[2016] JMCC Comm. 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. CD 00030 of 2011

BETWEEN	**L.D.T. SERVICES LIMITED**	**1st CLAIMANT**
	LEON FORTE	**2nd CLAIMANT**
AND	**TWIN ACRES DEVELOPMENT COMPANY LIMITED**	**1st DEFENDANT**
	HORACE MANDERSON	**2nd DEFENDANT**
	GARTH WILLIAMS	**3rd DEFENDANT**
	MICHAEL GYLES	**4th DEFENDANT**

ANCILLARY CLAIM

BETWEEN	**TWIN ACRES DEVELOPMENT COMPANY LIMITED**	**ANCILLARY CLAIMANT**
AND	**HORACE MANDERSON**	**1st ANCILLARY DEFENDANT**
	MICHAEL GYLES	**2nd ANCILLARY DEFENDANT**

Contract- Partnership- Company formed- Claim by one partner for work done and money owed- Breach of fiduciary duty and/ good faith - Claim for return of sums wrongly requested- Misrepresentation- Fraud- Conversion

Carol Davis for the 1st and 2nd Claimants

Seymour Stewart and Yanique Douglas for the 1st Defendant / Ancillary Claimant

Alton Morgan and Marlene Uter instructed by Anastaisa McNeish of Alton Morgan & Company for the 2nd and 4th Defendants / 1st and 2nd Ancillary Defendants

Heard: April 11-15, 2016, June 1, 2016 and July 29, 2016

CORAM: BATTS J,

[1] At the commencement of the matter Ms Carol Davis Counsel for the Claimants requested permission to use a recorder to tape the evidence. There was no objection and I decided to allow it on condition that a copy of the recording was provided to all concerned afterwards. No copy of the recording has been provided to the Court. I therefore rely solely on my notes of the evidence for the purposes of the delivery of this judgment.

[2] These proceedings are premised on the deteriorated relationship between partners whose disputes are now before the court for a resolution. The partners of whom I speak are Leon Forte, Horace Manderson, Garth Williams and Michael Gyles. They are all parties to the action, save for the 3rd Defendant Garth Williams against whom the claim was discontinued when the matter came before me on the 11th of April, 2016.

The partnership agreement is evidenced in writing by a document dated 28th December 1994 [exhibit 2]. That document records the fact that the partnership commenced in or about December 1992.The purpose of the partnership was to acquire and develop property known as Twin Acres situated at 14 Stillwell Road in the parish of St. Andrew. The parties to the partnership agreement brought with them special expertise from their respective professions. They were each to contribute their expertise in formulating a construction, marketing and management team.

The 2nd Claimant is a construction engineer. The 2nd Defendant is a commissioned land surveyor. The 3rd Defendant is a banker and the 4th Defendant is an architect.

[3] The 1st Claimant, L.D.T. Services Limited is a company registered and engaged inter alia in the business of construction. The 2nd Claimant is a director and majority shareholder of the 1st Claimant. He is also one of the partners and a director and shareholder of the 1st Defendant company. The 1st Claimant was the company through which the 2nd Claimant made his contribution to the project. The 2nd, 3rd and 4th Defendants are also partners and directors and shareholders of the 1st Defendant company.

[4] It was the intention of the partners to raise revenue for the project through the stock market. The partners believed that the sale of shares would provide sufficient funds so that the professional team could; build, repay investors, pay dividends and make a profit. Unfortunately, by the time the project was identified conceptualised and the prospectus formulated, the stock market crashed [see exhibit 2 and paragraph 19 of the witness statement of the 2nd Defendant]. The partners decided nevertheless to continue the development. The project received funding from two sources; capital injection from the partners and loans. The 2nd Claimant also gave a guarantee on behalf of the 1st Defendant.

[5] On March 23, 1993 the partners incorporated a company as a special purpose vehicle to carry out its functions and objectives. This company is the 1st Defendant, Twin Acres Development Company Limited. It is the vehicle through which the property at 14 Stillwell Road was developed. The name of the development is Twin Acres and it occurred in two phases. Twin Acres Phase 1 does not relate to these proceedings. I will however say that the development of Phase 1 failed and subsequently ended up with the Financial Sector Adjustment Programme (FINSAC). After approximately 10 years, the 1st Defendant was eventually able to buy back the project from FINSAC and go on to complete it. This case concerns only Twin Acres Phase 2.

[6] Although they went on to form a company the partners did not enter into a shareholders agreement. They agreed that the directors would be paid for their services from the proceeds of the sale of the units [see exhibit 2]. They also

agreed that they would each receive a unit in the development. Fourteen apartments were built. To date, thirteen of these have been sold. The sole unit that remains unsold is identified as apartment B6. The value of which was between 27 and 29 million Jamaican dollars in the year 2013 [see exhibit 1 page 176].

[7] The development of Phase II started in 2004 and ended in 2007 when the last unit was completed. It is clear that the contribution of the partners to the project was by no means equal. These proceedings have placed a spotlight in particular on the contribution of the 2nd Claimant who has sought to recover through the 1st Claimant the value of his contribution to the project. As counsel for the Claimants put it the 2nd Claimant's expertise was that of contractor in the field of construction engineering. The other three directors have not sought remedies to recoup their contribution, neither have they lead evidence of the value of same.

[8] Suit was commenced on April 6, 2011 against Twin Acres Development Limited as the sole Defendant. By way of further amended claim and particulars of claim Horace Manderson, Garth Williams and Michael Gyles were added as Defendants. The 1st Claimant says that it did work for the benefit of the 1st Defendant for which it has not been paid while the 2nd Claimant seeks to recover monies due under a loan to the 1st Defendant as well as an account of profits of the partnership by the Defendants.

