[2018] JMSC Civ. 186

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV03170

BETWEEN	**JOHN FITZGERALD PEART**	**CLAIMANT**
AND	**SANDRA PALMER-PEART**	**1ST DEFENDANT**
AND	**SSP APTEC LIMITED**	**2ND DEFENDANT**
AND	**JSJ HOLDINGS LIMITED**	**3RD DEFENDANT**

IN OPEN COURT

Mr. Kevin Williams and Mr. David Ellis instructed by Grant, Stewart, Phillips & Co. for the Claimant.

Mr. Aon Stewart instructed by Knight, Junor and Samuels for the 1st Defendant.

Heard: 19th & 20th June, 2017; 16th, 17th & 18th April, and 27th July, 2018

Company law- Articles of association – Companies Act S.5, 130,179 (2) - Wrongful dismissal – Validity of share allotment – Removal of director – Fraud – Termination of contract – Notice period – Damages.

WILTSHIRE, J (AG)

[1] This action by the Claimant seeks the court's determination of his interest and status in the 2nd Defendant and damages for wrongful dismissal and unpaid vacation leave. The Claimant specifically asked the court to determine the validity

of the allotment of 1,000,000 ordinary shares of the 2nd Defendant to the 1st Defendant, on the 24th December 2004 and whether the Claimant was entitled to an allotment of 500,100 ordinary shares in the 2nd Defendant.

The Parties

[2] The Claimant and the 1st Defendant were husband and wife. On the 17th September, 1997, during the marriage, they incorporated a limited liability company, the 2nd Defendant, SSP APTEC. The 1st Defendant held 900 of the company's 1000 shares (each bearing $1.00 in value) and the Claimant held the remaining 100. The Claimant was a director of the company and later became company secretary on December 16, 2005. Then from January 2007 he was employed as a Business Development Manager, reporting to his wife, the Managing director. On the10th January 2007 they incorporated another company, JSJ Holdings Limited, the 3rd Defendant, in which they had equal shares. There were no other shareholders in these companies. The couple were the stated directors of the 3rd Defendant, however, there were additional directors in the 2nd Defendant.

The background

[3] On 24th December 2004 at an Annual General Meeting the share capital of the 2nd Defendant was increased to 1,000,000 shares with value remaining at $1.00. The full allotment of the shares was made to the 1st Defendant and registered with the Registrar of Companies. The Claimant stated that the shares were to have been divided equally between them as shareholders as per his agreement with the 1st Defendant. He further stated that at the Annual General Meeting it was agreed that the prescribed shares if not subscribed, would be paid for from the undistributed profit as stated on the 2nd Defendant's records as Directors/ shareholders loan to the 2nd Defendant.

[4] The 1st Defendant on the other hand said that the shares were wholly allotted to her by unanimous agreement of the Board of Directors, the Claimant being one of

them. She stated that the shares were all paid for by her as she was the only shareholder who had lent money to the company. Sometime in May 2008 the Claimant was dismissed from his job as Business Development Manager at the 2nd Defendant and excluded from all company activities. He was later deregistered as company director and secretary and replaced. He alleged that all this was done without notice to him.

[5] The Claimant alleged that his dismissal was wrongful and sought to recover his salaries from May 2008 and payment in lieu of his vacation leave since employment. The Claimant also alleged that since his dismissal he received no notice of company meetings, as required by the company's Articles. His absence from meetings, as the only other shareholder and member of the company, resulted in a lack of a quorum, therefore the business decisions taken at those meetings, including those where he was removed from the company as director and secretary, were void. He further alleged that any meeting conducted in his absence that resulted in the decision to have Horace Williams and Gairey Palmer appointed as directors and Gairey Palmer replace him as secretary, also lacked a quorum and those appointments were therefore void and contrary to the Articles of the company.

