[2024] JMCC Comm 03

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2015CD00089

BETWEEN	**DEBBIAN DEWAR**	**CLAIMANT**
AND	**ERVIN MOO YOUNG**	**FIRST DEFENDANT**
AND	**BERES WARREN**	**SECOND DEFENDANT**
AND	**OVERTON MOO YOUNG**	**THIRD DEFENDANT**
AND	**LEROY ELLIOT**	**FOURTH DEFENDANT**
AND	**GROVE BROADCASTING COMPANY LIMITED**	**FIFTH DEFENDANT**

OPEN COURT

Tana'ania Small Davis, Sidia Smith, Kerri-Ann Allen Morgan instructed by Livingston Alexander and Levy for the claimant

M. Georgia Gibson Henlin QC, Stephanie Williams instructed by Henlin Gibson-Henlin for the first, second and fifth defendants

Ransford Braham instructed by Braham Legal for the second and third defendants

October 26, 30, 31, 2017, November 1, 2, 2017, January 29, 30, 31, 2018, February 1, 2, 2018, March 5, 6, 7, 8, 9, June 18, 19, 20, 27, 28, 29 2018 29, 2018 and January 22, 2024

COMPANY LAW – WHETHER DIRECTORS PROPERLY APPOINTED – EFFECT OF SHAREHOLDERS AND DIRECTORS NOT PARTICIPATING IN COMPANY'S OPERATIONS – BREACH OF FIDUCIARY DUTY – FRAUD – HANDWRITING EXPERT

SYKES J

[1] Grove Broadcasting Company (Grove) is registered under the Companies Act and it operates Irie FM radio station. It is agreed that the company was founded by Mr Karl Young. He was the first chairman of the board of directors. As an aside the court notes that regarding the number of Moo Youngs and Youngs in this case, each will be identified by first name. It is not a sign of disrespect.

[2] Mrs Dewar contends that that she, along with Mr Cheddesingh, Mr Ervin Moo Young, and Mr Beres Warren are the properly appointed directors of Grove Broadcasting Company Limited (Grove). She urges that any other directors appointed on December 9, 2014 are not validly appointed. She adds, for good measure, that her appointment as joint managing director is lawful. These assertions are challenged by the defendants and they, in turn, have accused of breach of fiduciary duty, fraudulently representing that she was appointed director and managing director.

[3] She is asking that court finds in her favour and makes the following orders:

a) a declaration that

   i) the properly appointed Grove board are Ervin, Mr Warren, Mr Marshanee Cheddesingh and Mrs Dewar;

   ii) that the purported suspension of Mrs Dewar by Grove while under the control of Ervin, Mr Warren, Overton, and Mr Elliot is null and void;

b) an order striking out all the records filed at the Companies Office on December 31, 2014 and May 29, 2015 which were to amend

   i) annual returns for the years 2000, 2003 – 2006, 2009 – 2014;

ii) Notice of appointment/change of director;

iii) Notice of appointment of company secretary all filed on May 29, 2015

c) Rectification of Grove's register of directors;

d) an order directing the defendants to register her on transmission of the 100,000 'A' shares and 350,000 'B' shares owned by Estate Chad Young;

e) Damages against all defendants;

f) Costs

[4] That first, second, and fifth defendants, that is to say, Ervin, Mr Beres Warren, and Grove are asking for

a) a declaration or order that Mrs Dewar was not appointed director or managing director of Groves;

b) removal of Mrs Dewar as director and managing director;

c) damages

d) interest

e) costs

THE CONTEXT

[5] Grove is a limited liability company incorporated on November 24, 1988 and operates Irie FM radio station. According to the memorandum of association the share capital of the company was JA$1,000,002.00 divided into 500,000.00 voting ordinary 'A' shares of JA$1.00 each and 500,000.00 non-voting ordinary 'B' shares and one special rights preference share of JA$2.00. Clause 5 of the memorandum stated that the 'A' and 'B' shares shall rank pari passu in all respects except regarding voting rights.

[6] Article 82 of the articles of association states that the number of directors shall be not less than three nor more than ten. It also states that the first directors '*shall be Messrs. Karl Young, Gobind Chatani, Cecil Chang, Leroy Elliot, Lloyd Stanbury, Patrick Yap Shing and J "Saucer" Williams.*'

[7] Article 83 sets out criteria that would prevent persons from being eligible for appointment as directors.

[8] Article 93 (A) states that the directors '*may from time to time appoint one or more of their number body to be the Chairman of the Directors or to be the holder of any executive office on such terms and for such periods as they may determine*.'

[9] Article 93 (B) states that the '*appointment of any Director to the office of Chairman or Managing Director or Joint Managing Director shall be subject to termination if he cease (sic) from any cause to be a Director, but without prejudice to any claim he may have for damages for breach of any contract of service between him and the Company*.'

[10] Article 94 states that the office of director shall be vacated by a number of events including resignation.

[11] Article 102 states that subject to '*article 83 the Directors shall have power at any time and from time to time to appoint any person to be a Director either to fill a casual vacancy or as an additional Director. Any Director so appointed shall hold office only until the next Annual General Meeting and shall then be eligible for re-election, but shall not be taken into account in determining the number of Directors who are to retire by rotation at such meeting*.'

[12] It is to be noted that neither Mrs Dewar, Mr Warren, nor Ervin was among the original directors. Mrs Dewar asserts that she was appointed a director on December 16, 2011. Ervin says in his fourth affidavit that he did not arrive in the island until 3:30pm on December 16, 2011. The implication being that he did not attend any meeting appointing Mrs Dewar as director. This is the clear implication in Ervin's fourth affidavit, but in his third affidavit (para 54), he says: *The claimant*

was not properly appointed as managing director. Her appointment as director is not an issue with me, as I had not in anything that I have done attempted to remove her as director. To the extent that I formed the view that she was not properly appointed even though she did not attend the meetings I regularised her appointment in her absence. The issue is the claimant's non-appointment as managing director.

[13] Ervin, in the immediately preceding paragraph, spoke about regularising Mr Dewar's appointment. He was referring to the December 9, 2014 meeting at which Mrs Dewar was purportedly appointed director. Despite the claim that he is not taking issue with her appointment, Ervin did say in his first affidavit '*that the claimant is not a bona fide director or managing director of the claimant*' (para 48).

[14] Mrs Dewar states that the directors at the time of her appointment were Chad, Ervin, and Mr Warren. Mrs Dewar also says that she was appointed joint managing director on June 12, 2013. She adds that Mr Marshanee Cheddesingh was appointed a director on October 13, 2013.

[15] It is to be observed that article 102 authorises the directors to appoint any person to be a director either to fill a casual vacancy or as an additional director. Thus the directors who were holding that office at the time had the power to appoint Mrs Dewar. She says that Ervin, Chad, and Warren were directors at the material time. Ervin and Warren say that they did not appoint or consent to the appoint of Mrs Dewar. By necessary implication, they are saying that the document purporting to show that they assented to her appointment must have been a forgery. This is a factual question to be resolved by the court but the legal authority of the directors to appoint her is not in doubt.

[16] Article 93 permits the appointment of 'joint managing directors.' This means there can be at least two managing directors existing at the time who can hold office on such terms and for such time periods as may be determined by company. Thus the question of whether Mrs Dewar could have been appointed joint managing director is not in doubt from a legal standpoint. Article 95 reaffirms this

interpretation by speaking to '*a Director (sic) appointed to the office of Managing or Joint Managing Director.*' The word 'joint' in articles 93 and 95 must mean two or more. Whether she was appointed as joint managing director is a factual question that must be resolved.

[17] According to records from the Companies Office Mr. Elliot ceased being a director in 1999, Mr Stanbury resigned on December 1, 1994; Mr Patrick Yap Shing ceased being a director on January 1, 1994. Mrs Dewar also asserts that the company returns in Karl's handwriting shows that on February 18, 1999, Messrs Elliot, Chang, Williams, and Chatani had resigned as directors, and on that same date, Ervin and Mr Warren were appointed directors. Thus, by Mrs Dewar's reckoning, of the seven original directors, six were no longer directors by February 18, 1999. There is a notification of change of directors dated April 1, 1999 indicating that that Messrs Gobind Chatani, Cecil Chang, Leroy Elliot and J (Saucer) Williams ceased being a director on February 18, 1999 and Ervin and Mr Warren appointed directors on February 18, 1999 (bundle 4 page 1814).

[18] From the original seven, only Karl survived, and on February 18, 1999, Ervin and Mr Warren were added. Karl died in 2010. Chad took over. Chad was appointed a director on August 23, 2004 (bundle 4 page 1868).

[19] Mrs Dewar joined the company in October 2001 as the financial controller. However, it is not uncommon in these courts when adjudicating in company disputes arising in small companies, to find that the employees often times work in the same manner as the leading personality of the entity despite the best efforts of the employee to introduce more formal processes and procedures.

[20] It is necessary to keep what has just been said in mind throughout these reasons for judgment because it will have an important role in the resolution of the counterclaim of dishonesty, fraud and similar adjectives that have been used by Ervin, Mr Warren, Overton and Mr Elliot to describe the conduct of Mrs Dewar who was the executor and beneficiary of Chad's estate.

[21] The reality was that Karl, by all accounts, ran the company as he saw fit. He was not known to be a man burdened by the niceties of corporate governance. Unfortunately, Karl died in 2010. His son, Chad, made in the corporate image and likeness of his father, took over the operations of the company and managed it in much the same way as his father. Regrettably, Chad died on February 27, 2014.

[22] Between Karl's and Chad's death, two things happened, according to Mrs Dewar. First, she was appointed joint managing director on June 12, 2013. Second, Mr Marshanee Cheddesingh was appointed director on October 10, 2013. Ervin, Mr Warren, and Grove are challenging the validity of these appointments.

[23] It is indeed accurate to say that none of the named directors at the time of incorporation participated in the company's operations during the reign of Karl and Chad. For all practical purposes, the board was simply a board in name only. There is no evidence that during the period Karl and Chad were in charge of the company any of the other directors showed any interest in or took any action, legal or otherwise, to insist on Karl and Chad honouring the letter and spirit of corporate governance as reflected in the articles of association and general law.

[24] After Chad's death in 2014, for the first time since his appointment as director fifteen years earlier, Ervin expressed an interest in the company's management. According to Mrs Dewar, Ervin wanted the company to continue to pay certain expenses but she refused. This precipitated a conflict between Mrs Dewar and Ervin. Without getting into the precise sequence of events, there were charges, counter charges, muckraking and mud-slinging between the parties. This came to a head when the board suspended Mrs Dewar by letter dated June 15, 2015. She launched her offensive in this claim to have matters settled once and for all.

Was Mrs Debbian Dewar appointed as a director?

[25] The context of Mrs Dewar's appointment as director and managing director will be examined. The annual returns for 2011 show the directors as Chad, Ervin, Mr Warren, and Ms Dewar. She was appointed on December 16, 2011 (bundle 4,

page 1905). There are also minutes of the meeting held on December 16, 2011, at 1:15pm. As noted earlier, Ervin said he did arrive in the island until 3:30 pm on December 16, 2011. The persons present were said to be Chad, Ervin, and Mr Warren in their capacity as directors. The other persons listed present were Mrs Dewar, and Mr Kenneth Lewis who was the secretary. Mr Lewis was described as the principal of SAS Ltd, a company that provided secretarial services to Grove since 1988. The sole agenda item was the appointment of Mrs Dewar as company director with immediate effect. The minutes were signed by Chad (bundle 4 page 2268).

[26] Ervin exhibited pages from his passport to support his point about his arrival. The court has examined the relevant exhibits and was unable to see any time attached to the date stamp of December 16, 2011. What is clear is that Ervin was in the island on December 16, 2011. Until this case, there is no evidence of Ervin raising any objection to Mrs Dewar's appointment as a director or even any objection to the assertion that he participated in the appointment of Mrs Dewar.

[27] The court concludes on a balance of probabilities that Ervin and Mr Warren did agree to appoint Mrs Dewar as director. Even if the document has the incorrect time, which the court does not accept, there is no reason to conclude that Chad would have signed off on a document recording the fact of Ervin being present if that were not the case. It is not only Mrs Dewar who is claiming that Ervin was present at the December 16, 2011 meeting but the document signed by Chad is also making that claim.

[28] Also the court can take judicial notice of the fact that distance between Sangster International Airport where Ervin landed and Ocho Rios where the meeting took place is not very great so that it could be said that having been landed at 3:30pm it was impossible for him to get to Ocho Rios, regardless of time, to participate in the meeting.

[29] The annual returns of 2013 have the same four directors as listed in the returns for 2011 and 2012, but with the addition of Mr Marshenee Cheddesingh, whose date

of appointment is October 10, 2013. This annual return was signed by Chad (bundle 4 page 1927).

[30] The issue of whether the document appointing her as joint managing director is a forgery will be determined later. Ervin has advanced that contention. Handwriting experts have been deployed by Ervin and Mrs Dewar.

[31] It is common ground that Karl and Chad managed the company in a very informal manner. Mrs Dewar indicated that '*[l]ike his father, Chad did not observe all the formalities of company governance. Both Mr Young [Karl] and Chad had simply run the Company (sic) according to their plan*' (bundle 4 page 2456, affidavit of Mrs Dewar).

[32] The reality was that the other directors and shareholders stepped away and left Karl to run the company as he saw fit. They never complained or objected. At least, there is no evidence that they took issue with his lack of formality. Chad, like his father, did not see the need for formality in decision-making. There is no evidence that Ervin or any of the other directors took issue with how Chad operated the company after he took over as chairman and managing director in 2010. All the evidence on this aspect of the case points towards acquiescence, agreement, and non-intervention in the company's operations.

[33] Let us hear from Ervin, in his own words, about Karl's and Chad's style of managing the company. Ervin says in his affidavit '*[he] became a director on February 18, 1999*' (bundle 4 page 2483 para 6). He makes the point that there were no directors' meetings from the time he became director when Grove was managed by Karl (his brother) and later by Chad (nephew) (bundle 4 page 2482). Ervin says '*Karl Young ran everything and did so in a very informal and unconventional manner*' (bundle 4 page 2483 para 9). He added '*[t]his meant that he literally did things his way; it was his "world." By this I mean that he would simply be running [Grove] by himself on his terms and his "rules" (bundle 4 page 2483 para 9). This is evidenced by the lack of directors' meetings and the number of*

directors with whom it can be said that he consulted for any significant changes. I was not consulted for meetings or financial decisions."

[34] Ervin adds that this '*informality also extended to shareholder's meetings'* (bundle 4 page 2483 para 10). In relation to Chad, he said that "*[a] lthough there were no director's meetings Chad was appointed managing director*" (bundle 4 page 2484 para 14). Tellingly, Ervin takes no issue with this. He adds that during '*Chad's illness and also while there were no board meetings the claimant was allegedly "appointed" managing director*' (bundle 4 page 2484 para 14). He adds, '*I don't know how it happened as there is no provision in the articles for two managing directors*' (bundle 4 page 2484 para 14). This is clearly an erroneous conclusion since the articles of association refer to joint managing director.

[35] In relation to Chad, who took over after Karl's death, Ervin says, '*I had my concerns. Chad ran the company in a similar way to his father and in fairness; he had little time to turn the governance issues around'* (bundle 4 page 2484 para 14).

[36] It is important to note that Ervin, despite having concerns (presumably about how the company was managed), he did absolutely nothing to see that the informality in governance came to an end. Critically, there is no evidence from any of the other directors objected other than perhaps Mr J Saucer Williams who resigned from the board.

[37] Is there an explanation for Ervin's response to this informality that he observed? The answer comes in his fourth affidavit (bundle 4 page 3018 para 12):

> ***In further answer to Paragraph (sic) 16, the Claimant's (sic) allegation that my brother and nephew kept me out of the Company (sic) is untrue.*** *It is untrue because it is the Claimant (sic) who alleged that I refused to sign audit reports but refused to sign the 2013 audit (the sentence in the original is faithfully reproduced). In addition ZIP 103 Limited was formed on the 20th September 2001, after Grove Broadcasting Limited and I was the only shareholder with my brother Karl Young until Chad caused me to sign what I later realised is an allotment of shares in that Company (sic) to him. I had*

> *a good relationship with both my brother and my nephew. I had a good career as an air traffic controller independent of Grove Broadcasting Company Limited and in any event as I said before* ***I left my brother to run the Company (sic). He was that kind of person, it was his style.*** *I am not the only person who did not participate in the Board (sic). It was the same for the other directors and shareholders. In relation to my nephew, by the time he came around to be ready to take charge of the Company (sic), he became ill and I verily believe that the Claimant (sic) took advantage of that position.* (emphasis added)

[38] Ervin is saying that he voluntarily declined to participate in the running of the company because he was an air traffic controller. He is also saying that the other directors deliberately took a hands-off approach and left Karl (and Chad) to their own devices.

[39] There is also affidavit evidence from Mr Beres Warren to similar effect. Mr Warren indicated that he '*was very close to [Karl] but in his business style he was never one to conduct meetings he would normally just contact me to get certain things done for the company*' (bundle 4 page 3324 para 3). Do note that Mr Warren did not object to this style of company management.