[9] I have reproduced below the remedies sought by the Claimants as contained in their further amended claim form;

> *1. The sum of $24,680,598 for work done on the construction at 14 Stillwell Road (inclusive of management fees)*
>
> *2. The sum of US$18,000 for loan made to the defendant by the 2nd claimant.*
>
> *3. The sum of $1,258,227 for loan made to the defendant by the 2nd claimant.*

4. Interest at a commercial rate of 16% p.a. or such other rate as this Honourable Court shall determine.

5. A mareva injunction / freezing order restraining the defendant , their servants or agents from selling, disposing of, transferring, charging, or in any way whatsoever dealing with or removing the property of the defendant and in particular equipment as follows:

a. The defendant's land registered at volume 1399 folio 793 of the register book of titles.

b. The sum of $ 6,100,000 held in account # 726531 at NCB Capital Markets, The Atrium, Trafalgar Road, Kingston 5

6. An account of profits of the partnership received by the 2nd, 3rd and / or 4th defendants.

7. Costs.

[10] The Defendants have not only defended the claim but have filed a counterclaim suing the Claimants for damages. On June 10, 2014 the 2nd and 4th Defendants by way of an amended defence and counterclaim sought against the 1st Claimant the sum of $16,866,092.35 which they say was wrongfully requested for pay bills on the Twin Acres Phase 2 project and for all other sums wrongfully requested and sums overpaid for construction work done. The 2nd and 4th Defendants claimed against the 2nd Claimant for the return of the sum of one million Jamaican dollars ($1,000,000.00) allegedly loaned to him by the 1st Defendant. The Defendants also claimed against the 2nd Claimant for misrepresentation, fraudulent conversion and breach of fiduciary duty and/ or duty of good faith.

[11] I reproduce below the remedies sought by the Defendants as contained in their defence and amended counter claim;

The 1st, 2nd and 4th defendants claim:

1. Against the 1st claimant as agent and/or servant of the 2nd claimant and/or the 2nd claimant for return of the sum of $16,866,092.35 wrongfully requested for the pay bill for the Twin Acres Phase 2 project at 14 Stilwell Road in the parish of Saint Andrew.

2. Against the 1st claimant as agent and/or servant of the 2nd claimant and/or the 2nd claimant for return of all other sums wrongfully requested and for the return of all funds overpaid for construction work done on the Twin Acres Phase 2 project at 14 Stilwell Road in the parish of Saint Andrew.

3. Against the 2nd claimant for the return of the sum of $1,000,000.00 loaned to him by the 1st defendant.

4. Against the 2nd claimant for damages for:

(a) misrepresentation;

(b) fraudulent conversion; and

(c) breach of fiduciary duty and/ or duty of good faith

5. Interest on such amounts found to be due to them from the 1st and 2nd claimants at such rate and for such period as the court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act.

6. Costs against the 1st and 2nd claimants.

7. Further and/or other relief.

[12] On November 6, 2015 an ancillary claim was brought by the 1st Defendant by way of a derivative action against the 2nd and 4th Defendants; Horace Manderson and Michael Gyles. The claim is for an account of monies collected by the Ancillary Defendants in the sale of apartments, as well as damages.

[13] I reproduce below the remedies sought by the ancillary claimant as contained in its ancillary claim;

And the claimant claims:

Damages

An account of all monies collected by the ancillary defendants in their purported sale of all properties belonging to the ancillary claimant;

Payment of all sums found due to the ancillary claimant on the taking of the account in (2) above within a time to be set by this Honourable Court;

Interest (to be assessed) pursuant to the Law Reform (Miscellaneous Provisions) Act or at such rate and for such period as this Honourable Court sees fit;

Costs; and

Further and other such relief as this Honourable Court deems fit.

[14] At the trial the Claimants called two witnesses; the 2nd Claimant and Mr Roger Graham. Four witnesses were called on behalf of the 2nd and 4th Defendants. They were the 2nd Defendant, the 4th Defendant, Dr Stead Williams and Mr. Fitzroy Bogle. The 2nd Claimant gave evidence on behalf of the Ancillary Claimant. The agreed expert Michael Robinson attended and was cross examined by all parties.

[15] It is agreed by the parties that the 2nd Claimant managed the project expenditure. The 2nd Claimant contends that he did more than that and provided construction services for the entire project. The details surrounding his contribution are therefore disputed. It is agreed that during the course of the development monies were requested and given to the 1st and or 2nd Claimants for project expenditure including but not limited to the payroll.

The 2nd Defendant (Horace Manderson) in his witness statement dated February 29, 2016 stated that the project construction cost was determined to be in the order of $100,000,000.00 in addition to a contingency of 20 per cent which brought the total to $120,000,000.00. He said that this was the basis on which the selling price of the units was determined. He went on to say that an additional sum of $39,700,000.00 was ultimately required to complete the project. This meant that the Directors would be unable to meet their objective of each obtaining an apartment unit in the project free and clear of debt. According to his witness statement after selling ten units of the fourteen the project was still not fully funded nor completed (see paragraph 29 of his witness statement). At the end of the

project with one of the apartments, unit A7, still not completed, it was determined that the construction cost of the project had risen to approximately $176 million.

The directors being dissatisfied with the state of affairs contacted Mr. Lascelles Williams the father of the 3rd Defendant and asked him to audit the accounts of the 1st Defendant and the construction account of the 1st Claimant After examining the findings of this audit the other directors concluded that the 2nd Claimant had mismanaged the funds of the project. Influenced by this position the directors, though they had previously paid sums to the 1st and 2nd Claimant, refused to pay further sums. They continued however to seek buyers for the remaining units.