[6] In addition the Claimant stated for the first time in his witness statement, that the 1st Defendant acting on her own behalf and as agent of the 2nd Defendant, deposited with the Registrar of Companies annual returns for 2006 -2007, which bore forged signatures purporting to be his. He claimed that "*the documents submitted to the Office of the Registrar of Companies to effect changes to the 2nd Defendant Company as to directorship, secretary and shareholdings, which were purportedly signed by me, are forgeries*."

[7] He also claimed that the 1st Defendant sold at least one motor vehicle and lands at 26, 30 and 32 Red Hills Road and 67 Constant Spring Road, all of which belonged to the 2nd Defendant, without the Claimant's knowledge or consent. He claimed further that the current account for the 2nd Defendant was closed by the

1st Defendant who used this money and the proceeds of the sale of the vehicle and lands for her own use. He said that she also closed the current account for the 3rd defendant which then contained $38,938.01 and no account was given to him for the disposal of the assets of the company. The Claimant and 1st Defendant are now divorced.

Claimant's case

[8] The Claimant by claim form asked the court for the following:

1. A determination of interest and status of the Claimant and the 1stDefendant in respect of SSP APTEC Limited the 2nd Defendant and JSJ Holdings Limited, the 3rd Defendant.
2. That an inventory be taken of all assets of the 2nd and 3rd Defendants as on the 12th day of May 2008.
3. An inventory to be taken of all the assets of the 2ndand 3rd Defendants as on the date of filing or the making of the order.
4. For the 1st Defendant to account for any difference in the inventory in respect of paragraphs 2 and 3 above.
5. That the appointment of Horace Williams and Gairey Palmer as Directors/Secretary of SSP APTEC Limited be declared void.
6. That ordinary shares of $1,000,000 allotted to the 1st Defendant in respect of the 2nd Defendant on the 24th day of December 2002 and registered with the Registrar of Companies on the 17th day of January 2007 be declared void.
7. That the Claimant is entitled to the allotment of 500,100 of ordinary shares in the 2nd Defendant.
8. That the dismissal of the Claimant from his employment with the 2nd Defendant was wrongful.
9. Damage and loss of income for the period May 12, 2008 to the time of filing.

Special damages were also claimed as follows:

1) Loss of income for 37 months at $145,000 per month … $ 5,365,000.00

2) Vacation leave pay for 10 weeks…….....	$ 362,500.00
3) Pain and suffering and lost opportunity……	$1,500,000.00
Total……	$7,227,500.00

Defendants Case

[9] The 2nd and 3rd Defendants did not appear. Judgment in default was granted against the 2nd Defendant for the wrongful dismissal of the Claimant. The 1st Defendant admitted to having started the 2nd Defendant Company in 1997 and that the shares were divided between herself and the Claimant. She stated that he was however, a silent partner having had no training in the field of information technology on which the company was based. She agreed that in 2004 a decision was taken by the Board of Directors to increase the share capital of the company by $1,000,000 at $1 per share. She stated however that it was by a unanimous decision that the entire additional shares were to be allotted to her, as she had provided the capital. The Board included herself and the Claimant along with two others. She stated that the Claimant never complained about the allotment until after the decree absolute was granted for their divorce. She also stated that the Claimant knew about the appointments of Mr. Palmer as secretary and Mr. Williams as director. This was done in 2007, before the Claimant was dismissed and those were decisions made by the Board. She also claimed that in any event, as majority shareholder, she could make unanimous decisions.

[10] She admitted that the company purchased 30-32 Red Hills Road in 2006. She stated that during the recession of 2008 the property at Red Hills Road was lost to the vendor as it had been purchased on a vendor's mortgage. She admitted that both herself and the Claimant formed the 3rd Defendant, JSJ Holdings, and allocated its shares equally between them. She does not recall the date of formation. After his dismissal she stated that the Claimant operated a business at Lyndhurst Road. She alleged that despite her indication to him not to use the name of the company or its logo he did so. She admitted closing the bank account for the specialty division of SSP APTEC, a division run by the Claimant, stating her reason as being to prevent him from adding liabilities. She stated that the business

continued to decline despite her best efforts and she filed for bankruptcy in 2013. She had no funds to employ auditors or liquidators and was made ill by the stress. The company was wound up and she has been sued by creditors.