[40] He added that when Karl was alive and in charge of the company, '*he never had board meetings or any other meetings in relation to the company that involved Directors (sic) so far as I am aware*' (bundle 4 page 3324 para 3). Mr Warren went on to say that he was involved with Karl and Grove before he (Warren) became a director. Indeed, so close was Mr Warren to Karl that he could confidently assert that he was Karl's right hand man ((bundle 4 page 3324 para 3). Thus as Karl's right hand man he clearly acquiesced to Karl's management style.

[41] Mr Warren stated that his only participation in appointing or removing directors was in relation to Mr J Saucer Williams. It came to Mr Warren's attention, through Karl, that Mr Williams wished to be removed from the company because he did not accept the informal way in which Karl operated the company. Mr Williams resigned from the company.

[42] Mr Warren was able to say that after Karl's death, '*Chad … the son like father had the same style of running the business as far as [he knew] as he did not have any formal meetings with the directors of the company. He would just make changes as he saw fit without consulting with the Directors (sic) of the Company*' (bundle 4 page 3325 para 6). He was very clear that he did not participate '*in any decision or meeting that appointed Debbian Dewar or Marshenee Cheddinsingh as Directors (sic)*' (bundle 4 page 3325 para 8).

[43] Mr Warren said that he only began attending directors' meetings on December 9, 2014, when Ervin became chairman (bundle 4 page 3325 para 9).

[44] Mr Leroy Elliot, in his affidavit, indicated that he became a director when Grove was incorporated on November 18, 1988. He states that since he became a director, he asked Karl when the initial meeting of directors was to be held, and Karl indicated that he would get back to him, but the 'getting back' never happened (bundle 4 page 3337 para 4). Mr Elliot stated that '*[he] was not asked to neither did [he] participate in any meetings appointing any directors of the company since its incorporation in 1988*' (bundle 4 page 3337 para 5). He said he has never attended shareholders' meetings. He did not participate in the appointment of Mr Marshenee Cheddinsingh and neither was he asked to do so (bundle 4 page 3338 para 7).

[45] In his oral evidence, Mr Elliot indicated that he did not hold any Grove shares. He added that when he was appointed as a director, he did not attend any board meetings. It was Karl who told him that he was a member of the board. He added that since his appointment, he did not attend any board meetings, and after Karl's death, he had not contacted anyone at Grove '*to ascertain what was going to be the continuation of management of the company*.' If ever there was a complete lack of interest in the affairs of a company this was it. Not even the death of the person who told him he was a director was sufficient to rouse Mr Elliot to make any enquiries about the company's affairs. He added that he briefly spoke with Chad but not about the management of the company. He did not disclose the content of

the conversation with Chad. After Chad's death, he did not '*speak to anyone at the company in connection with the management of the company.*'

[46] In cross examination, it turned out that Mr Elliot knew Karl from 1978 and was, in fact, his bank manager. Mr Elliot stated that he was not present at any meeting or meetings when Ervin, Mr Warren, or Chad was appointed a director, or managing director in the case of Chad. He said he was not involved in the company between 1999 and 2014.

[47] An examination of the annual returns from 2000 - 2015 shows the following:

a) It must be observed that in the annual returns for Grove for the year 2000, signed by Ervin on May 20, 2015 he is listed as a director appointed February 18, 1999; Karl appointed November 18, 1988; Mr Cecil Chang appointed November 18, 1988; Mr Leroy Elliot appointed November 18, 1988; Mr Beres Warren appointed February 18, 1999. This shows that that he knew of his appointment or at the very least, having learnt of it, accepted it despite the obvious lack of formalities. This document has written at the top: Amended 2000: Leroy Elliot and Cecil Chang added as directors (bundle 4 page 1828).

b) The annual returns of 2005 show that Chad was added as a director on August 23, 2004 (Bundle 4, page 1839). This was signed by Karl on January 24, 2006. There is also the Notice of Change of Directors dated August 16, 2004, signed by Karl, naming Chad as a director with effect from August 23, 2004.

c) The annual returns for 2006, signed by Karl on January 22, 2007, show the directors as Ervin, Karl, Mr Beres Warren, and Chad.

d) The annual returns for 2007, 2008, show the same directors.

e) The annual returns for 2010 shows the directors as Chad, Ervin, and Mr Warren. Karl had died earlier in 2010 and so would not be listed as a director.

f) There is another document bearing the signature of Chad, Ervin and Mr Warren. It is a consent form stating that Chad, Ervin, and Mr Warren consented to Mrs

Dewar as joint managing director to manage the affairs of the company in Chad's absence (Bundle 4 page 2269).

g) The annual returns for 2012 show the same directors as that of 2012 (bundle 4 page 1916).

h) The annual returns for 2014 listed Ervin, Mr Warren, Mrs Dewar and Mr Cheddesingh as directors (bundle 4 page 1938). This annual return was signed by Mrs Dewar. Chad had died earlier in 2014 and would not be listed as a director.

i) What is clear is that when Mrs Dewar signed the annual return in 2014 in which the directors were named she was only naming those persons who were alive and had been appointed by Karl and Chad. It is obvious that Mr Elliot and Mr Chang were not regarded as directors of Grove for quite some time.

j) There is a further annual return for 2014 headed Amended 2014: Leroy Elliot and Cecil Chang added as directors (bundle 4 page 1949). This annual return was signed by Ervin. The listed directors are Ervin, Mr Warren, Mrs Dewar, Mr Cheddesingh and Mr Elliot.

k) The annual returns for 2015 have listed as directors Ervin, Mrs Dewar, Mr Warren, Mr Cheddesingh, Mr Elliot, Mr Chang. Mr Overton Young, Mr Troy Moo Young, Ms Kimberly Murphy, and Ms Joni Torres as directors. This return is signed by Ervin. Interestingly, it lists Mrs Dewar as Managing Director (bundle 4 page 1962).

[48] This history from the annual returns is consistent with Karl's and Chad's style. Persons were added and removed as directors and the existing directors were simply advised and then they signed the documents indicating their agreement with the decisions of Karl and Chad.

[49] Mrs Dewar says that since she was employed to the company in 2001 she had never seen or heard mention of Mr Leroy Elliot. She had never seen him come to company's offices or be involved in anyway in the company's affairs.

[50] Ervin has been very punctilious in pointing out that he was not excluded by Karl or Chad from the company's operations. Mr Warren did say he was Karl's right hand man. Mr Elliot was Karl's banker. There is no evidence that the directors made any effort to discharge their duty to the company by insisting that it be operated in accordance with the articles of association.

[51] There is no evidence that Mr Warren or any other director was barred from participating in the company's management. He said he was Karl's the right-hand man.

[52] There is no evidence that any shareholder took any steps to intervene in the company's management during Karl's and Chad's time as chairmen and managing directors.

[53] The court will now address the legal issues arising from the voluntary non-participation of the shareholders and other directors in the company's management. This became necessary because the defendants wished the court to stand on the formalities of the articles of association to declare that Mrs Dewar was not properly appointed as either director or joint managing director.

[54] It should be noted that prior to the court's intervention in 2015 a meeting described as a board meeting was held on December 9, 2014, Mr Elliot is recorded as calling the meeting to order. Mr Cecil Chang, one of the original directors, was present. Mr Gobind Chatani was not present. It was recorded that he sent in a letter of resignation dated December 3, 2014. Mr Chang moved and seconded Mr Elliot to act as chairman for that meeting. Thereafter, Ervin and Mr Warren were appointed board members. This was followed by the appointment of Mrs Dewar, Mr Cheddesingh, Mr Troy Moo Young, Overton, Mrs Joni Young Torres, Ms Kimberlyn Murphy as directors.

[55] Mrs Dewar makes the point that the meeting of December 9, 2014, seemed to have proceeded on the premise that Mr Elliot and Mr Cecil Chang could have called that meeting since they were the only ones of the original directors present.

[56] In the case of **Deakin and others v Faulding** [2001] All ER (d) 463, [2001] 35 LS Gaz R 32, [2001] Lexis Citation 1692 there two actions were brought. The first was a claim was brought by the Deakin brothers against Mr Faulding and his mom, Nora. In the second claim, the company sought repayment of bonuses paid to the Deaking brothers on the basis that the bonuses were paid without the agreement of the shareholders. There were only two issued shares and they were in the names of Faulding and Nora. Faulding was a director of the company at all material times.

[57] The background is that Faulding had acquired the skill of rescuing persons in confined spaces. He wanted to make money from it. His banker encouraged him to form a limited liability company. He was also told that it was necessary for his company to have two shareholders. This advice resulted in he and his mom becoming the only shareholders.

[58] Eventually, Faulding and the Deakin brothers met. The Deakin brothers became part of the business. It was agreed that they would be formally appointed directors of the company. In 1997 and 998 bonuses were paid to all the directors. There was a falling out between Faulding on the one hand and the Deakin brothers on the other. The action brought by the Deakin brothers against the company alleged that the Deakins were entitled to have shares issued to or transferred to them and further that each Deakin would hold one third of the share capital in the company. Faulding denied the claim. The Deakins' action failed.

[59] In relation to the company's efforts to recover the bonus, Faulding advanced the argument that the shareholders, that is to say, Nora, his mom, did not consent to the payment of the bonuses. He claimed that her consent needed to be proved for the payment of the bonuses to the Deakins to be valid. In the absence of such proof it could not be said that she had consented and therefore the shareholders had not consented to the bonus with the consequence that the payment to the Deakin brothers was unlawful.

[60] It was clear from the evidence that Nora did not participate in the company's management in any form. There was evidence that there were no general meetings. The company argued that Nora was a beneficial owner of the share and so it was necessary to prove the assent of the shareholder with legal title (this would have been Faulding). In the absence of that proof then there was no evidence that the Duomatic principle could apply and therefore there was no consent by the shareholders and therefore, the argument ran, the company had not consented to the payment of bonuses to the Deakins. That argument was not accepted by the judge.

[61] Hart J accepted the proposition that Nora had '*expressly or impliedly clothed [Faulding] with authority to exercise on her behalf her rights as a shareholder in the ordinary course of the running of the business, and that this authority extended to his making decisions about his own remuneration and that of anyone he decided to be a director and remunerated*.' The judge held that the Duomatic principle was correctly expressed by Buckley J in **Re Duomatic Ltd** [1969] 2 Ch 365, 373. This meant that the absence of a formal meeting was of no moment because, having regard to the Duomatic principle (that is to say, where it can be shown that the shareholders who have the right to attend and vote at a general meeting assented to some matter which a general meeting could carry into effect that assent was as binding as a resolution in general meeting) Nora and Faulding had assented to the bonuses. The judge found that Nora knew that the Deakins were being remunerated but was prepared to leave such matters to her son.

[62] The totality of the evidence makes it clear that the directors in Grove left the decision making and day-to-day operations of the company solely in the hands of Karl and later Chad. There is no evidence that they wished to participate or were excluded from the company. On the evidence (assuming admissibility) the only director who appeared to have been concerned about the informal nature of the company's leadership was Mr Williams. He resigned. The other directors acquiesced and were content to go along with Karl and Chad and having made that decision they cannot, after thirty seven years of Mr Elliot and sixteen years in

the case of Ervin, now be heard to say that they disagreed or were not consulted with any decision made by Karl or Chad.

[63] This court cannot find any good reason not to apply the judge's reasoning to the instant case. The shareholders in this case were not interested in operating the company. The voting rights in Grove were restricted by to the 'A' shares. A review of the annual returns showed that there were various shareholders since Grove's incorporation. The directors behaved similarly. The shareholders and other directors in this case, like Nora, the mother of the other shareholder, in **Deakin**, so '*far as the conduct of its corporate affairs were concerned [they] might as well not have existed*.' To come now and give the impression that somehow they were excluded or not otherwise consulted is to present a false picture. In effect, the shareholders and directors, by their inactivity were prepared to abide by any decision Karl and Chad made.

[64] The decisions that were made between the incorporation of the company up to the death of Chad are valid and binding on the company, and this includes the appointment of Mrs Dewar as a director.

[65] The court accepts and concludes that Mrs Dewar was appointed properly as director by the board in a resolution made on December 16, 2011. The appointment was with immediate effect.

[66] In addition, Mrs Dewar gave evidence that it was Chad who told her of her appointment as director. However, the document indicating that she was appointed director lists her as being in attendance (bundle 4 page 2268). Thus, Mrs Dewar's recollection on this matter is not quite accurate since she would have been present at the meeting when the decision was made and thus there would be no need for Chad to advise her of her appointment.

[67] Similar reasoning applies to the appointment of Mr Cheddesingh as director. The court finds that he was appointed a director on October 13, 2013.

[68] Equally the removal of directors was valid. Mr Chang and Mr Elliot were no longer directors of Grove after they were removed. They were not directors on December 9, 2014. Thus, the meeting convened by Mr Leroy Elliot and Mr Cecil Chang, which is part of the foundation of the case for the defendants, cannot invalidate the actions taken by Karl and Chad during their lifetime. Mr Elliot and Mr Chang were part of the original directors and essentially sat on their hands for over two decades and acquiesced in all that was done by Karl and Chad. To now claim that they never resigned or otherwise removed in accordance with the articles of association and therefore had the legal basis to call the December 9, 2014 and purport to appoint all these other directors is simply unacceptable. They must accept Karl's actions and Chad's actions since they did that until Chad died. They were complicit, acquiescent, compliant, supine and completely accepting of the situation under Karl and Chad.

[69] At Chad's death, the directors were Mrs Dewar, Mr Cheddesingh, Ervin, and Mr Warren. These were the properly appointed directors until the court order of July 9, 2015. The meeting of December 9, 2014 cannot provide the legal basis for the appointment of directors.

[70] On July 9, 2015, by court order, an interim board was appointed comprising Ervin, Mrs Dewar, Mr Beres Warren, Mr Overton Moo Young, Mr Leroy Elliot, Mr Troy Moo Young, Mr Marshanee Cheddesingh, Mrs Joni Young-Torres, Ms Kimberly Murphy

[71] Against these conclusions is the evidence of Ervin. In his affidavit evidence he outlines the extensive history of the matter, first consultation with Nunes Scholefiled Deleon (a law firm), the result of what was said to be a search of the Companies Office's records regarding Grove. The conclusion proffered by Ervin is that since Mr Elliot, Mr Cecil Chang and Mr Gobind Chatani were not removed as directors in accordance with the articles of association that they (three as required by the articles) can meet and appoint other directors. The problem here is Mr Chatani did not participate in the December 9, 2014 meeting. This meant that only

Mr Elliot and Mr Chang were properly appointed directors and so by the articles they could not appoint any body a director. Mrs Gibson Henlin QC (at the time) sought to explain this away by saying that since Karl's and Chad's estate held the shares and those estates were not yet fully dealt with then (the court's understanding of the proposition) some doctrine of necessity could be prayed in aid. Folllowing the argument the proposition is that the resulting appointment of directors on December 9, 2014 could or should be accepted as valid. The problem with this approach and Ervin's evidence is that one cannot in one breadth rely on what is thought to be the strict letter of the relevant articles to invalidate Mrs Dewar's appointment as director but somehow the same strict logic ought not to apply to Ervin and the December 9 2014 appointments.

[72] The other problem arising from Ervin's logic is this: if decisions about directors during Karl's time are invalid for the reasons he advanced for Mrs Dewar's appointment, then it follows that not even his appointment under Karl's regime is valid, which would mean that he ought not to be referring to himself a director. Further, it necessarily means that Mr Elliot and Mr Chang could not possibly have properly appointed him or any other director on December 9, 2014 to make three directors so that those three directors could now appoint any other director.

[73] The principle in the **Deakin** case makes for a better solution than what was proposed by Mrs Gibson Henlin. In any event, the evidence in this case supports the application of the **Deakin** case.

[74] The court will now examine Mrs Dewar's appointment as joint managing director.

Was Mrs Debbian Dewar appointed as managing director?

[75] Mrs Dewar asserts that she was appointed joint managing director on June 12, 2013. Mr Chad Young was 'the principal managing director' (affidavit of July 3, 2015 **[3]**). At **[4]** of the same affidavit, she says that Mr Chad Young died on February 27, 2014, and as of that date, she, Ervin and Mr Warren were the Grove directors.

[76] Ervin is challenging Mrs Dewar's appointment as joint managing director on two grounds: (a) he was not on the island at the actual time stated on the document that the meeting was held; and (b) the signature on the document is not his, which in essence means, that it is a forgery. For good measure a medical report was placed before the court to suggest that Chad lacked the mental capacity to make the decision attributed to him, Ervin, and Mr Warren appointing Mrs Dewar as joint managing director. The court will address the medical report first.

[77] It should be noted that Mr Warren stated in his affidavit that '*[t]he only person I am ware (sic) that Chad Young really had dialogue with in relation to the affairs of the company was Debbian Dewar*' (bundle 4 page 3325 para 7). If this was the case (and there is no reason to conclude otherwise), the balance of probabilities makes it more likely that Chad would have seen to her appointment as joint managing director when he became ill.

[78] Another point to make is that in the voluminous evidence presented, there is nothing to suggest that any other senior officer of the company was as involved in its operations as Mrs Dewar. It seems reasonable to conclude that over time, Mrs Dewar had come to be increasingly relied on by both Karl and Chad. In fact, given her role in the company during Karl's time and the brief time that Chad was in charge, it is not surprising that Chad relied on her and had her appointed joint managing director.

[79] The point being made is that the surrounding circumstances were such that if anyone were to be appointed joint managing director that person would quite likely have been Mrs Dewar and definitely not Ervin or any other director. Ervin was busy as an air traffic controller and the other directors were not consulted and they did not seek to get involved. In those circumstances the logical appointment would be Mrs Dewar.