[16] The 2nd Defendant in his amended witness statement dated March 31, 2016 stated that after the audit the directors discovered that the 2nd Claimant had requested in excess of $18,000,000.00 million on payroll without the knowledge of the other directors. This is even after the 2nd Claimant had repeatedly been warned about requesting payroll cheques without the requisite supporting documents. He went on to say that the 2nd Claimant had never reconciled the float account and even when it became a source of dispute and discontent among the directors the 2nd Claimant would demand the float saying that: '*he was a director of the company and he must be trusted because he did not have any time to be reconciling accounts*'.

[17] The 2nd Defendant also says that the directors contacted an attorney at law who they trusted to mediate the dispute in accordance with the partnership agreement. The attorney in his quest to do so contacted Mr Michael Robinson a quantity surveyor to determine [see page 26 of exhibit 1] :

> *a. The bill of quantities duly priced using the de facto rates and the prices paid by the contractor in the development; and*
>
> *b. a comparative analysis between the priced bill of quantities and the total cost of the completed project.*

According to the 2nd Defendant while awaiting the report the majority of the directors took a decision in the 2nd Claimant's presence to allocate equal emoluments to all directors with the exception of Garth Williams because it was their opinion that the project had failed.

[18] On December 14, 2009 the 1st Defendant entered into an agreement for the sale of apartment B6 being the land comprised in the Certificate of Title registered at Volume 1399 Folio 793 for a price of twenty million Jamaican dollars ($ 20,000,000.00). The purchaser of the apartment initially paid a deposit of three million Jamaican dollars ($3,000,000.00). Interestingly, the 2nd Defendant admitted to receiving six million ($6,000,000.00) in his own name from the then purchaser as a deposit and a further payment for the apartment. This sale was however never concluded. In fact, what occurred was that the sale of the apartment was aborted. The Defendants instead of refunding the sums, sought to, and did execute a settlement agreement with the then purchaser for sums paid to be converted to a loan to the 1st Defendant (see paragraph 6 of the witness statement Leon Forte dated April 6, 2016 and the admissions made in cross examination by the 2nd and 4th Defendants) .As a consequence the 1st Defendant became indebted to the aborted purchaser in the sum of six million dollars Jamaican dollars ($6,000,000.00) plus interest at 10% per annum commencing on July 1, 2010 (see documentation at pages 170 – 174 of exhibit 1).

[19] The 2nd Defendant in his witness statement dated April 6, 2016 stated that apartment A7 was sold by the 1st and 4th Defendants for the sum of $20,350,857.57 million. The 1st Defendant did not receive any of the proceeds of this sale. Instead the sum was distributed amongst the defendant directors. The 2nd Claimant did admit receiving the sum of $500,000.00 from the proceeds of this sale. (see paragraph 8 of witness statement of Leon Forte dated 6th April, 2016)

[20] There are several issues to be determined in these proceedings. They are;

a. Whether the sum of twenty four million six hundred and eighty thousand, five hundred and ninety eight Jamaican dollars ($ 24,680,598) or any sum, is due to the 1st Claimant for work done on the construction at 14 Stilwell Road.

b. Whether the sum of eighteen thousand United States dollars ($ 18,000.00) or any sum, is due to the 2nd Claimant for repayment of a loan made to the 1st Defendant.

c. Whether the sum of one million two hundred and fifty eight thousand, two hundred and twenty Jamaican dollars ($1,258,220.00), or any sum, is due to the 2nd Claimant for repayment of a loan made to the 1st Defendant.

d. Whether the 1st Claimant wrongly requested the sum of sixteen million, eight hundred and sixty six thousand, ninety two Jamaican dollars and thirty five cents ($ 16,866,092.35) and if so whether this amount is due to the 1st Defendant.

e. Whether the 1st Claimant wrongly requested any other sums.

f. Whether there are any sums overpaid to the Claimants for construction work done on the Twin Acres Phase 2 project and if so whether such sums should be returned.

g. Whether the sum of one million Jamaican dollars ($1,000,000) is due to the 1st Defendant for repayment of a loan made to the 2nd Claimant.

h. Whether the 1st and/or 2nd Claimants are liable to the 1st Defendant for ;

- Misrepresentation and/ or
- Conversion and/ or

- Breach of fiduciary duty and/or breach of duty of good faith.

i. Whether the 1st and 2nd Ancillary Defendants should give an account of all monies collected in their purported sale of properties belonging to the Ancillary Claimant.

Ms Carol Davis, Counsel for the 1st and 2nd Claimants submitted that the issues are mostly factual and not legal. I am inclined to agree, for if the Court determines as a fact that the 1st Claimant was engaged as a contractor and carried out work as agreed and has not yet received payment then as a matter of law sums would be due and owing to it. Likewise if the court determines as a fact that the 2nd Claimant loaned sums to the 1st Defendant and has not received payment then as a matter of law sums would be due and owing to him, and similarly for the other issues.

[21] The 2nd Claimant stated in evidence that in or about the year 2004 the 1st Claimant was requested by the Defendants to do certain construction work on Twin Acres Phase 2. He said that it had previously worked on Phase 1 of the said project as a contractor and that the work on Phases 1 and 2 was done in a similar manner. It is the position of the Claimants that the work was done as requested.

[22] The Claimants say that it was a term of the partnership agreement that each partner would be responsible for his respective area of expertise pertaining to the project and would be entitled to charge their professional fees to the project towards the end of the development when funds would be available from the various units. The Claimants say that this means each partner is entitled to payment for professional services. This would be paid by the 1st Defendant towards the end of the development. This is the literal interpretation of the document evidencing the partnership agreement [exhibit 2]. The relevant portion of which reads as follows:

> *Each partner would be responsible for their respective areas of expertise pertaining to the project but would only be entitled to*

> *charge their professional fees to the project towards the end of the development when funds would be available from the sale of various units.*

I agree with the Claimant's construction. To my mind the phrase 'when funds would be available' does not represent a stipulated precondition to the charging of fees but an explanatory note as to why the charging of fees is postponed to the end of the project. Obviously if there were no funds available the fees could not be paid. However that did not mean that the proposed fees would not be charged.

