read 'S. Subbe', is written at the bottom of the page.