[80] The internal logic of Mrs Dewar's evidence is strengthened because it is more congruent with the external objective fact of how the company was operated and the role that Mrs Dewar came to play in the operation and management of the

company. Ervin's account on the other hand, lacks explanatory power. He does not explain or provide any evidence such that the logic of his account would point to any arrangement other than Mrs Dewar being appointed joint managing director when Chad became ill. In fact, the very terms of the appointment are more consistent with Mrs Dewar's evidence than with Ervin's. The terms were that she would manage the company's affairs when Chad was absent. Thus even without the court's conclusion on the handwriting evidence, the logic and probabilities favoured Mrs Dewar's account of her appointment.

The medical report

[81] Ervin makes the statement in his affidavit that Chad had two brain surgeries that affected his decision making ability and capacity (bundle 4 page 2484 para 12). He offers no details. He asserted a conclusion. He is stating a medical conclusion. Air traffic controllers do not have that competence, and neither has he presented any instance of the lack of Chad's decision making ability to demonstrate his conclusion. He exhibited a medical report.

[82] The proposition here is that when Chad had Mrs Dewar appointed as joint managing director he was not functional in mind to be able to do so. A document purporting to be signed by a Mr Ryan Merrell MD of Northshore University Health System. Under his signature appears these designations: *Clinical Assistant Professor, Pritzker School of Medicine, University of Chicago*. The document says:

> *Chad A Young was under my medical care from January 2012 to February 27, 2014 for a malignant brain tumor. It is my professional opinion that Chad A Young was not competent to make medical or financial decisions after his second surgery, May 10, 2013.*

[83] The court notes that Mr Ryan Merrell was not a witness in the case. The basis of his opinion was not tested. Further, there is no evidence of his competence or training that would enable him to form the opinion he stated. There is no evidence of certification, qualification, or competence. He did not explain the nature of the

malignant brain tumor or anything about it that would have prevented Chad from making financial or medical decisions after the second surgery, assuming that there was even a first surgery. But assuming that there was a first surgery there is nothing to explain why, if that was the case, Chad was or may have been able to make financial or medical decisions between the first surgery and the second surgery.

[84] The medical report does not indicate whether Chad was unable to participate in the decision to appoint Mrs Dewar as joint managing director.

[85] It has been established by many cases that the purpose of an expert is to provide the court not only with his/her conclusion but the basis of the conclusion so that the logic of the reasoning can be examined. Merely to say that Chad was under his care for a malignant brain tumor is not sufficient and therefore cannot serve the purpose of establishing on a balance of probabilities that Chad was unable to make financial or medical decisions. The hoped-for-knock-on effect of medical certificate (an exceptionally generous description) was obvious. If Chad, since May 10, 2013, was unable to make medical or financial decisions then he would unlikely to make any decisions regarding the company's operations. This would suggest that Chad could not suggest or even have Mrs Dewar elevated to managing director. On this line of reasoning the unstated conclusion is that Mrs Dewar took it upon herself to announce that she was managing director after Chad's death and produced a document that would have had to have been fraudulently produced. Mrs Gibson Henlin did not say fraudulently produced but that must be the logical conclusion in this chain of reasoning. If Chad was too ill to make such important decisions and Ervin and Mr Warren did not sign the document relied on by Mrs Dewar, then clearly it must be a forgery. This is why Ms East was brought into the case to bolster that conclusion. The court now turns to an examination of the handwriting experts.

The handwriting evidence

[86] Ervin relied on the evidence of Ms Beverly East, a handwriting expert, to support his assertion that he did not sign the document in question, namely, the one appointing Mrs Dewar as joint managing director. The claimant relied on the testimony of Sgt George Dixon.

[87] The handwriting evidence was largely dedicated to determining whether Ervin and Mr Warren signed a form, headed 'Consent Form'. This document was called Q 1 (questioned document number 1) by Sergeant Dixon. Interestingly, there was no challenge to the validity of Chad's signature which appears on the document. The document reads:

CONSENT FORM

GROVE BROADCASTING COMPANY LIMITED

We Chad Young, Ervin Young and Beres Warren, Directors of Grove Broadcasting Company Limited do hereby consent to the appointment of Mrs Debbian Dewar as Joint Managing Director (sic) of the Company (sic) to manage the affairs of the company whenever Mr Chad Young, Managing Director is absent.

[88] The document has the questioned signatures and two dates. The signatures for Ervin and Mr Warren bear the dates '12-6-13' and Chad's, '13-6-13.' Ervin and Mr Warren say that they do not recall signing this document. This is the primary document in dispute because this is the document that purports to bear the signature of both Ervin and Mr Warren appointing Mrs Dewar as Grove's joint managing director.

[89] There was a second document in relation to Zip 103 Limited which was Q 2 for Sergeant Dixon. It is similar terms to Q 1. It states that Chad Young and Ervin, directors of Zip agreed to appoint Mrs Dewar joint managing director of the company '*to manage the affairs of the company whenever Mr Chad Young, Managing Director is absent*.' The date of this document is '13-6-13' and purports to be signed by Chad and Ervin. However, the appointment of Mrs Dewar as joint managing director of Zip 103 Limited is not an issue before this court.

[90] The court has concluded after a careful review of the handwriting testimony of Sergeant George Dixon and Ms Beverly East that the Sergeant's testimony is to be preferred to that of Ms Beverly East. His testimony was more coherent and had greater explanatory power than Ms East's. The court will not refer to every single point in their evidence but will provide enough information to justify the court's preference for Sergeant Dixon.

[91] Sergeant Dixon was asked to determine whether the genuineness of signatures of Ervin and Mr Warren on Q 1 were genuine and Ervin's signature on Q 2.

[92] The court will use the experts' examination of the handwriting of Ervin as representative of how they approached the analysis of the handwriting of both Ervin and Mr Warren. As was the case with Ervin's handwriting, Sgt Dixon established a master pattern for Mr Warren's handwriting, letter by letter. He identified the features of a number of letters in Mr Warren's signature that led him to conclude there he had identified the master pattern in Mr Warren's handwriting. This in turn guided his examination of the questioned document (Q 1). Hence the conclusion that Q 1 was signed by Mr Warren.

[93] The core of Sgt Dixon's theory and practice is that each writer has a way of writing – even taking into account variations in the known writing – that can be analysed to see how the particular person writes, that is to say, each writer has what he called a master pattern. Within that master pattern are variations. The key skill is to be able to distinguish between variations within the master pattern and differences that take the questioned writing out of the master pattern and therefore points to the conclusion that the questioned writing was not that of the writer of the known samples.

[94] Sgt Dixon's methodology was both positive and negative. He looked specifically for variations between the known and questioned writings that are within the master pattern and, crucially, those differences that are outside of the master pattern. The differences outside the master pattern – even just one - he indicated would lead to the conclusion that the questioned writing was not written by the

writer of the known samples. This to my mind was the striking difference between Sgt Dixon and Ms East. Whereas Ms East focused heavily on differences, Sgt Dixon looked at both similarities and differences. This meant that his mind would be on the alert for evidence that undermined his master pattern thesis.

[95] This difference in approach is important because the discipline of handwriting analysis accepts that there will be differences within the known handwriting of the person. Of course the forgery is seeking to emulate the known writings. How will one distinguish the two? It cannot be simply on differences between the two because there will be differences even within the known writings. This is so because persons do not write their signatures the exact same way every time they sign. Thus merely to say that this or that letter formation is different does not advance the case of forgery very far. It is better to have a theory and a methodology that enables one to account for variations within the known writings but still able to detect differences sufficient to alert the examiner to a forgery since the objective of the forger is to make his/her forged writing so similar to the known that it can pass muster as a variation in the known. The ability to detect this is crucial and the court is satisfied that Sgt Dixon's theory, methodology and practice made this more possible than the theory, methodology and practice of Ms East.

[96] He and Ms East had a combination of originals and copies of known samples of the relevant signatures.

[97] The Sergeant produced five reports. As the case progressed it turned out that the Sergeant and Ms East had not examined the same known samples. There was an effort during the trial to have that done.

[98] Sgt Dixon, while accepting that originals are better than copies, asserted that he was able to determine that the questioned documents bore the handwriting of Ervin and Mr Warren. He indicated that when one examines copies, characteristics such as pressure points and tremors in the handwriting may not be easily seen or detected. He stated that when he viewed such originals as were presented in this case he did not state in his report anything about pressure points or tremors.

[99] Sgt Dixon also said that obtaining twenty five or more specimens of known writings would be ideal. He also agreed that the specimen should be in the same writing style as the questioned specimen. In practical terms, this meant that one should compare cursive with cursive, print with print, and signatures with signatures. He also accepted that the best practice is that the writings being compared should have the same content, meaning 'Ervin A Moo Young' should be compared with 'Ervin A Moo Young.' This is of some importance because Q 1 was signed 'Ervin A Moo Young.'

[100] The proposition advanced by Mrs Gibson Henlin QC is that if the questioned documents have, for example, 'Ervin A Moo Young,', then one ought to have samples of known writing in the content 'Ervin A Moo Young' and style as in cursive if written in cursive. Unless this is done, went the proposition, then any conclusion proffered is suspect. The court does not agree. In this case there are known writings of Ervin that did not have the 'A.' This theory advanced by learned Queen's Counsel reaffirms rather than undermines Sgt Dixon's theory, methodology and practice. His methodology was able to overcome the limitations of not having the exact content in all known samples of Ervin's handwriting and the questioned. The Sergeant did this by developing the concept of a master pattern and what this does is to enable the document examiner to identify the writing pattern across exemplars and thus places the examiner to say whether one is looking at a variation within the known writings or a forgery.

[101] In addition, in this case, the known writings of Ervin included the signatures with the following content: 'Ervin A Young' (see signature on National Commercial Bank document headed Universal Terms and Conditions Merchant Agreement), 'Ervin Moo Young' (see signature on affidavits signed in this case), 'E Moo Young' (letter dated October 14, 2014 on Irie FM letter head addressed to Directors of Grove Broadcasting Limited and annual return). It is true to say that, based on the agreed samples of Ervin's known handwriting in this case, Ervin signs his name, 'Ervin Moo Young' more often than not. No one has suggested that he has never ever signed his name as 'Ervin A Moo Young' or 'Ervin Young.'

[102] There was even a court register signed by persons who entered the court building to transact business, which showed signatures of 'E A MooYoung' and 'E Moo Young'. Thus given the variations in the content of his signature the document examiner in these circumstances would need to conduct an analysis of the known writings using some method by which he could extract the distinctive features of the handwriting that can be identified regardless of the content of known and questioned writings. This is what the master pattern analysis of Sgt Dixon has done and the theory, methodology and practice of Ms East has failed to do. In short despite the lack of the ideal pointed out to Sgt Dixon by learned King's Counsel, it did not undermine his ability to develop what he called the master pattern emerging from Ervin's known handwriting regardless of the content of the signature.

[103] While he proved resistant, initially, to the theme being advanced by Mrs Gibson Henlin KC that best practice is to compare like with like in all respects down to the granular details, as indicated in the immediately preceding paragraph, the court was not of the view that the cross-examination undermined Sgt Dixon's theory, methodology and practice. The court was not left with the impression that unless one had the same content of known and questioned a comparison could not be done. It may not be ideal but the court did not form the view that it would have been impossible or very difficult to do the comparison. The absence of the ideal or the presence of imperfection does not negate the ability of a competent expert to make the comparison and advance an opinion. It must be kept in mind that this is a civil case where the standard of proof is a balance of probabilities.

[104] Ms Beverly East is a forensic document examiner. The first report was dated December 18, 2015. This report had an addendum dated June 28, 2016. She did another report filed October 30, 2017 and a fourth document dated June 19, 2018 was filed.

[105] She explained that she was asked to review the two questioned documents, Q 1 and Q 2. She indicated that in her first report she identified inconsistences in the questioned signature when compared with the known. She began by speaking of

Ervin's signature. She concentrated, she said, on the terminal stroke because the terminal stroke in handwriting tend to be subconscious and it is usually where the writer becomes careless. She added that 'in the known signature the letter 'G' forms itself in a movement of upward motion and completes in an upward motion while the questioned signature completed in a downward motion.'

[106] She looked at what she called K3, K4, and K5. K here means known. When comparing the known with the questioned signature of Ervin she spoke to what she called inconsistencies in the end of the formation of the letter 'M.' She looked at the double 'oo'. She said that the two Os were connected like a string and that was inconsistent with the questioned where the two Os are separate. In the known signature the movement of the terminal stroke continued upward and completed in an upward motion, continued downward and complete upward. Whereas the questioned signature completed in a downward motion.

[107] On one of her pages, she had a K 2. This was said to be the known signature of Ervin which was attached to a document dated October 27, 2015 and directed to Mrs Dewar. It was signed 'Ervin A Moo Young.' This was one of the examplars that formed the basis of her comparison of known and questioned. K 3 was from another memorandum from Ervin to Mrs Dewar dated November 5, 2015. It was signed 'Ervin Moo Young'

[108] Ms East indicated that the K 3 used in the comparison found at page 3450 of the bundles was the K 3 from the memorandum dated November 5, 2015. On the court's examination that K 3 used at page 3450 was not the same K 3 from the memorandum dated November 5, 2015. The court is not purporting to be a handwriting expert. What the court is doing is looking at the K 3 said to be an original signature, which was then placed on the same page as the questioned signature in order to demonstrate her conclusion. The court is saying that the K 3 on the comparison page is not the same K 3 from the known sample. In other words, the wrong K 3 was being compared with the questioned. There are now two K 3s.

[109] There was mislabelling of the known and so the demonstration of the comparison was not effective. All this occurred in respect of her December 17, 2015 report.

[110] She went on to say that in 2016 she was asked to prepare additional documents. She did, in her own words, a more extensive report. This was the report dated June 28, 2016 which was previously described as an addendum. Her focus was on what she described as the inconsistencies between the known and the questioned documents. The inconsistency spoken of was the movement showing upward strokes in terminal strokes in all known signatures from K 2 to K 6 -1 and there was a downward stroke in the questioned signature.

[111] She turned to the letter 'E' in Ervin. She said that in the known signatures of the letter 'E' 'the movement of the lower loops show a more slender loop inside in the bottom part in all the known signatures' whereas the in the questioned signatures 'the movement and the form of that bottom part of the loop is wider in both questioned' documents.

[112] She continued by saying that the crossing point in the 'E' is different in the questioned when compared with the known.

[113] As it relates to the 'Y' in 'Young' she says that in the questioned document the downstroke completes shorter than the 'G' whereas in the known signatures the 'Y' is longer than the 'G.'

[114] She added that when the 'G' was being formed in the known it is like a figure eight whereas in the questioned it is a straight down stroke.

[115] In looking at the letter 'M' she said that the final stroke of the 'M' is missing from the questioned document whereas it is present in the known.

[116] In respect of the name 'Ervin' she said there is no dot over the 'i' in Ervin in any of the known but it is present in the questioned.

[117] Regarding the 'un' in 'Young' the inconsistency is that in the questioned the 'un' is more angular but in the known it is more of a garland.

[118] Ms East identified what she called patching of the letter 'A' in 'Ervin A MooYoung.' Her position was that the 'A' in the questioned showed signs of patching. The idea here is that if the handwriting was genuine then there would be a fluidity to the writing that would obviate the need for patching. The writer of this signature it is said stopped and retraced the letter. This is Q 1.

[119] She added that in this case even in the case of photocopies her opinion was not affected because she 'had sufficient samples to examine and the only difference is a photocopied sample of signature is the colour of the ink.'

[120] She said she focused on identifying inconsistencies or the differences because identifying the characteristics in the known enables you to look for the same characteristics in the questioned and of you don't find them in the questioned that you cannot say that the questioned writing is authentic.

[121] Turning to Mr Beres Warren's signature she noted inconsistencies. She said that in the known signature there is an overlap in spacing between the 'W' the top part of the 'W' which overlaps into the 'A'. She added that in handwriting there are four main principles: movement, form, spacing and line quality also known as trend. The said that the spacing was inconsistent with the questioned signature and also the formation of the final letter is much wider, bigger, rounder and the connection between the penultimate letter 'E' is inconsistent with the questioned.

[122] The court spent some time on Ms East's analysis in order to demonstrate that her methodology was not as robust as that of the Sergeant's in that her methodology did not account sufficiently for variations within the known writings. A variation is, by definition, a difference, but the real question is whether the difference is such that it is outside the variation within the known writings. Ms East's methodology, in the court's view, did not indicate the technique to differentiate between differences that are variations within the known writings and differences that are sufficient to say that the document is a forgery or, at the very least, not written by the writer of the known samples. Thus she concluded that the conclusion was that neither Ervin nor Mr Warren wrote on Q1.

[123] The court concludes, on a balance of probabilities, that Ervin and Mr Warren signed the questioned Q 1. This means that Ervin, Mr Warren and Chad signed the document (Q 1) dated June 13, 2013 with the word, 'CONSENT FORM', and 'GROVE BROADCASTING COMPANY LIMITED' that indicated that they 'hereby consent to the appointment of Mrs Debbian Dewar as Joint Managing Director of the Company to manage the affairs of the company whenever Mr Chad Young, Managing Director, is absent.' Q 1 is on the Irie FM letterhead.