[23] The Claimants say that in or about the year 2010 the project, Twin Acres Phase 2, was coming to an end as at the time only two units remained unsold. They also say that Mr Robinson was first appointed in or about February 2005 by the partners [paragraph 55 witness statement of Leon Forte]. He was later, after the dispute arose, instructed to assess the value of the work done by the 1st Claimant. This account accords generally with that of Mr Robinson [see pages 6 to 16 of the Expert Report exhibit 3]. The 2nd Claimant says and I accept, that it was also agreed that the 1st Defendant would pay to the 1st Claimant the sum found due. Although this was agreed it was not until the Court appointed Mr Robinson as an expert (see Order dated 8th January, 2013) that a report was actually prepared. The Claimants say that a sum of one million Jamaican dollars ($1,000,000.00) for equipment rental was paid by the 1st Defendant on May 22, 2006 (see exhibit 1 page 12). The 1st Claimant was also paid $ 2,036,000.00 towards management fees as part payment of the sum due to it (see exhibit 1 page 15). The Claimants say that these sums have been deducted from the sums owed. The Claimants say that despite requests, the 1st Defendant has failed to pay for the work done.

[24] The report dated October 2013 from Mr. Michael Robinson, Chartered Quantity Surveyor and Cost Consultant is exhibit 3. Mr Robinson is an expert witness appointed by this court. Mr Robinson found that the total spent by the 1st Claimant of $207,766,745 was less than the priced bill of quantities for the project being $213,062,437.00 [page 29 exhibit 3 as amended by the expert]. He

assessed the total management fees due to the 1st Claimant as $15,497,095.23 [page 28 exhibit 3]. By letter dated the 5th December 2013 [exhibit 4(b)] he confirms that that amount is the sum due to the 1st Claimant. I accept the evidence and opinion of Mr Michael Robinson.

[25] The 2nd Claimant says that in the month of May 2006 during the course of the construction of Twin Acres Phase 2 he advanced to the 1st Defendant the sum of US$20,000 for the purpose of meeting its expenses, in particular payments due to persons working on the project. This was evidenced by a National Commercial Bank manager's cheque number 021237, which was lodged to the 1st Defendant's United States dollar savings account on May 2nd, 2006, (see exhibit 1 pages 22-24) The 2nd Claimant says that only US $2,000 has been repaid. The balance of US$18,000 is claimed.

[26] The 2nd Claimant says that in or about September 1994 the 1st Defendant borrowed money from Winston Miller. He says that the directors of the 1st Defendant agreed to repay the sum to Mr Miller. Each of the four directors agreed , on behalf of the 1st Defendant ,to repay a quarter of the loan to Mr Miller. The 2nd Claimant says that in or about 1998 each of three directors including the 2nd Claimant repaid the sum of $1,258,227 but one of the directors was unable to meet his obligation. The 2nd Claimant said that he loaned to the 1st Defendant the sum of $1,258,227 for the purpose of repaying the loan to Mr Miller. The said sum he says was to be repaid towards the end of the development when it was expected that funds would be available from the sale of the various units (see witness statement of the 2nd Claimant filed March 3,2016 at paragraph 36 as well as page 41 of exhibit 1). This evidence was not contradicted and stood unchallenged.

[27] The Claimants say that in the year 2010 the project was coming to an end and there were only two remaining units left to be sold. The 2nd Claimant says that one of the two units was sold in 2010. The 2nd Defendant was paid by the 1st Defendant a sum in excess of market rates for his services as a commissioned

land surveyor. The 2nd Claimant also says that the 4th Defendant has been paid despite the fact that he provided no professional services. The Claimants say they have not been paid for work done and loans as set out above.

[28] The 1st, 2nd and 4th Defendants have maintained that they made no request of the 1st Claimant to do work on Phase 2 of the Twin Acres project. They say that there was no contract between the 1st Claimant and the 1st Defendant. In his evidence the 4th Defendant states that the 1st Defendant did not have the resources to have a bill of quantities prepared for the Twin Acres Phase 2 project. As a result he says that there was no basis for the engagement of a contractor and the usual features associated with the use of a contractor were not present. Those features he said included site insurance and mobilization bond. He said that the directors agreed that there would be no contract with the 1st Claimant (see paragraphs 5 and 6 of the witness statement of Michael Gyles filed February, 29, 2016). He stated that the 2nd Claimant was only to oversee the construction (see paragraph 7 of the said witness statement). In cross-examination however he makes the following statement:

> *"Q: Did you prepare a developer's budget*
>
> *A: That was Mr Forte's (2nd Claimant) responsibility*
>
> *Q: Is Mr Forte a quantity surveyor*
>
> *A: He was the partner responsible for management of the construction aspect of the matter*
>
> *Q: Was he a quantity surveyor*
>
> *A: No*

I find the denial that the 1st Claimant was the contractor on the project disingenuous. I find on a balance of probabilities that the 2nd Claimant was using the 1st Claimant for the purpose performed the role of a contractor on the project.

[29] There exists no written agreement between the 1st Claimant and the 1st Defendant. It is however clear that the Claimants played a significant role in the

construction of the project. The evidence reveals to me that the 2nd Claimant's contribution outweighed those made by the other partners. He oversaw the project and had responsibility for spending and construction. Significant sums of money of which the directors were aware were paid out to his company the 1st Claimant. It cannot be that there was no agreement between the partners that he and his company would have taken on this role. Indeed the Defendants admitted signing the cheques payable to the 1st Claimant. The value of the Claimants' contribution over the period of 2004 - 2007 has been assessed by the expert witness. Pursuant to the written agreement between the partners he and his company are entitled to be paid. After all, as submitted by Counsel for the Claimants, the expertise of the 2nd Claimant is that of a contractor in the field of construction engineering. I find that his service was provided through his company the 1st Claimant, and this with the knowledge and concurrence of the Defendants. I accept the 2nd Claimant as a witness of truth generally. To the extent his evidence differs from that of the Defendants I accept his account.

[30] There was documentary evidence before this court to substantiate the finding that the 1st Claimant was the contractor on the project. At pages 1-6 of exhibit 1 is a brochure which was issued by the 1st Defendant in which the 1st Claimant is described as the main contractor. Additionally the certificate of practical completion which was signed by the 4th Defendant as architect described the 1st Claimant as the contractor (see Exhibit 1 pages 7-9). There is also evidence that the 1st Claimant was the company through which the 1st Defendant disbursed funds and in particular pay bills (see witness statement of Fitzroy Bogle filed February 29, 2016)

[31] Dr Stead Williams the structural/ civil engineer and project manager of the Twin Acres Phase 2 project gave evidence that there was no specific service known as construction management on the site. He stated that that function was never mentioned at meetings (see paragraph 27 of his witness statement dated February 29, 2016). He acknowledged however that the 1st Claimant was involved in the project. Most importantly he admitted in cross examination that the job

description of the 1st Claimant (as outlined in paragraph 28 of his witness statement) fits the job description of a contractor.

[32] Dr Williams also stated that he visited the site almost daily to inspect structural elements, to check their shape and locations and to assess the progress of the works during the entire construction period. He gave evidence of the alleged overbilling of the 2nd Claimant:.

> *"By October of that same year we had completed the basic structural frame, including major architectural addition, namely, a strata office and amenity areas that were necessary but not designed nor costed in the initial project outlay. Since the space was there and the roof (of this area) was needed for the entrance and inclined elevator, the strata office designed by me was built.*

He continued ;

> *Accounting and quantity surveying presentations by LDT Co Ltd as claim for additional funds and to justify expenditure seemed to be grossly misstated, assumed and inflated based on where we were in August 2005 or even December of that same year.*

The Defendants in their submissions relied also on a document prepared by Mr Lascelles Williams (exhibit 1 pages 190-192) who conducted an audit and concluded that the 2nd Claimant requested $17,500,000.00 in excess of the payroll and float account. However, the 2nd Defendant during cross examination conceded that he did not receive any documentation to support Mr Lascelles Willaims' findings. In the absence of this he says he could not say to what Mr Williams was referring in his categorization of the sums. I note that Mr Lascelles Williams is the father of Garth Williams the partner against whom the claim was discontinued. He was therefore not an independent party and could have been influenced by the dispute between the parties. Of greater significance however is the fact that his findings were not supported by any documentation and those who relied on it could not properly interpret it. Furthermore his report runs counter to that of the mutually agreed expert who attended and was cross-examined by the parties.

[33] On January 8, 2013 the Hon. Justice Mangatal (as she then was) made an Order by and with the consent of the parties appointing Michael Robinson as an expert for the purpose of preparing a report as follows;

(a) *Quantifying the work done by the 1st claimant on construction of phase 2 of the project located at 14 Stilwell Road, Kingston 8 in the parish of Saint Andrew.*

(b) *Bill of quantities duly priced using the de facto rates and prices paid by the contractor in the development; and*

(c) *A comparative analysis between the priced Bill of Quantities and the total actual cost of the completed project.*

[34] In the preparation of his report the expert substituted two words in the learned Judge's order [exhibit 3]. Counsel submitted that the substitution was erroneous that this fundamentally compromises aspects of the conclusions and findings of the report. The report states its purpose to be 'Bill of quantities duly pricing using the de facto rates and prices used by the contractor'. I cannot agree with Counsel. I see no material difference as the effect is the same. The expert was to prepare a Bill of Quantities for the project and compare it with the total cost of the project.

[35] The total sum assessed by Mr Robinson for construction costs is more than the amount allegedly paid by the 1st Defendant as per the summary of construction costs provided by Mr Lascelles Williams. Mr Robinson in his report at page 14 stated that the 2nd Claimant ought not to have been permitted to sign on an impress account as it could give rise to mistrust and the casting of negative aspirations. He however made no findings of misappropriation. The documentation, requested by Mr Robinson, was not provided and hence he was never able to verify the pay bills. The relevant cheques were however counter signed by the other Defendants or one or other of them. In cross examination they said that they too did not check supporting documents. The independent

expert however found that given the size and technical nature of the project the amounts paid are within the range of that which is reasonable. A portion of Mr Robinson's evidence when cross-examined by Mr Seymour Stewart is worth quoting:

> *Q: Page 26 (of your report) what is $213 million.*
>
> *A: This is construction cost*
>
> *Q: Projected ?*
>
> *A: A job started in 2004, went until 2007. In that time three increases in labour and material. In a normal contract the contractor would be entitled to add those increases in the period. The increases would bring it to $213 million. It emphasises that the $172 million is even more than reasonable."*

[36] Mr Fitroy Bogle, a site foreman stated that he was employed to the 1st Defendant as the site foreman (see his witness statement filed February 29, 2016). He stated that he was not supervised by the 2nd Claimant nor did he receive any input from him in carrying out his duties. Mr Bogle stated that for most of the project the 2nd Claimant was working on another construction project in Barbican. According to Mr Bogle the 2nd Claimant visited the site but did not supervise the project up to the time the superstructure was completed. Mr Bogle says the 2nd Claimant wanted to be the contractor on the project but the other partners did not allow it. He stated that a gentleman by the name of Dr. Stead Williams was in charge of the overall management of the project and only called the 2nd Claimant when material was needed. Mr Bogle stated that the 1st Claimant, was the entity through which the 1st Defendant paid funds for disbursement but was not the contractor on the project. Mr Bogle gave evidence of his perceptions and, reporting as he did to Dr Williams, it is not surprising if he was mistaken. When cross-examined, although denying that the Claimants were contractors on the project, he said he was paid by the 1st Defendant by cheques drawn on the 1st Claimant's account. I do not accept the evidence of Mr Bogle or the Defendants as it relates to the role of the 1st and 2nd Claimants.