[124] An important sub-issue is whether Ervin was in the island at the material time. Attention is now directed to that issue.

Was Ervin in the island on the date Q 1 appearing by his signature?

[125] Ervin says he was not in the island on the date appearing by his signature on Q 1. He produced his passport with stamps to indicate that he was not in the island at the date on Q 1. Mrs Dewar says that she saw both Ervin and Mr Warren sign the document appointing her as joint managing director. Mrs Dewar further contends that the consent form signed by Ervin and Mr Warren assenting to her being appointed joint managing director were signed in her presence by both men, and thereafter she sent the forms to Chad for his signature. She further explained that both men signed the consent form in her presence at different times on the same date. This evidence, if true, may explain why the date beside the signatures of Ervin and Mr Warren was June 12, 2013, and the date beside Chad's signature is June 13, 2013.

[126] There is no infallibility about the writing of dates. It is not uncommon for the most diligent person to write the incorrect date and even the incorrect time on a document. Since the court has found that Det Sgt Dixon's evidence is more compelling than Ms East's and the court has found that Ervin and Mr Warren signed Q 1, then it is not unreasonable to conclude that Mrs Dewar did see Ervin and Mr Warren sign the document but she is quite likely mistaken as to the time and possibly the date. She is clear though that both men signed before Chad because she said after they signed she gave the document to Chad. This evidence

is the best explanation on the evidence before the court for Chad's signature bearing a later date than those of Ervin and Mr Warren.

[127] The court concludes on a balance of probabilities that Ervin, Mr Warren and Chad did appoint Mrs Dewar as joint managing director in June 2013.

[128] At the time of the appointment of Mrs Dewar as joint managing director, it was the case that Chad was ill. The consent form appointing Mrs Dewar only said that she was the managing director when Chad was absent. The leaves open the question of the meaning of absent in this context. Was it physical absence from the company even if he was present in Jamaica? Was it absence of Jamaica? Did it mean absent due to illness alone or absence for any reason including illness?

[129] Words derive meaning from context and not solely from dictionaries (**Investors Compensation Scheme Ltd v West Bromwich Building Society, Same v Hopkins** [1998] 1 WLR 986 (Lord Hoffman spoke of the assimilation of interpreting contracts to interpretation of serious utterances subject to one exception). *Absent* in the document (Q 1) would certainly cover absent managing the company due to death or serious illness. Mrs Dewar's appointment was done to ensure that the company had leadership if Chad was unable to exercise leadership of the company and therefore would be absent from the leadership of the company. The purpose of the consent form was to make sure that the company had a leader in the event that Chad was incpacitated and could not provide leadership. The background and context of Q 1 was Chad's illness that undoubtedly did or was thought to be sufficiently serious to affect his ability to lead the company. With that background it is unlikely that *absent* meant absent from the island as in a normal visit overseas because he would very well be in Jamaica but unable to lead because his medical condition may have incapacitated him. If it unlikely that Mrs Dewar would have been appointed joint managing director if Chad were well otherwise. Thus it was his illness that was the driving reason behind the appointment of Mrs Dewar as joint managing director. This seems to be one of those cases where the wrong

word (absent) was chosen but what was mean is clear enough to persons who have sufficient background information.

[130] She did not appoint herself the managing director by announcement as has been suggested. When Chad died his absence became permanent and so she became sole managing director.

[131] Mrs Dewar was therefore properly appointed as director and joint managing director and she continued as managing director after Chad's death.

[132] Having regard to the totality of the evidence above on the management styles of Karl and Chad, the acquiescence of the directors, and other shareholders who were content to abide by the decisions of Karl and Chad, the properly appointed directors prior to December 9, 2014 were Ervin, Mr Warren, Mrs Dewar and Mr Marshanee Cheddesingh.

[133] It follows from what has been just stated that the December 9, 2014 did not establish the legitimacy of Ervin, Mr Warren, Mrs Dewar and Mr Marshanee Cheddesingh as directors. Those appointed at the meeting were not lawfully appointed and thus were not directors of Grove.

[134] It necessarily follows that the letter of June 15, 2015 purporting to suspend Mrs Dewar, Mr Hoilett, and Mr Cheddesingh was unlawful because the suspension was executed by the improperly appointed board that came into existence on December 9, 2014. But more fundamentally as the analysis later in these reasons will demonstrate: the suspension was not justified by the facts.

Was Ervin appointed Grove's chairman at the May 27, 2014 at the chambers of Nunes Scholfied Deleon and Co?

[135] A word must be said about a meeting held at the offices of the firm Nunes, Scholfield Deleon on May 27, 2014. This was held after Chad's passing. Over time it has come to be described as a board meeting. It must be said that there is subtle but significant difference between a board meeting and a meeting at which board

members are present. The fact that all or most members of a board are present at a meeting does not necessarily mean that it is a board meeting.

[136] This meeting seemed have been a follow up from a previous meeting held by between Ervin and attorneys at Nunes Scholfield DeLeon. Ervin, it appears, was making enquiries in the wake of Chad's death. At that time he was a director of the company and there is no evidence that he was purporting to speak on behalf of the board. The court reads this May 27, 2014 as a follow up meeting with the attorneys and the board was invited to the meeting.

[137] After this May 27, 2014, which has now been described by Ervin as a board meeting and there is correspondence referring to him as chairman after this meeting, it appears that Ervin and the relevant attorneys at the law firm were of the view that Ervin was appointed Grove's chairman at this meeting. The court has examined the minutes and concluded that no such appointment was made.

[138] He refers to this meeting in this context: 'with the concurrence of the claimant Nunes Scholefield Deleon and Co arranged a board meeting of the 27th of May 2014.' The background to this meeting as stated by Ervin was this:

i) Chad died on February 27, 2014;

ii) Chad was appointed managing director despite the absence of board meetings;

iii) No board meeting during Chad's illness and Mrs Dewar is claiming to have been 'appointed' managing director;

iv) To his mind the articles made no provision for two managing directors. The court observed earlier that this is not correct;

v) After Chad's death he attempted to sort out the estate of Karl and Chad;

vi) At some point he realised that Mrs Dewar was the sole signatory on Grove's account;

vii) He met with Nunes Scholefield Deleon on or about March 10, 2014;

viii) He says that the law firm was the company's attorney at law for years;

ix) Based on i to viii, the law firm arranged a board meeting 'to achieve the objectives as set out in the email correspondence on the 12 March 2014.'

[139] The court has examined the minutes of the May 27, 2014 meeting exhibited to the relevant affidavits of Mrs Dewar and Ervin and the court is satisfied that they are the same minutes. What is clear is that those minutes do not provide any evidential foundation for saying that (a) it was a board meeting although all board members were present; and (b) Ervin was appointed chairman.

[140] The second item on the agenda was 'purpose of the meeting.' Ervin was invited by Mr Jackson to state the purpose of the meeting. Under that section in the minutes no reference was made to this meeting being a board meeting in contra distinction to a meeting with the board. What is recorded is that Ervin indicated that:

(1) he was interested in knowing what was happening on a day to day basis;

(2) he wanted to find out about Karl's will;

(3) he said that there were now five children of Karl and some of them had obtained legal representation.

[141] The point to note is that nowhere does Erin or even the lawyers present state that this meeting was about electing a board chairman. Even under the heading in the minutes of 'structure of company', there is no mention of the election of a chairman. At that section of the minutes which reads '*[t]he matter of chairman of the company came up*' it was stated '*that to date none was appointed*.' It was at this point that Mrs Dewar indicated her desire to be appointed chairman and Mr Tai, one of the attorneys present indicated that '*due to corporate governance she cannot occupy the positions of managing director and chairman concurrently*.' The court notes that of all the places in the minutes for the issue of the appointment of board

chairman to be mentioned this was it; yet it was not. There is no indication in the minutes that Ervin even expressed an interest in being chairman.

[142] Towards the end of the minutes one reads the following:

(1) **if** Mr Moo-Young (sic) is appointed chairman of the board he is to ensure that meetings are held (my emphasis);

(2) the reporting chain is Mrs Dewar to the chairman;

(3) Mr Moo Young can talk to any manager of the company at any time;

(4) remuneration is to be determined for the chairman

[143] The court notes the conditional pronouncement. This is yet another place where one would expect to find in the minutes that Ervin was appointed chairman.

[144] Shortly after that it is recorded that '*Mr Moo Young asked Mr Jackson to prepare an outline of the functions of the chairman*' while Mrs Dewar 'stated that her concern is the day to day operations of the company.' The meeting ended.

[145] In light of this, it is difficult to see how Mr Jackson could be writing letters and emails to suggest that Ervin was appointed chairman or even expressed an interest in being chairman.

[146] Mr Warren provided an affidavit in this case. He states that he began attending board meetings as of December 9, 2014 and has attended every board meeting since that date. He says that he attended the board meeting '*held on May 27, 2014' at Nunes Scholfied Deleon and Company.*' He said that the issues '*discussed at that meeting was in relation to accountability, board meetings and a single signatory on the claimant's bank accounts among other issues.*' Earlier in the affidavit he referred to Ervin as Grove chairman. His silence on the appointment of Ervin as board chairman at the May 27, 2014 is striking. It is extremely unlikely that such a development would have escaped Mr Warren particular when this litigation is about the validity of the appointment of Mrs Dewar and she is saying

that Ervin was never appointed chairman at the May 27 meeting. His second affidavit did not correct the omission if it was an omission.

[147] There is no evidence of any board meeting between May 27, 2014 (the meeting at the law firm) and Mr Jackson's email of June 6, 2014 (a mere eleven days, counting inclusively), yet Mr Jackson has this sentence in the email: *I have suggested to Ervin as chairman that we schedule a further meeting of the directors of [the company] to follow on these matters [referring to matters stated earlier in the email].'*

[148] By some alchemy not easily discernible the May 27, 2014 meeting was being seen an official board meeting of the company's directors and that Ervin was appointed chairman. There is simply no evidence to support either proposition.

[149] Prior to this email of June 6, 2014, there was a letter, dated June 5, 2014, from the law firm, signed by Mr Jackson, to Ervin which stated: ***We confirm the decision of the Board to confirm Ervin Young as chairman of the board of*** *directors of Grove Broadcasting Company Limited. As Chairman it is recognised that Mr Young would be first among equals. To assist in providing an understanding of his role as chairman, we outline the following matters concerning the usual matters that govern the activity of a chairman:…'* (my emphasis). Who is doing the confirming and when was that decision made? Was it on May 27, 2014? and if yes, why was it not reflected in the minutes of the meeting assuming it was properly constituted board meeting? Unless it is being said that the meeting of May 27, 2014 was a board meeting then it is difficult to understand the opening sentence under paragraph 4 of the June 5, 2014 letter. It is therefore not surprising that Mrs Dewar took the view that the meeting of May 27, 2014, was a set piece with all the players, except Mrs Dewar, on board.

[150] Ervin seems to have been under this view that the May 27, 2014 meeting appointed him a chairman. He states in his second affidavit at paragraph 41 that '*prior to that the meeting of the 27th May 2014 [resolved] that I should be the chairman of the board.*' The evidence does not show this.

[151] Here we have the sticklers for proper procedure cannot point to single sentence in the May 27, 2014 minutes appointing Ervin as Grove's chairman. In this court's view this meeting was nothing more than a meeting suggested either by Ervin or the lawyers or both and the other board members were invited. It was a meeting to chart a path forward in light of the death of Karl and later Chad but it was not a board meeting in the commonly understood sense of the phrase.

[152] Thus Mrs Dewar's observation in her June 6, 2014 response to Mr Jackson's email and letter was not surprising. She swore:

> *It appears that there was preset (sic) agenda for the meeting which I was not privy to, just to be clear whose interest do you represent? You have again made mention to (sic) Ervin Young as the chairman as far as I am aware we the board did not vote to appoint Ervin Young as chairman, the suggestion was made but not agreed to by anyone. I specifically asked you to draft up exactly what this chairman would be required to do before a consideration could be made to an appointment, your answer was that you would come up with something.* ***Just to be absolutely clear I did not appoint Ervin Young chairman of the board.***

[153] Mrs Dewar says she did not receive a reply to her email. There is no evidence of a reply from Mr Jackson correcting Mrs Dewar's error pointing out how Ervin became chairman on May 27, 2014.

[154] The factual record supports Mrs Dewar when she asserts that no decision was taken to appoint Ervin as chairman of the board at the May 27, 2014 meeting. There was no vote to appoint Ervin. There was no resolution appointing Ervin as chairman. She says the suggestion was made for him to be chairman. The court notes that if that is the case it is not recorded in the minutes but her account is consistent with the record of the meeting to the extent that Ervin was not appointed chairman at that meeting. How could a decision as vital as the appointment of a board chairman not make its way into the minutes of the very meeting where the appointment is alleged to have taken place?

[155] Mrs Dewar's email is silent on any meeting held between May 27, 2014 and Mr Jackson's communications of June 5 and 6, 2014. Her silence is consistent with the absence of any record of any meeting or communication between the dates just mentioned where the board considered, decided and appointed Ervin as chairman.

[156] The court notes that it appears that the absence of any record appointing Ervin as chairman of the board occurred to someone. The meeting of December 9, 2014 took the curious turn of Mr Leroy Elliot and Mr Chang engaging in an exercise which saw Ervin being appointed chairman of the board. The rhetorical question is this: if Ervin was appointed as chairman at the May 27, 2014 meeting, why would Mr Elliot and Mr Chang find it necessary to have Ervin appointed chairman?

[157] Under cross-examination it must be observed that Mr Elliot testified that at the December 9, 2014 meeting the business transacted was the appointment of Ervin and Mr Warren by Mr Elliot and Mr Chang and thereafter they purported to appoint Debbian Dewar, Marshanee Cheddesingh as Grove directors. The irony here is that under the articles of association it needs three directors for there to be a quorum. The articles also point out that existing directors can appoint directors but for that to happen there needs to be three directors and at this meeting, assuming Mr Elliot and Mr Chang were properly directors of Grove at the material time, then that would be two and not three. This prompted Mrs Dewar to point out that those who are insisting on strict compliance with the articles themselves have violated the article they claim to be upholding. It is this appointment that Mr Dewar is saying is contrary to the articles and therefore none of the directors other than Ervin, Mr Warren, Mr Cheddesingh and herself is legitimately appointed.

[158] The court noticed that the meeting of December 9, 2014 mirrors the letter of November 24, 2014 which outlined that there are issues relating to the managing director (Mrs Dewar) and her conduct of the affairs of the company. This November 24, 2014 letter was written to Ervin by Mr Jackson. In the November 24, 2014 letter there was reference to what was called '*our retainer letter of 9th October 2014*' and

this October 9 letter seemed to have referred to Ervin as '*the chairman of the Board of Grove Broadcasting Company Limited.*' The court is not clear on the factual basis for this assertion since there was no evidence that prior to December 9, 2014 the board had met and appointed Ervin as chairman.

[159] The first meeting after the December 9, 2014 meeting took place on January 8, 2015. The persons present were Ervin, Mr Elliot, Overton, Mr Warren, Mr Chang, and Ms Kimberly Murphy (via phone). At the meeting Ervin indicated that prior to the meeting Mrs Dewar and Mr Cheddesingh had indicated that the meeting was not properly constituted and based on legal advice she would not be participating in the meeting. He said she had distributed a document to Ervin, Mr Warren, Mr Cheddesingh (persons who she regarded as properly appointed) explaining her position.

[160] Ervin also stated that the directors other than the first directors were improperly appointed. He spoke of the arbitrary removal and appointment of directors which was discussed at the May 27, 2014 meeting. He said that the December 9, 2014 meeting passed resolutions reappointing the improperly removed directors.

[161] The meeting addressed the issue of signatories on the bank account and decided that there would be a minimum of two signatories for all bank transactions.

The suspension and allegations of withholding information

[162] The court will embark upon a granular examination of the period March 2014 to June 2015 because one of the main complaints levelled against Mrs Dewar was that she was uncooperative and did not wish to provide information to the board. It was also said that she did not cooperate with the board to appoint other persons having signing authority on the company's accounts.

[163] No board meeting was held in November 2014. The unequivocal documentation is that Mrs Dewar indicated that information was available, she proposed budgets

(master and supporting), she proposed board meetings, she invited discussion on matter related to the company's affairs. Thus for seven months Ervin did not take up the opportunity to have a board meeting and enquire into the financial affairs of the company. There is no evidence that he contacted the auditors of the previous years' financial statements to ask questions of them.

[164] Between the May 27, 2014 meeting and December 9, 2014 meeting it appears that no board meetings were held. In that period, there is no question that Ervin and those persons who were directors before December 9, 2014, received or were notified of the readiness of the 2013 financial statements. Also between May 27, 2014 and December 9, 2014, there is no evidence that Ervin requested financial information from Mrs Dewar at all and if requested that it was not presented to the directors excluding the directors who were purportedly appointed at the December 9, 2014 meeting.

[165] Equally regarding signing limits on the accounts, there is no evidence that the board, as constituted after December 9, 2014, made any decisions in that regard. The point is that even if Mrs Dewar did not assist with setting signing limits on the accounts, then the board could have passed a resolution and advise the bank on the limits for each account and signatory.

[166] Regarding Mrs Dewar being present at the commencement of board meetings and then withdrawing from those that were held after the December 9, 2014, Mr Elliot was not able to assist with any specific report Ervin made regarding any advice given to address Mrs Dewar's behaviour.