[37] As regards the claim for US $18,000, the Defendants have admitted to receiving the sum of US $ 20,000 and only repaying US $2,000 (see paragraph 24 of the Amended Defence of the 2nd and 4th Defendants). In their Amended Defence they say the balance was set off against material owed to the 1st Defendant. These materials relate to the period December 1997 to December 1998. They are connected with the construction of Phase 1 of the project. The factual circumstances surrounding this matter relate to Phase 2 of the project. In any event the sum of US $20,000.00 was loaned on May 2nd, 2006. This was the date that the money was lodged to the Defendants' account. The Defendants cannot unilaterally say that they set off amounts due to them from the year 1998. I say unilaterally because there is no evidence that it was agreed by the parties that there would be a set off. Furthermore it is unclear whether in 2006 when the loan was made, the Defendants could have maintained an action for material supplied in 1998. More than 6 years had lapsed.

[38] Fitzroy Bogle also stated that during the construction phase of the project, he along with the store keeper/timekeeper and the payroll clerk observed that when material was ordered they did not get all the material. He said that in all cases, they copied the receipts and placed a notation on the copied receipts before delivering the original receipts to the 2nd Claimant. All the receipts he said were copied and kept on site but disappeared after the 2nd Claimant moved his office to the site (see paragraph 18 of the witness statement of Fitzroy Bogle filed on February 29, 2016). There was no quantification of the value of the material allegedly taken. There is therefore insufficient evidence from which I can quantify those sums or indeed make any finding that the 2nd Claimant used material purchased for the Twin Acre Phase 2 project on any other project. Mr Bogle in his witness statement dated February 29, 2016 also stated that on several occasions the 2nd Claimant borrowed material from the site. Mr Bogle said that he along with the store keeper/ timekeeper and the payroll clerk made written note of what was borrowed. He stated that the 2nd Claimant did not return the material borrowed and their notes disappeared after the 2nd Claimant moved his office to the site. Similarly, this evidence does not assist the court in quantifying the value of the

material of which the company was allegedly deprived. I do not accept the evidence of Mr Bogle as factually correct in this regard.

[39] In the circumstances I find for the Claimants on their claim. The sums due are to be reduced by drawings taken by the 2nd Claimant throughout the life of the project. The 2nd Claimant in his witness statement filed on March 3, 2016 at paragraph 27 stated that he received no drawings from the 1st Defendant. He went on to state that the payments he received were towards management fees and other expenses . If that is so the sum that the 2nd Claimant received from the sale of apartment B6 in the sum of $500,000.00 is to go to reduce any amount due to the 1st Claimant from the 1st Defendant.

[40] I must add that on the final hearing date and in the course of his submissions Counsel for the Defendants Mr Alton Morgan, conceded that monies were to be paid to the Claimants. In quite a contrast to the pleadings he stated that the dispute concerned when they should be paid and whether this should be to the exclusion of the other directors. I have already examined the terms agreed by the parties, which states that the partners are to be compensated for their respective contribution towards the end of the project. The project having already long been physically completed and thirteen of fourteen units having been sold, we are certainly towards the end of the project. I will emphasise that the Defendants have not sought to provide evidence of their contribution. The Claimant has pleaded and proved its case and so I will give judgment accordingly.

[41] The Claimants have also sought an injunction from this court. However prior to the trial of this matter a mareva injunction was granted on the 12th May, 2011 by the Honourable Mr Justice Brooks in the following terms:

> *1. That the defendant TWIN ACRES DEVELOPMENT COMPANY LIMITED (hereinafter the company) its directors and officers be restrained and an injunction be granted restraining each of them until trial or further order in this action whether by themselves or their servants or agents or any of them or otherwise howsoever from:*

Disposing of or transferring, charging, diminishing or in any way howsoever dealing with any assets and/ or any property belonging to and/ or in the name or on account of business carried on by the company and/ or acquired or held wholly or in part for, used in connection or otherwise associated with the business of the company , wheresoever the same may be situate in Jamaica and in particular from disposing of or removing any of the following:

The Defendants land registered at volume 1399 Folio 793 of the Register Book of Titles, or any splinter title derived from same.

The sum of $ 6,100,000 held in account no. 726531 at NCB Capital Markets, The Atrium , Trafalgar Road, Kingston 5.

Provided always that nothing in this order shall :

Prevent any bank from exercising any right of set-off it may have in respect of faculties given to the company before including any interest which has accrued or may hereafter accrue in respect of such faculties;

Prevent the company from carrying out ordinary transactions or from expending sums in the ordinary course of business, subject to prior notification to the claimant's attorneys-at-law of amounts, payees , and account from which payment is to be made; and

Prevent the company from expending all sums in connection with reasonable legal costs of defending or prosecuting these proceedings as the case may be, subject to prior notification to the claimant's Attorneys-at-law of amounts, payees, and account from which payment is to be made.

PROVIDED THAT:

The defendant shall sell the real estate property referred to in (10 above and the net proceeds of sale be paid into the defendant's bank account and no payments be made there from except to Tatlyn Hall and Shernette Manning as per existing agreements with each of them.

In any sale of the said unit the 2nd claimant shall be one of the signatories on behalf of the defendant.

There shall be liberty to apply generally and specifically in the event , of the 2nd claimant failing and or refusing to sign any agreement presented to him for execution.