[167] Mr Elliot said further, under cross examination, that Ervin had advised the board that legal advice was received but that advice was not reflected in the minutes of the January 8, 2015 meeting.

[168] Further cross examination of Mr Elliot gnawed at the foundation of the allegation of non-provision of information. He admitted that the 2014 accounts were up to date. This means, based on the evidence, that the financial records for 2013 and

2014 were current and up to date. In fact, it was Ervin who refused to sign the 2013 on the basis that he wanted an explanation regarding what he was signing, never mind that the evidence was that he had signed several of the same kind of reports before the passing of Karl. What was it about the 2013 financial statements Ervin did not understand when it appeared that he understood them sufficiently well in the past to sign was not revealed in any of his many affidavits in this matter nor his oral evidence in court? No satisfactory answer came from Ervin's affidavits or his oral testimony.

[169] The court concludes that the assertion that Mrs Dewar was not willing to provide financial information to the directors has no foundation in fact. What she declined to do was to participate in board meetings after December 9, 2014 when persons whose appointments as directors she had concerns about were present. Even then she provided the information to the persons who were directors prior to December 9, 2014.

[170] Mrs Dewar prepared a document, dated October 6, 2014, called, *Material Matters Arising In the Management of Grove Broadcasting Company Limited – March – September 2014.* It was a document prepared for the board of directors. In the document Mrs Dewar indicated that she took over the role of managing director in March 2014 after Chad's death. The report indicated that the company was in good general health despite sustaining a loss in 2013. She indicated that Karl and Chad controlled the running of most departments.

[171] Her report outlined issues that had to be addressed such as

a) Lack of clear strategic direction for the company

b) Heads of Department not empowered to carry out duties properly as a result of lack of authority, responsibility and revenue

c) Sales representatives not being monitored by way of quota system to assess performance

d) Sales manager needed an assistant

e) Lack of a music director

f) Need for a new financial controller

g) Lack of an HR department

h) Legal matters needing board discussion

i) Operating issues in need of urgent attention to avoid negative short and long term impact on company

[172] For each item she went into detail outlining proposals and solutions. She indicated that there were cost savings amounting to $10,220,389.00 over the previous four months (March to September 2014).

[173] The document indicated that Mr Hoilette was appointed Financial Controller in April 2014 because she could no longer discharge that role effectively. She even highlighted '*the immediate need to quickly develop and implement a Management Accounting System (sic) which is critical in ensuring reports to the Board (sic) and the Managing Director (sic) are done in a timely manner.*' This was the context of Mr Hoilette's appointment.

[174] Under the heading *Legal Matters* Mrs Dewar noted the following:

Flower Hill Land – this has been going on from Karl Young was in office. The land owner is now willing to sell at a cost of $1,500,000.00. Our lawyers are now in the process of reviewing the Sale Agreement (sic) from his Attorney (sic).

[175] She concluded the report on the optimistic note that the '*future prospects for the company are positive*' and '*should return to profitability in another two years at best if we continue to restructure to eliminate wastage and inefficiency*.'

[176] While this memorandum outlined what Mrs Dewar had done in her capacity as managing director, all was not well between Ervin and her.

[177] The problem was that Mrs Dewar refused to attend the board meetings that had persons in attendance other than those the court has found were the properly appointed directors up to and beyond December 9, 2014. The court has concluded that the board at and after December 9, 2014 to the appointment of the interim board by way of court order was not properly constituted. This meant that neither Mrs Dewar nor Mr Cheddesingh were obliged, legally, to attend these meetings.

[178] Mrs Dewar was accused of not attending board meetings. The complete picture is that she refused to recognise the directors appointed at the December 9, 2014 meeting. As will be shown, Mrs Dewar's conclusion that the additional directors (Troy Moo Young, Overton Young, Joni Camille Young Torres and Ms Kimberly-Ann Murphy) appointed at the December 9, 2014 meeting was unlawful was correct.

[179] By letter to the directors of Grove dated January 8, 2015, Mrs Dewar indicated that she would not attend the meeting scheduled for January 8, 2015. She took the view that the meeting was irregular, that the board should not be taking advice from Mr Jackson because of his personal representation of Ervin and Mr Warren and she was unable to discuss company matters with improperly appointed directors. She also stated – which is factually correct – that she had provided information to properly constituted directors with whom she was prepared to discuss matters.

[180] The evidence shows that before the December 9, 2014 board meeting Mrs Dewar was working with the directors. This is supported by the following evidence.

[181] It is known that as of May 27, 2014 – the meeting at NSD – that she had said that the 2013 financial statements were ready for signature. She also said that she wrote to each director delivering the financial statements (2013), income tax returns (2013) and estimated income tax (2014). The directors signed a document dated June 25, 2014, as receiving the same. The directors who signed were Ervin, Beres Warren, and Mr Cheddesingh. The document even proposed that board would meet 'a week from June 25, 2014.' One would think that this presented an

opportunity to raise questions with Mrs Dewar about the financial affairs of the company. No meeting took place.

[182] She proposed a board meeting for July 3, 2014, but it did not take place. Let us keep in mind that Chad died on February 27, 2014. The financial statements for 2013 were ready for signing by June 2014. There is no quarrel that previous financial statements were not available to Ervin and any other director. Indeed the letter of suspension made reference only to the 2013 financial statements. The unambiguous evidence shows that Ervin signed as receiving the 2013 financial statements.

[183] On July 21, 2014, by email to the company secretary, Mrs Dewar asked for a board meeting on August 14, 2014 and indicated that one of the agenda items would be signing off on the financial statements. The email said:

At this meeting we will discuss and sign off on the Financial Statements (sic) for both companies, discuss legal matters which have come to our attention recently ***and other matters which are of concern to the other Directors.*** *(my emphasis)*

[184] The email was copied to Ervin and Mr Cheddesingh. Thus the assertion that financial information was being withheld, at least the period from Chad's death in February 2014 and July 2014 is not supported by the available evidence. What the evidence shows is that there were two indications from Mrs Dewar to Ervin and the other directors to convene a meeting and discuss matters related to the affairs of the company. Nothing happened in response to this email.

[185] On September 23, 2014,03:01 PM Mrs Dewar wrote to Ervin, Mr Cheddesingh, and Mr Donovan Jackson indicating that management accounting systems were in place. This is her letter in relevant parts:

Ervin, Cheddy, Berres

Let me say thanks for the patience of the board in allowing me the time needed to put a framework in place to allow for transparency in the running of both

companies. At this time I am pleased to inform that we have management accounting systems in place which will allow me to give information to the Board in a timely manner.

The Master budgets and supporting budgets have been done for both companies. ….

I will also send weekly a payment report for both companies which will show bank balance, payee names and amounts.

Income and Expenditure (sic) reports and Balance Sheet (sic) will be sent monthly or quarterly depending on which time is preferred. *(**emphasis added**)*

[186] No response from Ervin. All this in a context in which it is being said that Mrs Dewar was reluctant to share financial information with the board of directors.

[187] Earlier in the day – September 23, 2014 12:53 PM (bundle 4 page 2550) – Ervin wrote an email to Mrs Dewar in which he said that meetings with him alone or with a couple other directors do not constitute board meetings. The critical point though is this sentence:

Finally, your attempt to request meetings were not ignored, the requested times were not convenient for those to attend. You were asked to request a date that was convenient for all. I am referencing your correspondence to Prudence Townsend at SAS Ltd to take notes for a meeting you requested for 8/14/2014 at the Kingston Office (sic).

[188] At the very least this email is consistent with Mrs Dewar's assertions that she made efforts to arrange meetings but they fell through for one reason or another.

[189] On October 14, 2014 she delivered the master budget report to the directors and a master budget for 2014-2015. Each director signed for each document. There is the document dated October 14, 2014 which referred to (a) management report to the directors; (b) letter addressing issues raised by Mr Donovan Jackson on behalf

of Ervin and Mr Warren; and (c) master budget for 2014. It bears the signature of Mr Cheddesingh and Ervin. There is no signature for Mr Warren.

[190] This October 14, 2014 document was preceded by communication dated October 3, 2014 (bundle 4 page 2657). In this communication Mrs Dewar wrote:

I am pleased to say that the Management Report (sic) and my formal response … are ready. These documents will be available along with the Draft Master Budget (sic) and supporting departmental budgets for the financial year 2014-2015 at the Board Meeting to be convened at our Kingston Office on the proposed date of October 7, 2014.

[191] The proposed October 2014 board meeting did not occur. By email dated October 8, 2014 Ervin wrote to Mrs Dewar indicating that the board meeting for October 9, 2014 needed to be rescheduled because Mr Warren was ill. On the morning of October 9, 2014, Mrs Dewar responded by saying that the '*proposed meeting for the budget can still be held even if Mr Waren is out sick, I see no reason why we cannot meet today, Mr warren (sic) can always be filed in. We must make every effort to meet today to discuss the budget was we are almost two weeks into the new financial year. If you cannot make the meeting will proceed, you can pick up your copies at your convenience…*' She continued to say, '*I must have discussions to get approval from the Board, the daily operations of the company must continue, hence it is imperative that we have these discussion. Please be reminded that the Budgets (sic) for ZIP must be signed off as will (sic)*' (bundle 4 page 2659 from Ervin's affidavit). All this from the person who was said to be unwilling to provide information to the board.

[192] No board meeting was held in October 2014. All this took place before the December 9, 2014 meeting. There are no minutes indicating, in detail, that Mrs Dewar did not provide the information she said she provided. Thus before the December 9, 2014 meeting there is no evidence that Mrs Dewar failed to provide financial information to the board or at the very least, did not want to provide information.

[193] Thus between Chad's death in February 2014 and December 9, 2014, the court has not seen any evidence of Mrs Dewar's refusal to provide financial information to Ervin and the other directors.

[194] Attached to Ervin's affidavit dated July 9, 2015, is an email from Mrs Dewar dated December 31, 2014 in which she asserted that (a) the management report was distributed to board members in October 2014 and they signed for it; (b) financial statements for 2013 were distributed from June 2014 for review and discussion. She explained that the financial statements for 2014 were not yet ready because the audit for the year ending September 30, 2014 was done in November 2014. She made the claim, in the email, that '*[w]eekly payment reports have been sent to Ervin, I assume he has received same even thought he has never acknowledged same*' (bundle 4 page 2661). Ervin's affidavits do not contradict the assertion in this email. The court has not seen any evidence to the contradict these assertions by Mrs Dewar's email.

[195] Regarding the proposed October 2014 meeting there is email correspondence from Ervin and Mrs Dewar stating that the meeting was to be held on October 7, 2014. Mrs Dewar wrote in an email dated September 30, 2014:

The suggestion for a meeting of October 7, 2014 is a great one as there are outstanding issues to be discussed and finalised.

[196] In the same email she repeated her suspicion that Mr Jackson was seen to assist Ervin to get control of the board but more important she asserted:

Let me be very clear in saying that I have personally reached out to all Directors (sic) impressing .....need to have Board Meetings (sic).

[197] On the same September 30, 2014 Ervin responded by saying that the October 7, 2014 meeting was mandatory and would not be cancelled. He agreed that there were important items to be finalised. In other words, he and Mrs Dewar were united in the need for the board meeting so that important matters regarding the operation of the company could be discussed and resolved.

[198] The court will now detail extracts from her management report of October 6, 2014, to support the just-stated conclusion. She said this:

Identification of a long term strategy for the General Direction of the Company

It is the responsibility of the board to determine the Long Term Strategy (sic) and overall direction of the company. While the management team will assist with this process the Board (sic) has the ultimate responsibility. I have adopted a Master Budget and supporting departmental budgets for the 2014 – 2015 Financial Year (sic), though this is short term this will serve as a useful guide for the Board (sic) to determine the expected results for the new financial year.

Under empowering HODs, she said:

Empowering HODs

I have had numerous meeting (sic) with all the HOD's (sic) where I informed them that my management styles (sic) were different from what was practised (sic) in the past.

In dealing with development of a sales and marketing strategy, Mrs Dewar wrote:

Development of a Sales and Marketing Strategy

Detailed analysis of our income has been done; this is something that has never been done certainly since I joined the company almost thirteen years ago. Previous management did not require this information…. It is now mandatory for each department responsible for station projects to supply a calendar of events for the financial year this will allow us to send out sales proposals to all our clients from the start of the financial years this should ensure better sponsorship and increased (sic) much needed revenue.

[199] The court has set out enough to give a flavour of her management report of October 6, 2014. There is no evidence that the board took up this report and discussed it in detail. This report was also exhibited by Ervin in his affidavit

evidence. The next major event was the December 9, 2014 meeting which turned out to be a board expansion exercise.

[200] There is even a document dated October 2, 2014 apparently by Mrs Dewar addressed to the Grove directors (bundle 4 page 2679). This document was exhibited by Ervin, In that document reference was made to the pressing issue of:

(1) a public share offer of shares in the company;

(2) potential claim against Grove by Messrs Bob Clarke and Clyde McKenzie;

(3) NCB bank mandate;

(4) the company's financial statements;

(5) the management report;

(6) the company's tax liability;

(7) current tax position which referred in some detail to company tax, statutory tax returns, and general consumption tax;

(8) renovation of Kingston offices

[201] It seems to this court that Ervin's assertion of Mrs Dewars withholding information certainly up to the end of December 2014 has no factual foundation. What the evidence shows is that after Chad's death Mrs Dewar was seeking to move the company away from the informal style of leadership and put in place more formal structures and have more current financial information available to the directors.

[202] The court also examined the period January 2015 to June 2015. The court has not seen in the minutes any specific withholding of information from the board. What Mrs Dewar did was to provide information to board members who were, in her view (and which the court has found) were the legitimate board members.

[203] The court now turns to the suspension letter dated June 19, 2015. In that letter is alleged that Mrs Dewar '*was made aware that there is an issue with the financial statements including the 2013 financial statements since 27th May 2014. Several efforts to get to you to regularise this position by reporting to the board proved futile*.' The court found it significant that Mr Elliot, the former banker, (with all of what comes with such a position) could not recall the issue referred to in the allegation against Mrs Dewar. Under cross examination Mr Elliot stated that the special audit did not find any irregularities concerning the 2013 financial statements. Mr Elliot was not able to identify any particular issue with the 2013 financial statements. This evidence is quite telling since Mr Elliot agreed, under cross examination, that he took part in drafting the suspension letter. If that is the case surely one would have expected him, being a banker (with all of what that entails in terms of experience, maturity, assessment and analysis of financial information), to say what were the problems with the financial statements.

[204] Mr Elliot said that what the board was not getting from Mrs Dewar were (a) current accounts; and (b) income and expenditure accounts. That, in essence, was, in his view, the problem the board was having with Mrs Dewar. Of course we have the explanation from Mrs Dewar regarding her view of the composition of the board.

[205] It is important to note that Mr Elliot indicated that he was recalled to the board by Ervin in December 2014. The court would have thought that a former banker who was recalled to the board, after an absence measured in decades if not years, a mere six months before suspending a managing director would have satisfied himself about the matters which were in the suspension letter which he participated in drafting. It appears that he did no such thing. In short, Mr Elliot knew nothing about the financial statements/position of the company but was prepared to draft a letter of suspension and participate in the decision to suspend Mrs Dewar. It would be fair to say that the directors appointed at the December 9, 2014, would be hardly in a better position than Mr Elliot.

[206] The court has not seen any record in the minutes of board meetings between January 2015 and June 2015 indicating the issue with Mrs Dewar regarding the financial statements. One would have expected to find this information in board minutes if those issues contributed to the suspension of a managing director. The court has referred extensively to Mr Elliot's evidence because he would be the 'natural witness' given his background as a banker to be able to say what the issues the board was having regarding the financial records. Ervin's evidence in this regard was not very helpful.

[207] Mr Elliot was taken to the second allegation namely that Mrs Dewar co-opted the Financial Controller, Mr Germaine Hoilett and Mr Marshenee Cheddesingh to withhold financial information from the Board. Mr Elliot was not able to say whether Mr Hoilett or Mr Cheddesingh was asked for any financial information. The point being made here is that Mr Elliot does not seem able to say with any degree of precision whether the board had requested information from the two gentlemen who were said to have been co-opted by Mrs Dewar in her stratagem of non-cooperation with the board. There was no evidence that either Mr Hoilett or Mr Cheddesingh was requested in writing or orally to present any financial information to the board and they refused.

[208] The point the court is making is this: since Ervin and the other persons were of the view that the December 9, 2014 meeting was legitimate, it was perfectly within their remit, based on their belief in the correctness of their appointments, to address the issue of signatories to the account. The board is the principal organ of governance other than the shareholders in general meeting. The board could have easily passed a resolution indicating who the signatories were and advise the relevant financial institutions accordingly. There is no evidence that this was done when the board had the power to do exactly that.

[209] The audit report was completed. It was to be presented at a board meeting on October 9, 2015. There is evidence to show that Mrs Dewar's copy came to her on October 8, 2015 – a day before the board meeting. Clearly that would not have

been sufficient time for her to respond to the details in the report. This point was made clear by Mrs Dewar at the board meeting of October 9, yet Ms Thompson was suggesting, with the apparent concurrence of Ervin, that the report could be tabled and Mrs Dewar could ask questions. The other directors present were not of the view and Mrs Dewar was given time to respond which she did in time for the next board meeting on October 29, 2015. As it turned out the matter of discussing the report and refutation in depth did not happen because, it was said, the case was now before the court.

Loan taken by ZIP 103, construction of wall, purchase of property and comingling of funds

[210] From the evidence all these items are connected. From the evidence of Mrs Dewar, which was not seriously disputed by anyone, ZIP 103 Ltd (ZIP) took a loan of approximately JA$15,000,000 from National Commercial Bank. According to Ervin, Mrs Dewar did not fully disclose the financial arrangements surrounding the loan and neither did she explain why it was necessary for ZIP to take out a loan in its name for the benefit of Grove.

[211] Mrs Dewar admits that a loan was taken out in the name of ZIP and used to construct a boundary wall for Grove. Her explanation is that ZIP owed money to Grove and it was quite legitimate for ZIP to take on this loan as part of the liquidation of Grove's loan to ZIP. Her justification was that by doing this a portion of ZIP's loan from Grove would be written off. She asserts the legitimacy of this transaction and further that Mr Cheddesingh, Ervin and herself were directors of ZIP and Grove. She seems to be saying that since there were common directors of ZIP and Grove the arrangement was not untoward.

[212] She added that at the Grove board meeting of March 16, 2015, the board signed off on the wall construction. The persons present were Mr Cheddesingh, Ervin, Mr Warren and she were present.

[213] There is a document dated March 20, 2015 signed by Mrs Dewar, Ervin, Mr Cheddesingh and Mr Beres Warren which summarised the decisions of March 16, 2015. The document indicated that the total project cost was JA$7,812,500 at a rate of 9.7% ($7,165,000 construction and $645,500 for furnishings). The heading of this document specifically states that it was an estimate for renovation of Irie FM front fence and boundary wall. There is no mention there of acquisition of any real estate.

[214] Overtan Moo Young (Overtan), who was engaged by Grove as consultant for an estimate for the renovation of the Grove's front and boundary wall, said in his affidavit that Mr Cheddesingh brought him 'a quota' dated March 4, 2015 in the sum of JA$7,812,500.00 in respect of 'Irie FM's front fence and boundary wall.' He said that he did an assessment and adjusted the sum to JA$7,165,000.00.

[215] Ervin says that the directors approved boundary wall repairs on the Grove property to the amount of JA$7.8m. He said she negotiated the loan from NCB before seeking the directors' approval. He added that there was a letter of commitment showing a loan for ZIP 103 to the tune of JA$15m for boundary wall and purchase of property in Bamboo. He says the directors had no knowledge that money was being borrowed by ZIP and they did not approve the purchase of the property by ZIP. Further, he added, the commitment letter preceded the approval given by the Grove board.

[216] On the question of purchase of properties Mrs Dewar explained that there were three properties, Lillyfield, Coopers Hill, and Flower Hill. These sites hosted transmitters and therefore essential to transmit the signal from Irie FM to population centres across Jamaica.

[217] She further explained that an examination of the relevant files showed that Karl travelled around the island looking for land to purchase on which to locate transmitters. The files suggested that in all probability Karl paid for the properties but in keeping with his now accepted lack of formality it appears that there were no sale agreements in place or at least, she has not been able to find any.

[218] Regarding the Flower Hill property, she explained that Karl had entered an agreement with a Mr Lynfatt who had apparently purchased the property from the executor of an estate. There was a challenge to the authority of the executor to sell the property. This challenged resulted in Grove paying expenses of Mr Lynfatt to have the matter resolved in the Supreme Court. The litigation ended in Mr Lynfatt's favour, thus securing the property (comprising two lots).

[219] The Lillyfield property was more than vital to the operations of Grove. The Lillyfield transmitter sent the signal to Cooper's Hill and from there the signal was sent to Kingston (the capital city with over one million residents) and the south coast. Mrs Dewar indicated that it came to her attention that for some reason the property was to be sold. Grove it was said was not in a financial position to purchase the property. It was purchased by Zip in Zip's name. According to Mrs Dewar had that not been done then in all probability the property would have been sold to a third party thereby imperilling the viability of Irie FM.

[220] In cross examination, Mrs Dewar accepts that she did not discuss the Lillyfield property issue at the board meeting of Grove held on March 16, 2015. Mrs Dewar explained that or around January 2015 there were discussions between a bank and herself concerning a loan to purchase the Lillyfield property, or at least that is how the court understood her evidence. The issue of the wall came up afterwards. She says that she cannot recall if she told the Grove board that she was taking a loan in ZIP's name. What she could say was that the discussions regarding the Lillyfield loan was well advanced in that the bank already had Grove's financial statements.

[221] From the totality of the evidence it is fair to say that Mrs Dewar did not bring home to the consciousness of the board (assuming only the directors that she recognised comprised the board) that by March 2015, there were two loans in view, namely, the loan to construct the boundary wall and the loan to purchase Lillyfield. Having reflected on the matter it is not immediately clear why the taking of the loan ZIP taking the loan would amount to a breach of fiduciary duty to the Grove company.

Mrs Dewar says that the ZIP board agreed to take the loan. The Grove board was told about the construction of the wall; there is no dispute about that. The Grove board was not asked to approve any loan. The reason seems obvious from Mrs Dewar's evidence: Grove's financial circumstances was strong enough to carry the loans. Mrs Dewar asserted that ZIP was indebted to Grove and having ZIP take the loans was a methodology to reduce ZIP's indebtedness to Grove.

[222] In the end, the inference Mrs Dewar is contending is this: Grove's board was not required to approve the loans ultimately taken; Grove was not placed in an adverse financial position; Grove received the benefit of having a boundary wall constructed, land on which its transmitter was located secured, indebtedness to it by ZIP being reduced, and ZIP servicing the loan.

[223] This arrangement benefited Grove and if any company would be at a disadvantage, it would have been ZIP but ZIP is not a party to these proceedings and neither was there any detailed analysis of the decision making within ZIP placed before the court so that the court could determine the soundness of the transaction. As to the impact of this arrangement on ZIP and what the ZIP board knew is not an issue before this court in this trial.

[224] Ervin says that what Grove board approved was repairs to the boundary all and that it would be financed by a loan. This assertion by Ervin is supported by a memorandum dated March 20, 2015 (bundle 4 page 1737). He claims that approval it did not mean that Mrs Dewar could go off and borrow money without reference to the Board. However, given that ZIP was borrowing the money the approval of Grove's board to borrow the money was not a legal necessity since that would be a matter for ZIP's board. Ervin says he was a member of ZIP's board and that board did not approve the loans for the land purchase and the wall construction.

[225] Mrs Thompson, the person called in to do the special audit (detailed below), indicated that the loan taken out by ZIP was not used to purchase the land but

used to pay salaries and other statutory deductions. According to her only $250,000.00 were used to pay for the land.

[226] She said Grove's board signed for the loan but did not get it. This was not quite accurate. The evidence is that the Grove board approve the expenditure which was to be by loan financing. The loan went to Zip. This loan was for JA$15m. Mrs Dewar responded in an email to Ms Thompson (which shows that had Ms Thompon made the effort she could have received responses to her questions from Mrs Dewar via email) saying that JA$8.5m purchased land and the balance was used to construct the wall. Ms Thompson alleges that money was not used to purchase land.

[227] In cross examination on this loan Ms Thompson was aware that ZIP, a related company, was indebted to Grove but she was not aware of the level of indebtedness. She also said that was not aware whether ZIP was servicing the loan. She added that she knew nothing about ZIP.

[228] In relation to the NCB loan to ZIP, Ms Thompson set out in her special audit report, in relation to this loan, what was described as two e-link transfers into Grove's account of JA$7,750,000.00 totalling JA$15,500,000.00 on March 23, 2015. There were payments out by e-link between April 2015 to July 2015 inclusive totalling JA$14,976,727.61.

[229] She was asked whether she followed the underlying documentation connected to the e-link. She was asked this because she asserted that the money was used to pay salaries. Her response was that the payments out went into a payroll account and therefore they were used to pay salaries. When pressed to demonstrate her conclusion that the moneys were used to pay salaries no such proof was forthcoming.

[230] This conclusion in light of all the documentary evidence was questionable from the moment it was written. It can be tested in this say. Regarding the sale of land, there is a sale agreement dated May 11, 2015 for the land. The contract said that

the completion date was sixty days from date of agreement. It spoke to a deposit of $850,000.00 to be paid on signing with the balance being paid in exchange for duplicate title. There was a vendor's attorney and a purchaser's attorney. The purchaser's attorney was Nunes Scholefield DeLeon, the same firm, that has played a significant role in this case. In other words, Ms Thompson had at least two sources of information to determine whether only $250,000.00 out of an $8,500,000.00 transaction was paid or allocated for payment of the purchase price. She could have asked either of the attorneys.

[231] There is no circumstantial evidence favouring Ms Thompson's assertion. Would the lawyer for the vendor receive only $250,000.00 out of an $8,500,000.00 transaction without writing for and agitating for the balance? In effect, the lawyer would not have received even the deposit.

[232] Mrs Dewar acted did not benefit from these transactions and neither did she show any intent to harm Grove. There is no Regal Hastings moment here. An argument could be made that her purchase of the Lillyfield property was significant for the very survival of Grove and had that property not been bought there was every likelihood that Grove would have lost access to very large portion of its market. In other words, her actions benefitted Grove.

[233] Mrs Dewar has been accused of violating her fiduciary duty to the company. But what is that duty? It is fair to say that the directors have a duty of loyalty to the company. They are required to act in good faith and avoid self interest and a conflict of duty. It must be kept in mind that '[a]t common law, the rule is that the directors' fiduciary duties are owed to the company and the company alone. This means, for instance, that the directors owe no duty to the individual shareholders.' (Burgess, Commonwealth Caribbean Company Law, (2013) (Routledge, page 233).

[234] Mrs Dewar's sin, if any, was her failure to advise the board about the details of the loans. But does that failure, if failure it is, translate, in this case, into a violation of her fiduciary duty to the company?

[235] The board has the responsibility to oversee the running of the company and 'to provide for the establishment and execution of of sound, consistent business policies which foster a spirit of enterprise' (Palmer, 'Directors' Powers and Duties', 1 Studies in Canadian Company Law (Zeigler ed 1973) 365 – 366, cited in Burgess, Commonwealth Caribbean Company Law, (2013) (Routledge), 204). It needs information to be able to discharge that function. But does failure to provide information, in and of itself, automatically and without more translate into a breach of fiduciary duty to the company? The answer is no. There must be a demonstration that failure to provide the information was a violation of the no-conflict rule, was disloyal to the company, or not an act made in good faith.

[236] The board needs to be properly constituted. The court has already decided using the case of **Deakin** the composition of the board prior to December 9, 2014. **Deakin** was based on a course of prolonged conduct which made it very clear that Nora did not participate in the operation of the company. The application of that case in the instant case was based on the proposition that over many years the inactivity of the initial directors and their acquiescence in Karl's and Chad's management of the affair indicated that they were not going to raise any challenge or indeed dispute any decision made. By contrast there is no such prolonged conduct in relation to the December 9, 2014 board. Mrs Dewar made her position known and at one point, according to her, urged that the matter of the composition of the board after the December 9, 2014 meeting be taken to court. The board after that date was inquorate and therefore not in a position to make any valid decision. It these circumstances, Mrs Dewar was not obliged to report to an inquorate board. Her failure to disclose all the details about the loan to the inquorate board does not amount to a breach of fiduciary duty.

[237] Even if the board was not inquorate, the failure to make full disclosure to the board is not a violation of fiduciary duty in this case.

Special audit

[238] A special audit was commissioned by the board into the affairs of the company. Mrs Dewar provided a detailed response. The court will refer to her as Ms Thompson because that was the name used at trial.

[239] On July 23, 2015 there was a letter of engagement with a firm of auditors, DMT & Associates, covering the period October 1, 2013 to June 30, 2015. The scope of work was to conduct an '*audit [of] the company's balance sheet for the period and the related statements of income, retained earnings, and especially cash flow, payrolls and other special areas for the period then ended, for the purpose of expressing an opinion on them. The financial statements are the responsibility of the company's management. Our responsibility is to express an opinion on the financial statements based on our audit*.'

[240] By letter dated September 25, 2015, the auditor writes to the chairman that audit would not be completed in time for the board meeting to be held on September 28, 2015 '*due to the lack of corporation (sic) by the managing director … on the following matters*:

1. *Documentary evidence on the land purchased with the NCB loan*
2. *Gross salary for July 2015 and August 2015 (she informed that the audit should be to June 2015)*
3. *Payment of our first invoice for invoice - $99,025.00*
4. *Payment for the 3rd interim invoice for $407,750*

[241] Not to be outdone Mrs Dewar had her own expert, a Mr Leary Mullings, whose terms of engagement were '*to review the special audit report …. for the period October 1, 2013 to June 30, 2015…*' and '*comment on whether there are gaps and/or inconsistencies' in the special audit and to indicate whether the audit was consistent with international standards. Also he was to review and comment on Mrs Dewar's refutation 'especially as it relates to the validity of matters raised by [her] in her refutation*.'

[242] Having received the report it appears that the board did not discuss it at all. Mr Elliot stated stated that the board had not discussed the audit in any detail and neither had it discussed the refutation. A truly remarkable outcome considering the history of this matter. He also said that the decision of the board was that because litigation had ensued then the special audit and refutation would be addressed by the court.

[243] Mrs Small Davis challenged Ms Thompson in several areas. Ms Thompson said she also looked at the refutation prepared by Mrs Dewar. The first major area was the assertion by Ms Thompson that she did not have complete information regarding accounting systems and procedures because Mrs Dewar was uncooperative. Ms Thompson conveyed the impression that she arrived on site and stepped into a very hostile environment where persons in the company were divided into factions. She also said that when she arrived on July 23, 2015, she did not see Mrs Dewar and each time she asked for her, Mrs Dewar was not there. She then decided to speak with Mr Germaine Hoilett whom she understood to be the next in line and was informed that he was unavailable. She then spoke with Ms Dannique Johnson who was cooperative.

[244] Ms Thompson said she did not see Mrs Dewar for the first three days that she was there and further, that each time she enquired of Mrs Dewar's availability she was told that Mrs Dewar was not on the property.

[245] The cross-examination revealed a more nuanced position. Ms Thompson accepted that on one of the days Mrs Dewar came to her and asked her if she had received all the information requested. Ms Thompson agreed that she told Mrs Dewar that she had requested the trial balance, petty cash voucher, cheque requisition but they were not delivered. She agreed that after she said this Mrs Dewar called Ms Dannique Johnson to enquire what was happening. Ms Johnson told Mrs Dewar that she was aware of the request and had asked the payroll officer to assist. All these latter activities took place in the presence of Ms Thompson.

[246] Ms Thompson also agreed that Mrs Dewar explained to her the document flow process '*to bring clarity to the situation*.' Ms Thompson also accepted that Mrs Dewar had '*explained that the files would be bulky hence [they kept] separate supplier files for supplier invoices*.' She also agreed that Mrs Dewar told her that she could not complain of control weaknesses '*if she had not asked of management what the controls are*.' Ms Thompson agreed that Mrs Dewar showed her '*how to quickly find the supporting invoices*.' Ms Thompson said that in some instances Mrs Dewar could not find supporting invoices.

[247] It was Ms Thompson herself who volunteered in cross-examination that Mrs Dewar wanted to speak with her alone, but she refused on the basis that she would only speak with the board as a whole. If this is correct, then it means that Ms Thompson declined an opportunity to speak with Mrs Dewar albeit alone. This would mean that it is not true to say that Mrs Dewar as unavailable and uncooperative. But even assuming that Mrs Dewar did not wish to speak Ms Thompson in person or voice to voice or vice versa, there was the option of written communication which was not utilised.

[248] The effect of this cross examination was to undermine the assertion that Mrs Dewar was uncooperative and refused to meet with the auditors. What Ms Thompson admitted under cross examination came from Mrs Dewar's refutation of the special audit. This then is not just a competency issue but one of credibility. It is therefore inaccurate for Ms Thompson to have said that Mrs Dewar was uncooperative and refused to meet with the auditors. The cross examination has showed that that was not the case.

[249] These revelations in cross examination illuminated the court's understanding of Ms Thompson's approach to the audit. Thus when she said she did not have access to Mrs Dewar to ask questions, that was not quite accurate. The court accepts Mrs Dewar's position that she (Mrs Dewar) was on the building when Ms Thompson turned up and was available both physically and in mind. The truth is that Ms Thompson made no genuine effort to find Mrs Dewar and assuming that she did

not find her, Ms Thompson made no effort to communicate with her by other means to secure the information that she needed and hence her understanding of the accounting systems, controls and processes at the company was always going to be deficient.

[250] Ms Thompson agreed that she knew that Mrs Dewar worked at the company since 2001 and when asked if she thought it relevant to speak with Mrs Dewar who was a member of the management team who would know the systems and controls, she repeated that Mrs Dewar was not there. Mrs Dewar asserts that she was present. Ms Thompson herself, it appears, did not go and look to see if Mrs Dewar was present on the days she (Thompson) asked after her and was told that she (Dewar) was not present on the property at the material time. On this aspect of the case, the court accepts Mrs Dewar's evidence since the probabilities favour her presence than her non-presence. The letter of engagement bears a date after the interim board was put in place by court order which contained the provision that Mrs Dewar was to continue as managing director. The audit did not commence during the period Mrs Dewars was actually on suspension. Hence she would not have any reason to be persistently and consistently absent from her work space as the initial evidence of Ms Thompson sought to suggest.