Costs to be costs in the claim.

Claimant's Attorney-at-law shall prepare, file and serve final order herein on or before 30th June, 2011.

[42] I will extend this Order until the 1st and 2nd Claimants are paid their judgment debt in this action or until further order.

[43] As I had previously stated the Defendants have counterclaimed for the return of money as well as damages for misrepresentation, fraudulent conversion and breach of fiduciary duty. This counterclaim also fails when regard is had to my findings of fact as adumbrated above.

[44] The 1st Defendant says that it has debts which it is unable to pay because the 1st Claimant as agent and / or servant of the 2nd Claimant wrongfully requested more sums than was due for the pay bill for the project as well as construction work carried out on the project. Additionally the 1st, 2nd and 4th Defendants say that they have not been able to earn on their investment in the project, as a result of the actions of the 1st Claimant as agent and/ or servant of the 2nd Claimant. The Claimants they contend have requested and received money from the 1st Defendant over and above that which is due to them. The Defendants say that the Claimants made misrepresentations which caused the 1st Defendant to act to its detriment in paying out sums to which they were not entitled and for which they did not properly and fairly account. These allegations the Defendants have been unable to prove.

Whereas it is clear that the 2nd Claimant acted outside of what would be deemed best practices, [see expert report exhibit 3 pages 13 to 17], the Defendants failed to prove that the 2nd Claimant wrongly requested funds or that he requested excess sums. The evidence of Mr Robinson is that the sums requested were comparable to that which obtains in the industry for such a project. The pay bills were scrutinized by Mr Robinson and found to be not unreasonable when regard is had to the size and scale of the project (see pages 18, 24 and 25 of exhibit 3, the expert report).

[45] As regards the Defendants' claim for damages for misrepresentation and/ or fraudulent conversion and/ or breach of fiduciary duty and/ or duty of good faith the evidence falls woefully short. Fraud must be specifically pleaded and particularised. In addition to the inadequacy of the evidence the tort was not particularized. The Claimants in their Defence to Counterclaim filed November 19, 2015 stated that they could not respond further to this aspect of the claim, since no particulars of misrepresentation and/ or fraudulent conversion and/ or breach of fiduciary duty and/ or duty of good faith were given. The Defendants made no attempt to amend their pleadings and cannot now seek those remedies. See **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15.

[46] The 2nd Claimant says that the sum of $1,000,000.00 claimed by the Defendants was not a loan. He pointed to a cheque dated May 22nd, 2006 (page 12 of exhibit 1) payable to the 1st Defendant. There is attached to this cheque an endorsement 'LDT Rental'. Receipt of this cheque is acknowledged by the Claimants. The 2nd Claimant says that the cheque was received as an advance on amounts due for equipment rental .He has deducted the sum from the amounts due to the 1st Claimant. I accept the evidence of the 2nd Claimant in this regard on a balance of probabilities and as there is some documentary support for his account.

[47] The 2nd Claimant was the sole witness called by the Ancillary Claimant. The basis of the ancillary claim is the return of money which the Ancillary Defendants have allegedly diverted away from the Ancillary Claimant. This relates primarily to the aborted sale of apartment B6. That apartment was to be sold for $20,000,000.00 . A deposit of 3,000,000.00 was paid to the Ancillary Claimant by the purchaser. A further payment amounting to 6,000,000.00 was paid by her but this was paid directly to the First Ancillary Defendant who deposited the money into his personal bank account at what was then RBTT bank at Sovereign Center in Liguanea in the parish of Saint Andrew. The sale was aborted but instead of refunding the $6,000,000.00 to the purchaser the Ancillary Defendants executed a

settlement agreement with the aborted purchaser. By that agreement the Ancillary Claimant became indebted to the aborted purchaser in the sum of $6,000,000.00 plus interest at 10% per annum commencing on the first day of July 2010 [exhibit 1]. The 2nd Defendant after being effectively cross examined on this loan stated:

> *" Q: For you and Mr Gyles to sign a document agreeing for the company to repay $6 million where that money had never been received by the company was improper.*
>
> *A: We sought legal advice and this is what the lawyer suggested"*

[48] I accept that the 2nd Claimant was not aware of this sale and did not give his consent to any of these agreements. The Ancillary Defendants also sold apartment A7 for the sum of $ 20,350,857.57. From the proceeds of that sale the 2nd Claimant received $500,000.00, the First Ancillary Defendant received $4,420,000.00 and the Second Ancillary Defendant received $ 4,300,000.00 from the proceeds of that sale. These amounts must also be brought into account.

[49] It is clear that although there are substantial liabilities outstanding, the 2nd and 4th Defendants (the Ancillary Defendants) paid themselves substantial amounts as drawings. Both also admitted that these monies would have to be repaid if there are insufficient funds to meet the liabilities of the project.

The 1st Ancillary Defendant admitted to receiving a total of US$ 28,000.00**.** He also admitted to receiving JA$4,420,000 from the proceeds of sale of apartment A7 (see page 168 of exhibit 1).

The 2nd Ancillary Defendant admitted to receiving a total of US$ 14,000 . He also received the sum of $4,300,000 from the proceeds of sale of apartment A7 (see page 168 of exhibit 1).

[50] A finding that the Ancillary Defendants are in breach of their fiduciary duty would cause the court to order that an account be made. The starting point

on any discussion on a breach of fiduciary duty is the Companies Act, specifically section 174 which states

> *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).*

[51] Section 174(1)(a) bears a striking similarity to section 122(1)(a) of the CBCA (Canada Business Corporation Act) and section 141(a) of the BCBCA (British Columbia Business Corporation Act).