[251] Ms Thompson's explanation that Mr Hoilett was suspended and therefore she did not speak to him is not a credible explanation for not speaking to him. The truth is that she made no effort to do so by other means which were available such email or other written memoranda.

[252] Mrs Small Davis enquired of Ms Thompson whether she thought it would be relevant or important to speak with Mrs Dewar who was a member of the management team and therefore would know about the accounting systems and controls. Ms Thompson sought to say that Mrs Dewar had sent an email to her indicating that she (Mrs Dewar) was unavailable. This response by Ms Thompson was misleading. Whilst it is true that Mrs Dewar did write an email indicating her unavailability it was not a response to any request by Ms Thompson to speak with

Mrs Dewar regarding knowledge of the accounting systems and control. The email was written about another issue.

[253] Ms Thompson was pressed on this aspect of the matter. She responded by saying that she arrived to find a very hostile environment. She sought to convey the impression that on her arrival on the ground at Irie FM she found a difficult and hostile environment where persons were only willing to speak after in surreptitious circumstances.

[254] Ms Thompson stated that no member of the board took her to meet with Mrs Dewar. She asserted that it was the board that told her that Mrs Dewar was not present. According to her she was there from 0900hrs to as late at 1900hrs at times. She eventually admitted that the board did not introduce her to any member of the management team. After pressing again and again, Ms Thompson finally conceded that whether one is doing an audit -, special, financial or any kind – it is customary to meet the management team in order to collect information that would enable understanding and documentation of the company's systems and controls.

[255] Where we are now is that Ms Thompson did not meet the management, was not taken by the board and introduced to Mrs Dewar, but was given what now appears to be inaccurate information that Mrs Dewar was absent from work during the early days of the audit. In addition, we now know that Mrs Dewar had actually gone down to where the auditors were and met Ms Thompson. We also now know that Ms Thompson declined Mrs Dewar's request to speak with her alone. We also know that Ms Thompson did not send any written questions to Mrs Dewar about the systems and controls of the company.

[256] It is also the case that she did not meet Mr Hoilett or send any questions to him regarding accounting systems and controls. She was advised that he was suspended.

[257] The ultimate objective of this line of questioning which the court concludes was successfully established was that Ms Thompson's audit was undermined from the

outset because: the board did not introduce her to the management team; she did not meet with Mrs Dewar who was with the company for over a decade up to the date the audit commenced; she did not obtain a thorough understanding of the company's accounting systems and controls; she did not have written or detailed voice to voice communication with Mrs Dewar or any member of the management team.

[258] Mrs Small Davis established that Ms Thompson did not document in her report the company's accounting systems and controls and then document what she her examination revealed. Therefore there was nothing in the report that placed what she found against what the management said existed and ultimately measure her findings against objective accounting systems and control standards.

[259] At the end of this part of the cross-examination, Ms Thompson said that she had not spoken with Mrs Dewar, had not spoken with Mr Hoilett, had not spoken to a Ms Martin, who was the secretary of Grove at the time of the audit, about the company's systems and controls, had spoken only with a Ms Dannique Johnson. Even though Ms Martin was the company secretary at the time of the audit there is evidence to suggest that (a) she was either a chartered accountant or had significant accounting certification and experience; and (b) she worked in accounts between 1999 to 2004. Ms Thompson even mentioned in evidence that she thought that Ms Martin was a chartered accountant. Thus if you cannot get to the accountant, the accountant's second in command and there is a company secretary who you thought was a chartered accountant one would have thought that consulting such a person was a logical step given the circumstances outlined by Ms Thompson. In addition, she had not brought her difficulties to the attention of the chairman of the company.

[260] It is safe to say that regardless of the proficiency of Ms Thompson it is quite plain that her audit got off to an unfavourable start and did not recover.

[261] Another aspect of Ms Thompson's audit that was called into question was whether she contacted the bank to determine whether the bank itself had a written mandate

indicating the number of signatories required to draw cheques on the bank. Ms Thompson sought to say that she knew or determined that only one signature was needed because she had seen cheques, bank statements, and lodgements. What she saw indicated inadequate accounting control since, in her view, a sole signatory was undesirable. This is a questionable approach if for no other reason than that it was based on an untested assumption, namely, the honouring of the cheques which bore a single signature meant that only one signature was required by the mandate at the bank. Ms Thompson assumed that her conclusion was correct and did not seek to confirm her position by asking the bank for the written mandate for the account in question.

[262] Ms Thompson sought to extricate herself from the position just stated. She said that she could not have asked the bank for information on the mandate because the letter of engagement to her indicated that there was only one signatory to the account. That is a strange response. There is no reason why the board could not have asked the bank to release that information because the account in question was that of the company and not Mrs Dewar's. In any event, what this points to is the lack of thoroughness on the part of Ms Thompson in that she did not cross check with the bank to see whether the mandate authorised only one signatory.

[263] It is not unknown for banks to be negligent in managing cheques drawn on a chequing account. Ms Thompson's approach was to assume that the bank was in fact acting in accordance with the existing mandate rather than confirm the terms of the existing mandate.

[264] These are her answers under cross examination:

> *Q. Did you understand what I mean when I say the bank mandates?*
>
> *A. What does the bank require.*
>
> *Q. No, I'm asking you because I'm not sure by your answer if we are speaking on the same page?*
>
> *A. Explain what you want please.*

Q. What do you call bank mandates?

A. What the bank requires to issue, to give the money from one person to another or a company, when you write a cheque, you instruct the bank to do something and those cheques had one signature.

Q. Right and is it correct and in accordance with your understanding that when you are operating an account, the bank requires a signing mandate that signs to say, "Honour cheques which have this or these signatures". That's what you call the banking mandate?

A. Yes, it is.

Q. Did you see any of those?

A. The cheques are a mandate.

Q. No, no, I'm not talking about cheques, that's not a mandate.

A. I saw nothing else, bank statements and cheques and lodgements.

Q. So, did you ask the bank back for the mandate that the bank keeps on its records...

A. I cannot ask the bank; somebody who signs on the account has to ask the bank any information.

Q. I understand that but as the auditor, you were authorized to say to the board 'please request the banking mandate'?

THE WITNESS: Your Honour, the engagement letter has in it that there is only one signature to the account. I asked for the account, I looked at the transactions going through, and all had one signature. I verified what I was looking for. If anything is needed from the bank, the same only signature would have to ask for it, nobody else can.

[265] There it is, in the words of Ms Thompson. No attempt at verification from the bank.

Internal controls

[266] Mrs Small Davis began her questioning by asking whether Ms Thompson's view of lack of internal control was the result of testing the system overall to see how it worked and whether what took place was consistent with the company's practice and procedure or whether what took place was a deviation from the company's practice and procedure. Ms Thompson responded by saying that that is why she was given the three suspension letters. This led counsel to say to her that it was not an audit of the general accounts but an audit of the three suspended persons. Ms Thompson responded by saying '*special audit. Not these 3 persons but they had a listing of things that the Board was not comfortable with and these are the 3 letters they presented to me*.' This is what prompted the response of counsel that it was not clear (before that point in the evidence) that Ms Thompson was not actually engaged in an investigation of the company's accounting systems and controls but was involved in investigating the three suspended persons.

[267] As the cross examination progressed it became apparent to the court that this was not a special audit in the sense of an examination of the accounting systems and controls of the company but rather it was an examination into the activities of three specific persons namely, Mrs Dewar, Mr Cheddesingh and Mr Hoilett**.** The prelude to the evidence supporting this just stated conclusion was this exchange:

> *Q. Sorry, I am going to ask you a general question first before I go to the standards. Would you agree with me that when you are - your assessment of the controls and practices in a company which you are auditing is very -much you- would use a slightly different assessment depending on the size of the organization?*
>
> *A. Yes, I would.*
>
> *Q. And, if it were a smaller organization it would not be surprising to find that there are single employee doing multiple task?*

A. The owner for the company would be directly involved in the company and that would reduce the any irregularities. So the controls of one person doing many things because the owner of the company is directly involved, it would not...

Q. So, it is only where there is an owner directly involved that you would find a small operation one person doing multiple things?

A. The direct involvement of the owner of the company can reduce the amount of internal controls.

Q. Oh, it can reduce but I am asking you if that is the only circumstances in which you would expect to find one person doing multiple jobs in a small company?

A. Yes because why do we need controls?

Q. We need controls regardless of the size. Why is the fact of one person performing more than one function a lack of control?

A. Controls are to prevent irregularities, fraud and those things. We just don't put controls in place for control sake.

[268] This was the background leading to the challenge of the finding that '*one employee had too many functions. During the audit one persons being 1. An employee of the accounts department, 2. A contractor, 3, a procurement officer, 4, a security provider, 5 supplier of moulding … 6. Supplier of bus for rentals*.'

[269] This employee was Mr Cheddesingh. This was cited as an example of one person having too many functions and, therefore, a lack of control. The point being made by Mrs Small Davis was that in a small company it would not be surprising if there were many functions being carried out by one person. Thus one cannot simply say multiple functions being carried out by one persons somehow translates into a

massive (deliberate?) breach of good practice without more. Context is important. Another context which is important is that the company had a long period of informality and little regard for the niceties of corporate governance. The cross examination sought to take issue with view that any shortcomings unearthed was to be laid solely at the feet of the three suspended employees without any regard to the many years of informality. In addition, the audit ran from October 2013 which included a time when Chad was managing director and until his passing in February 2014, in a small family owned company, as a practical matter, it may well have been foolhardy for Mrs Dewar to attempt any radical changes to introduce more structure to the company's way of operating.

[270] The court has said that it seemed that this was a targeted audit and not a special audit of a general nature. This was confirmed by the following evidence.

> *Q. I am sorry, 3540, I'm going through your checklist one by one.*
>
> *A. Okay. Do you want me to explain them going down?*
>
> *Q. No, I'm going to ask you some questions. So, the second bullet point there, you have said employees were purchasing goods on behalf of the company and authorized the payment and received reimbursements for the purchase and you take us to Exhibit 8.12 to 814, that is actually at page number 3602, to 360...*
>
> *A. No, for Mr. Cheddesingh it is coming from 3597 3594.*
>
> *Q. You mean the reimbursements right?*
>
> *A. Reimbursements purchase on behalf of the company.*
>
> *Q. 3594 you say?*
>
> *A. 3594.*
>
> *Q. All right and these are relating to which members of staff?*
>
> *A. Mr. Marshanee Cheddesingh.*
>
> *Q. Anybody else?*

A. I was given three suspension letters so I looked at Mr. Cheddesingh and I saw reimbursements for Mrs. Dewar.

Q. Right, well, in doing your in testing the system because you said there is lack of internal controls, it would not be in that limited way if you're testing the system to see if it is something throughout, is it consistent with the company's practice and procedures or is it a deviation as you call it here?

A. That's why they gave me the 3 suspension letters. What I would see relating to these 3 letters.

Q. I see what you mean. So, it was not really an audit of the general accounts, it was an audit of these three persons?

A. Special audit. Not these 3 persons but they had a listing of things that the Board was not comfortable with and these are the 3 letters they presented to me.

Q. I see. I must say [it was] never clear to me that you were not doing an investigation of the company's finances in general for that period but it was in relation to these 3 persons. So, let me ask you to look then at page 36 3782, let's start at 3781. 3781, 3782, all the way down to 3795 are all examples of members of staff purchasing things and seeking the reimbursement from the company for them.

[271] The point that was being made by this cross-examination was that it was not the case that Ms Thompson's special audit was a genuine audit of the accounting systems, controls and processes. It was a targeted hunt for irregularity with its focus on the three persons who were given suspension letters.

[272] The mill of Mrs Small Davis' cross examination ground very fine indeed. Learned counsel pressed Ms Thompson on her second finding internal controal that '*employees purchased good on behalf of the company, they received the goods for the company, authorised the payment and also received reimbursement for the purchase.*' The employee in question here was Mr Cheddesingh.

[273] The court will use a portion of the cross examination to illustrate that Ms Thompson did not have full and complete information not because it was unavailable but because she did not put herself in a position to get it.

[274] The court now goes back to the second finding under internal controls 'employees purchased good on behalf of the company, they received the goods for the company, authorised the payment and also received reimbursement for the purchase.' For contrast Ms Thompson gave as an example of what should have happened in respect of a reimbursement for a Ms Corine Stewart. It was said that she was independent of the transaction. Ms Thompson said that Mr Cheddesingh's conduct in the transaction that involved the supply of moulding to IRIE FM showed a lack of internal control. Ms Thompson was asserting that Mr Cheddesingh, in relation to the moulding, signed the receipt (possibly a delivery receipt) showing that the service or goods was provided to the company. She said that from there he was the one who was seeking to generate payment to himself in relation to this transaction. She suggested that his signature was on the document generating the payment to him. She said that there was a document showing that service or goods that the service or goods were provided by a Mr Devon White and not Mr Cheddesingh. Ms Thompson went further to say that money went to Mr Cheddesingh and not to Mr Devon White. This was put forward as one of the consequences of a lack of proper internal controls. The underlying suggestion being that Mr Cheddesingh had control over large sections of the process so that he was able to make payment to himself and he was able to do this because he signed the receipt indicating that the service or goods were received and then also was generating payment to himself. The money, according to Ms Thompson, ended up in Mr Cheddesingh's account.

[275] It turned out on further cross examination and an examination of the records that Mr Devon White signed a document saying that he received the sum indicated on the receipt referred to earlier signed by Mr Cheddesingh. The document signed by Mr Devon White also said that the money he received was for moulding strips delivered to IRIE FM. The authenticity of this document is not in dispute. There is

another document apparently signed by Mr Cheddesingh which states that the funds were to be transferred to Mr Cheddesingh as instructed by Mr White. The end result of this is that the money ended up with Mr White and that the money was paid over by IRIE FM to Mr Cheddesingh.

[276] Ms Thompson explained that the document signed by Mr White came in after the audit and was not available to her. When this explanation was given, Ms Thompson was asked whether she spoke to Mr Cheddesingh, the response was that Mr Cheddesingh was suspended. However, the final question undermined the efficacy of Ms Thompson's explanation. She said that she did see in the suspension letter that the suspended persons were to make themselves available to answer questions in relation to the audit. Why did she not rely on that provision in the suspension letter to speak with Mr Cheddesingh?

[277] At bullet point number 9 under the heading internal controls there appears what was described as a list of some questionable transactions with little or no controls seen. Bullet point number 9 said, 'payment of rental income with no supporting contract eg rental of Coconut Grove Broadcasting Premises.'

[278] Ms Thompson said was aware of a provision made in the books for rental payable to the owner of the premises who was Karl. She stated that she did not check to see how far back that provision went because it was not relevant. The context is this. Ms Thompson explained that once provision is made for a payment it does not matter whether the payment is actually made because in accounting terms it is treated as it was actually paid because the money for which provision was made is available to whomever may activate the provision. Her other point is that such a provision once it was in excess of JA$3m then the consumption tax must be paid. That was the general principle and since the provision was made for Karl to be paid and it was in excess of JA$3m then he ought to have been paying GCT and it is completely irrelevant whether there was actual payment to Karl.

[279] Ms Thompson was pressed on this and asked whether she actually examined the actual consumption tax returns for the company. She said yes and then she was

asked whether she saw whether any actual payment was made to Karl under this provision.

[280] This cross examination arose because Ms Thompson was suggesting that there was an expense to the company without actual documents supporting the expense. As it turned out the evidence produced by Ms Thompson was inconclusive because she could not say how long this provision was made, whether there was the actual movement of money from the company to Karl.

[281] Ms Thompson explained that she was given surreptitiously a copy of Peachtree software and password. This was the accounting software being used by the company. She says she got a schedule of payment of rent. This explanation became necessary because the financial statements did not isolate rental of Coconut Grove Broadcasting Premises as indicated in her bullet point number 9. The explanation was that the schedule of payment gave the breakdown of the rental payments. Needless to say, Ms Thompson was unable to produce the schedule; she could not recall if she had printed it. When pressed further she said that not everything that was looked at was printed. To escape from an unfavourable conclusion Ms Thompson referred to the refutation of Mrs Dewar. In that refutation Mrs Dewar stated that no payment was actually made but provision of JA$500,000 was made. Of course, Ms Thompson would not know this because, as she explained, it is completely irrelevant whether money was paid out or not. The court is not an accountant but it does seem odd that whether or not payment was actually made was completely irrelevant to the question of whether the resources of the company was being properly used.

[282] Ms Thompson concluded by saying that if no money was paid out then it raised questions about the competency of the audit because it would be failure to conform to the accruals and matching concept. In the end she accepted that it was book entry without any money being placed into any account anywhere but nonetheless it was a sum available to Karl and he could call for it at any time. It was an expense charged to the company even if no actual cash was set aside or paid over to Karl.

She is also saying that given the frequency of the provision for this money Karl was actually in the business of commercial renting of property and he would have been doing two things: (a) pay the consumption tax on the amount and (b) issue a receipt to the company. This is so even if no money actually changed hands from the company's to Karl's.