An examination of the interpretation of those provisions would in the circumstances prove useful. **Canadian Aero Service Ltd v O'Malley, [1974] SCR 592** and the later decision of **People's Department Stores Inc (Trustee of) v Wise** 2004 SCC 68 are two of the leading cases on the fiduciary duty of

directors and officers. The **People's** decision comprehensively examined this area of this law, per Justices Major and Deschamps at page 16;

> *38 It is settled law that the fiduciary duty owed by directors and officers imposes strict obligations: see Canadian Aero Service Ltd. v. O'Malley (1973), [1974] S.C.R. 592 (S.C.C.), at pp. 609-10, per Laskin J. (as he then was), where it was decided that directors and officers may even have to account to the corporation for profits they make that do not come at the corporation's expense:*
>
> *The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of Phipps v. Boardman [[1967] 2 A.C. 46], which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is Industrial Development Consultants Ltd. v. Cooley [[1972] 2 All E.R. 162], a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention. [Emphasis added.]*
>
> *A compelling argument for making directors accountable for profits made as a result of their position, though not at the corporation's expense, is presented by J. Brock, "The Propriety of Profitmaking: Fiduciary Duty and Unjust Enrichment" (2000), 58 U.T. Fac. L. Rev.185, at pp. 204-5.*
>
> *39 However, it is not required that directors and officers in all cases avoid personal gain as a direct or indirect result of their honest and good faith supervision or management of the corporation. In many cases the interests of directors and officers will innocently and genuinely coincide with those of the corporation. If directors and officers are also shareholders, as is often the case,*

> *their lot will automatically improve as the corporation's financial condition improves. Another example is the compensation that directors and officers usually draw from the corporations they serve. This benefit, though paid by the corporation, does not, if reasonable, ordinarily place them in breach of their fiduciary duty. Therefore, all the circumstances may be scrutinized to determine whether the directors and officers have acted honestly and in good faith with a view to the best interests of the corporation.*

It cannot be said that the 2nd and 4th Defendants acted in the best interests of the company and in keeping with the fiduciary duties that they owe to the company. I therefore find for the Ancillary Claimant on this aspect of the claim and order that an account be made of the sums collected. The Ancillary Defendants breached their fiduciary duty to the Ancillary Claimant by the distribution of the sums collected from the sale of the apartment units at the time and in the manner in which it was done.

[52] The Ancillary Claimant has also pleaded conversion and fraudulent misrepresentation. I do not find that there was anything fraudulent in the conduct of the Ancillary Defendants. Their conduct was the result most probably of a misplaced sense of right, that is, they believed that they were entitled to take those amounts because they thought the 2nd Claimant was also "taking".

[53] Counsel for the Ancillary Defendant highlighted in his submissions as an issue; whether the 1st Claimant misappropriated the sum of $17,000,000.00 given for payroll by the Ancillary Claimant. I cannot agree that this is an issue raised on the Ancillary Claim because the 1st Claimant is not listed as a defendant in the ancillary proceedings. This amount was not claimed in the ancillary claim. A Claimant cannot rely on factual allegations raised within written submissions that were not pleaded . This was the position taken in the decision of the Jamaican Court of Appeal in **Alexander Okuonghae v University of Technology, Jamaica** [2014] JMSC Civ. 138 at paragraphs 74-78. In any event my acceptance of the conclusions of Mr Robinson and the absence of supporting evidence means that these allegations by the Ancillary Defendants are rejected.

[54] In the result and for the reasons stated above and having heard further submissions on the 29th July 2016 I give judgment as follows:

1. In favour of the 1st Claimant against the 1st Defendant for the sum of $ 15,497,095.23 for work done on the construction of Twin Acres at 14 Stilwell Road less $ 500,000.00 paid.

2. In favour of the 2nd Claimant against the 1st Defendant for the sum of $ 18,000.00 USD for repayment of a loan made to the 1st Defendant.

3. In favour of the 2nd Claimant against the 1st Defendant for the sum of $1,258,220.00 for repayment of a loan made to the 1st Defendant.

4. The Defendants' counterclaim against the 1st and/or 2nd Claimants for the sum of $ 16,866,092.35 or any sum at all is dismissed.

5. The Defendants fail on their claim for sums allegedly overpaid for construction work done on the Twin Acres Phase 2 project.

6. The 1st Defendant's claim for repayment of a loan made to the 2nd Claimant is dismissed.

7. Judgment for the Ancillary Claimant against the Ancillary Defendant in the amount of 6 million dollars.

8. The 1st and 2nd Ancillary Defendants shall within 60 days lodge with the Registrar an account of all monies collected from the sale of property belonging to the 1st Defendant / Ancillary Claimant in phase 2 of the project.

9. The account at paragraph 8 is to be accompanied by all necessary vouchers, receipts and cheques and is to be verified

by affidavits. The said account documentation and affidavit are to be served on the Claimants' and the Ancillary Claimant's Attorneys-at-law.

10. The Registrar shall on such date and time as she may deem fit consider the said account and certify the amounts collected and the amount due to the Ancillary Claimant. The amount when certified shall be paid as a judgment of the Court to the 1st Defendant/ Ancillary Claimant by the 1st and 2nd Ancillary Defendants or either or both of them within 30 days of the date of certification.

11. Costs of the Claim to the 1st and 2nd Claimants and to the 1st Defendant/Ancillary Claimant against the 3rd and 4th Defendants/ Ancillary Defendants. Such costs to be taxed or agreed.

12. Liberty to apply.

13. Order of Brooks J dated 12 May 2011 is extended until the judgment debt is paid or until further order of the Court.

14. Interest will run on the Jamaica dollar award at a rate of 10% per annum from the 31st December 2007 until payment.

15. Interest will run at a rate of 10% per annum on the 6 million Jamaican dollars awarded at paragraph 7 above from the 14th December 2009 until payment.

.....

Batts J

Puisne Judge