Purchase approval

[283] In her report Ms Thompson has a heading called 'Purchases Approval.' One of her conclusions was that a letter dated July 29, 2015 was sent to Petcom Ocho Rios advising of the persons authorized '*to approve gas vouchers and receive fuel and other supplies from the gas station*.' She alleges that a copy of that letter which bore the signatures of Ervin, Overtan, Mr Leroy Elliot, and Ms Heather Martin was altered by removing Ervin's signature to replacing it with Mrs Dewar's. This now altered letter advised that only Mrs Dewar was to authorise and approve transactions at the gas station. From this Ms Thompson concluded that this '*is clearly a fraudulent transaction of which Mrs Dewar was aware*.'

[284] Ms Thompson said that on an examination of the altered letter the signatures that were on the original letter were there, then followed by a line as if someone had placed something over the original and did a copy, below that line there is a signature purporting to be Mrs Dewar's. From this she concluded that Mrs Dewar was aware of the altered letter. All this without any handwriting analysis.

[285] The next matter that came up for scrutiny was Ms Thompson's conclusion that a letter allegedly sent to Petcom indicating who could authorise and approve transactions was not only fraudulent but that Mrs Dewar was responsible for the fraud. The matter arose in this way. Ms Thompson said that a letter signed by Ervin was brought to her attention. The letter indicated to Petcom persons authorised to do business with it by way of vouchers for gasoline. The allegation was that the Ervin's signature was removed and replaced with Mrs Dewar's.

[286] Ms Thompson claimed that she had seen the original and made a copy of it. That is the original letter that bore the Ervin's signature. She was not able to say the source of the original. She did not contact Petcom to see if they receive the letter either the original or the allegedly fraudulent one. The explanation was that when she asked whether she could speak with someone by Petcom she was told that they did not want the internal issues to be on display. The result was that Ms Thompson did not verify whether the allegedly fraudulent letter was in fact sent to Petcom. She did not speak with Mrs Dewar.

[287] In the end the accusation of a fraudulent letter rested on (a) Ms Thompson's own observations; (b) no enquiry whether Petcom got the allegedly fraudulent letter; (c) no actual verification that the signature was in fact Mrs Dewar's and that she placed it on the document or had it placed there on her instructions.

[288] It has turned out that Ms Thompson did not find out whether the altered letter was sent to Petcom. She could not say the source of what she claimed was the original letter. There is no evidence that any forensic examination of the altered letter to determine whether the signature was indeed that of Mrs Dewar and how it got there assuming it was hers. Ms Thompson made the claim that just by looking at the document she could see that it was fraudulent and since Mrs Dewar's signature was there then it must mean that Mrs Dewar aware of it. This court concludes that this information is not sufficient to draw such a damning conclusion.

[289] To digress a bit to address this question of getting information. Ms Thompson kept saying in her evidence that persons were providing information to her on condition of anonymity. Thus she was unable to say when, where, from whom and under what circumstances she received important information. There is no evidence that she made notes in working papers or even to herself concerning receipt of information.

[290] The next matter challenged was Ms Thompson's conclusion that the documents showing that 23 loads of dump material at JA$21,500/load were purchased with Grove's money was not true. She claimed that an examination of the area

'revealed that it is simply not physically possible for the parking area in question to accommodate 23 loads of material.' Ms Thompson was relying on her observations to form her conclusion. She did not see the trucks or have any idea of the truck's size or have any idea of the size of the loads. She did not consult any technical person. At best what we have is Ms Thompson's unguided opinion. It is not immediately clear how she could form any opinion given the information deficit just highlighted.

Questionable transactions

[291] Under the heading called 'Questionable Transactions' Ms Thompson listed a number of transactions 'that arouse[d] our suspicion.' Among those was a loan of JA$364,000.00 on September 18, 2013. The special audit noted that the loan should have been repaid in two instalments by March 2014 but was renegotiated to be repaid at the rate of JA$8,000.00. Ms Thompon's position was that the company's resources were not being handled prudently. The loan should have been repaid as per the original agreement in two instalments. In her view this loan was not consistent with safeguarding the company's assets. Cross examination revealed that this report was incomplete. It failed to disclose that the loan was being serviced as at the time of the report.

[292] Ms Thompson was also referred to two other loans referenced in the report. It turned out that only one of these two loans was granted. It was a loan of JA$2m. There was also another loan to a person who was not an employee of the company.

[293] Dealing with the JA$2m loan Ms Thompson said that '*this document showed a clear intent to distribute the company's assets without due care*' never mind that it was a secured loan.

[294] The loan to the non-employee, it was admitted under cross examination was repaid in full. Ms Thompson regarded this outcome as '*[j]ust being lucky again.*' Ms Thompson's response, when asked if she was aware of the long standing

relationship between the borrower and the company, was that she saw it in Mrs Dewar's refutation. The clear implication being that there was nothing else in support of the long standing relationship. It was pointed out to Ms Thompson that this person had a long standing relationship with the company and had in borrowed money before. That earlier loan was approved by Karl. In other words, Ms Thompson's report did not give full context.

[295] In other words, Ervin and other earlier directors had left Karl to run the company as he saw fit. Clearly, that included making loans to at least this person who while not an employee was an air conditioning contractor whose relationship with the company was such that Karl granted him a loan from as far back as 2010. Thus the full context is that this particular person had borrowed money in the past when Karl was alive and in that context he was granted an unsecured loan of JA$250,000.00. Her concern was that this loan was unsecured. She said it was a risky loan there being no security. The fact is that the loan was repaid.

[296] This means that all four loans were being serviced and the company was recovering the loans over time. Ms Thompson sought to maintain the proposition that the company had cash flow problems and making loans to staff members of JA$4m was '*in keeping with safeguarding the assets of the company*' and that is '*a duty of management*.' When asked by the court why she used that phraseology Ms Thompson said the '*assets of the company was distributed or loaned to someone else and they (sic) could have used it*.'

[297] When asked whether she found any portfolio of bad debt in respect of loans made by the company Ms Thompson was not able to produce any evidence of bad loans.

[298] The court does not accept the conclusion advanced that the special audit showed that there was a *clear intent* to distribute the company's assets without due care. If that were the objective why secure one of the loans, renegotiate the terms of another which was being serviced, and secure repayment of a third?

[299] Finally, Ms Thompson was challenged on her conclusion that the manner of recording the payment of security for Mrs Dewar was done 'in order to prevent easy detection.' It turned out that Grove recorded the security payments for Mrs Dewar by referring to a journal entry and if one had gone to the journal entry one would have seen additional information leading one to the ultimate explanation for the payments, the cheques used and other information.

[300] This issue was pursued with much vigour by Mrs Small Davis because Ms Thompson had expressed the view that manner of recording the payments for the security was not only done to prevent easy detection but '*in our view … this represents a misappropriation of the company's funds*.' This was followed by the recommendation that '*nothing less than a full reimbursement of same.*' The suggestion of dishonesty was clear.

[301] Having followed the cross examination and Ms Thompson's response it is not clear to the court that the manner of recording the transaction amounted to misappropriation of funds or was designed as a device to funnel money out of the company for some inappropriate use by Mrs Dewar. In effect, had Ms Thompson followed the trail and asked the right questions of the right persons what appeared to be indicator of fraud would have been clarified. She did not ask Mrs Dewar about them. Ms Thompson's reason was that she had already received an explanation from Mr Hoilette. The court is not sure how this occurred given that there was scant evidence of any communication between her and Mr Hoilette. What is undeniable is that the related documents were present and available if only Ms Thompson had asked Mrs Dewar about them.

[302] In respect of the redundancy of Ms Corrine Stewart, Ms Thompson seemed to have been on firmer ground. From all the evidence it does not appear that Ms Stewart was made redundant in law but that she and Grove parted ways voluntarily. But no firm conclusion can be reached on this.

[303] Ms Thompson advanced the view that Mrs Dewar engaged in a redundancy exercise. Mrs Dewar's manner in this exercise was described as callous. Ms

Thompson said that she spoke to a number of persons who expressed that view. Regrettably, she did not say what those persons actually said so that the court would determine whether the conclusion she drew was supported by evidence.

[304] Overall the court was not very impressed with Ms Thompson's approach to the audit. It appeared that she did not intend to be objective, fair, and balanced. She did not have regard to full historical context of a company that was operated in the image of Karl and later Chad. The usual conventions of corporate governance were not part of the culture of this company and unsurprisingly, it being a small private company and the directors took a hands off approach, practices had developed which were not appropriate. Mrs Dewar was part of that culture and she worked under Karl and Chad. She took over as managing director when Chad died. There is evidence that Mrs Dewar attempted to introduce more formality into the operations of the company.

[305] In addition, Ms Thompson also knew with absolute certainty that the accounts were audited and were approved by the auditors. The evidence did not disclose that the management of the company influenced the auditor or that they colluded with the management to present a false and misleading picture of the financial affairs of the company. There is no evidence that Mrs Dewar, Mr Hoilette or Mr Cheddesingh had altered the accounting systems and processes of the company between Chad's death in February 2014 and the commissioning of the special audit in June 2015.

[306] Ms Thompson insisted that the records must speak for themselves. That became her stock answer when pressed on the extent of her examination of some issues and whether she sought clarification. While the court accepts that records are to be accurately kept but to act as if the records must be so complete and accurate that there is no need have a word with the management of the company was utterly misleading. To make matters worse, Ms Thompson appeared to have relied heavily on members of a board (ignoring for the moment the legality of their appointment) which by the admission of some (Ervin, Mr Elliot and those

purportedly appointed at the December 9, 2014 meeting) were not involved in the running of the company for many years or at all until the December 9, 2014 meeting.

[307] The management of the records and the accounting systems and procedures did not begin when Mrs Dewar became managing director. The issues that arose were part of a larger context in which the company operated. This explains why Mrs Small Davis from time to time asked Ms Thompson if she spoke with Mrs Dewar. Ms Thompson did not seek any clarification from Mrs Dewar who incidentally when asked in the one or two emails about transactions provided the answer. Ms Thompson's response that she could not speak to Mrs Dewar because she was not on the property is simply not accurate. The court is satisfied that Mrs Dewar was available had Ms Thompson really wanted to speak with her in person, by phone or email or any other form of communication.

[308] It is clear that Ms Thompson did not keep full and accurate notes in her working papers. The claim that information was given to her in secret and she did not want to jeopardize person's jobs is not accepted as a proper explanation for not recording in some way (a) the persons who provided the information to her which she said she received secretly; (b) the reporting of the secrecy and other difficulties to the board. The irony of ironies that Ms Thompson who sought to castigate Mrs Dewar for not ensuring that proper records were kept was herself guilty of the same 'crime.'

[309] If the environment was as toxic as Ms Thompson was making out then that would be an excellent reason to communicate with Mrs Dewar in writing. The one email sent by Ms Thompson to Mrs Dewar produced responses which shows that it was quite possible that Mrs Dewar was not averse to making responses in writing.

[310] In addressing the payment for security for Mrs Dewar, Ms Thompson said that she spoke with Mr Hoilett one day when he came to the gate and she also spoke with Ms Dannique Johnson. Both, according to Ms Thompson, said that she (Ms Thompson) must keep in mind that they (Johnson and Hoilette) were being

supervised and in the case of Mr Hoilett he said that the transaction took place before he got there. Ms Thompson's response was that 'as a chartered accountant you ought to know better.' Assuming what has just been said is true, then all the more reason to speak with Mrs Dewar or send her an email.

[311] Continuing this query regarding the security for Mrs Dewar, Ms Thompson indicated that she did not ask Mrs Dewar about the cheques paid in relation to this item because Mr Hoilett was the one who did the reconciliation because Mr Hoilett had explained what it was and he was the one who did the reconciliation. This is an unreasonable position given that Ms Thompson also said that Mr Hoilett, in effect, qualified his response, when he said (a) the transaction took place before he got there and (b) he was being supervised. At the very least that full context should have alerted Ms Thompson to the real possibility that Mr Hoilett may either have been following instructions or did not have complete knowledge and so she ought to have gone further and spoken to Mrs Dewar who, to repeat, had not shown herself reluctant to answer the email that Ms Thompson sent to her. There was no legitimate basis to form the view that the security arrangements for Mrs Dewar '*represents misappropriation of the company's funds.*' This was a very strong statement implying some degree of moral turpitude when Ms Thompson did not have full and complete information about the transaction and never sought clarity from Mrs Dewar.

Sick leave

[312] Ms Thompson concluded that Mrs Dewar took forty nine days sick leave 'which commenced on February 11, 2014 for which she was paid in full' but 'only 10 days are allowable by law.' This led Ms Thompson to conclude that the extra 39 days was valued at $802,025.25. This is recoverable. Mrs Dewar in her refutation responded by saying that the sick days were granted but this was in the days leading up to Chad's death. She says in the refutation that she was, in essence, not on sick leave, because she now had to undertake a number of activities in relation to the company and also assisting with the funeral arrangements. She says

(and not contrary evidence has been presented) that Chad was buried on March 8, 2014.

[313] There is no evidence that Ms Thompson sought to confirm whether Mrs Dewar was away from work (as distinct from not on the property) and working. The balance or probabilities favour Mrs Dewar's explanation given the context. She was the joint managing director. The other joint managing director had died. The company still had to operate and no other managing director was appointed. In all likelihood she did continue working as she has asserted. The conclusion of Ms Thompson rests on weak, slender facts and is therefore not accepted.

Salary increase

[314] Ms Thompson spoke of Mrs Dewar, to put it bluntly, gave herself a salary increase without evidence of the board's approval. Again, Ms Thompson lost sight of the reality in the company. The absence of records, while not ideal or even desireable, does not mean that no approval was given. This company was run in a very informal way. The court is not approving informality but the facts cannot be ignored and pretend that departure from the ideal means that there is necessarily some skulduggery going on. This underscores the need for an auditor to get a feel and understanding of the working realities as it exists in the particular audit space and not come with an academic/textbook approach. There are bound to be incorrect conclusions and inferences as has been demonstrated in this case.

[315] This audit came sixteen months after Chad's death. He died on February 27, 2014 and this audit came about by July 2015. The court has not seen any evidence of dishonesty or impropriety in the sense of deliberate mismanagement of the company's affairs. What was happening for near unto two decades could not be undone in sixteen months.

[316] Clearly the way in which the company was managed over the many years by Karl and Chad needed to change once they were out of the picture but to attempt to tar Mrs Dewar with the brush of incompetence, questionable and possible unethical if

not dishonest practices was not justified. The problem arose because Mrs Dewar refused to recognise as directors persons who were appointed or resurrected at the December 9, 2014 meeting.

[317] The audit suffered from confirmation bias. That is Ms Thompson was presented with a jaundiced view of Mrs Dewar, Mr Hoilette, and Mr Cheddesingh commencing with the letters of suspension and the audit did not seek to find out if what was being said about her was true but proceeded on the basis that what was said about her in the suspension letter was true and the search was to find evidence to support the conclusion. It was the late Justice Jackson of the United State Supreme Court and Nuremberg prosecutor who said that there is no man whose affairs are so in order that a determined investigator could not find something wrong with which to charge him with an offence.

[318] The record keeping and the accounting processes needed overhauling but that does not mean that Mrs Dewar was being deceptive. She did provide information to the directors who she thought were properly appointed. Even if she was wrong in her approach that did not mean that she was deliberately mismanaging the company.

[319] The court concludes that Ms Thompson's report was not robust enough to form the basis of any adverse finding against Mrs Dewar. The meticulous detail required before damning adverse conclusions are made was absent. The court has detailed a few of them in these reasons for judgment to demonstrate the point.

[320] Ms Thompson's report was the primary basis upon which Ervin's, Mr Warren's and Grove's counterclaim is based. The court has found that cross examination of Ms Thompson has revealed enough to make the report an unstable foundation upon which to build a case for breach of fiduciary duties against Mrs Dewar.

[321] Ervin, Mr Warren and Grove counter claimed to say that Mrs Dewar was responsible for the loss of JA$61,215,822.00 in the year 2014. The report does not

contain the depth, breadth and quality of analysis to cause the court to take seriously this aspect of the counter claim or indeed any aspect of the counterclaim.

[322] The counterclaim for breach of fiduciary duty fails. The court cannot help but observe that it has become fashionable to turn every dispute in a company into a breach of fiduciary duty. The evidence does not establish that Mrs Dewar breached any fiduciary duty to Grove.

Conclusion

[323] The court concludes that as at December 9, 2014 the properly appointed board members are Mrs Debbian Dewar, Mr Ervin Moo Young, Mr Beres Warren, Mr Mashanee Cheddesingh.

[324] Mr Overtan Moo Young, Troy Moo Young, Mrs Joni Young Torres, and Ms Kimberly Murphy were not properly appointed.

[325] Mr Leroy Elliot and Mr Chang had ceased being directors.

[326] The register of directors is to be amended in accordance with these reasons for judgment.

[327] The records at the Companies Office filed on or after December 31, 2014 are to be struck out and the records are to be corrected in accordance with these reason for judgment.

[328] Mrs Dewar has already been registered on transmission as the holder of 100,000 ‘A’ shares and 350,000 ‘B’ shares owned by Estate Chad Young.

[329] The court does not find that Mrs Dewar was dishonest or engaged in fraudulent misrepresentation of her status as a director or joint managing director of the company.

[330] The court does not find that Mrs Dewar breached any fiduciary duty to the company.

[331] The court does not find that Ervin and Mr Warren violated any fiduciary duties to the company. The evidence does not support any such conclusion.

[332] Counsel are asked to prepare the judgment in accordance with these reasons for judgment.