The issues

[11] The following must be determined in order to resolve this matter:

1) Was the allotment of one million shares to the 1st Defendant valid or done in breach of a decision of the directors of the 2nd Defendant.

2) Was the removal of the Claimant as a director/company secretary of the 2nd Defendant done in accordance with the Companies Act of Jamaica and/ or the Articles of Incorporation of the company.

3) Did the 1st Defendant fraudulently misuse the assets of the 2nd and 3rd Defendants for her sole purpose.

4) Did the 1st Defendant submit documents to the Registrar of Companies, notifying changes made to the 2nd Defendant without a resolution from a meeting of directors or shareholders.

5) Was the appointment of Horace Williams and Gairey Palmer as directors and secretary of SSP/Aptec valid.

6) Is the Claimant entitled to an allotment of 500,100 ordinary shares in the 2nd defendant.

Determination of the Claimant's interest and status in respect of the 2nd Defendant.

[12] The memorandum of association for SSP APTEC declared the Claimant's and 1st Defendant's unequal shareholder status at the start of the company in 1997. The Claimant was the minority shareholder with 100 shares and the 1st Defendant held 900. This agreement was duly signed by both parties and there has been no allegation otherwise. The shareholding members of the company were these two individuals at its inception. That shareholder position, based on the admission of

the 1st Defendant as well as the documentary evidence, the Annual Returns, was the same up to the date of the trial. Despite the Claimant's absence from the company as a consequence of his dismissal, his ownership of shares in it was not dissolved. No evidence was given indicating that he had sold, transferred, assigned or forfeited his shares to anyone. His interest in his shares was not dependent or conditional on his employment.

[13] By resolution on 24th December, 2004, at an extraordinary general meeting, the share capital of the 2nd Defendant was increased to 1,000,000 with value remaining at $1.00. That is undisputed. Where the parties divert is on the allotment. The Claimant said the new shares should have been divided equally between himself and the 1st Defendant. The 1st Defendant said the shares were to be allotted to her by the unanimous agreement of the Board of Directors which included the Claimant. The Claimant stated that this allotment was in breach of the agreement with the 1st Defendant. The question is what proportion of the new shares should be allotted to the shareholders. Before proportions can be determined however, we need to ascertain whether there was in fact an increase in shares.

Section 5 of the Companies Act states that,

> *'A company shall not carry on any business or exercise any power that it is not restricted by its articles from carrying on or exercising, nor shall a company exercise any of its powers in a manner contrary to its articles.'*

Article 42 of the Articles of Association of SSP APTEC states that:

> *'the company may by ordinary resolution increase the capital by the creation of new shares, such increase to be of such aggregate amount and to be divided into shares of such respective amounts as the resolution shall prescribe".*

Article 44 makes clear the requirement for notice to be given of the new shares and of an offer to be made to those persons entitled to attend general meetings i.e. shareholders.

It states the following:

> *'Subject to any direction to the contrary that may be given by the Company in general meeting, all new shares shall before issue, be offered to such persons as at the date of the offer are entitled to received notices from the Company in general meetings in proportion as nearly as the circumstances*

> *admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of those shares in such a manner as they think most beneficial to the company".*

[14] In this case the company clearly was allowed to increase its capital by increasing its shares. There was a resolution to that effect. The difficulty was with the allotment. The Claimant's evidence is that there was an agreement at the Annual General Meeting of 24th November 2004, that the shares would be divided equally giving Claimant and 1st Defendant 500100 and 500900 shares respectively. The Claimant's attorney argued that he should be believed because there is no document indicating otherwise. In the absence of such a document the court sought assistance from the minutes of the meeting of the SSP APTEC Board held on July 1, 2005. It stated as follows:

> *'A resolution was passed that (1,000,000) of shareholders' loans in accounts as at 2003 be converted to share capital at $1 par effective December 6, 2004.'*

It did not say how the shares were to be distributed. The resolution itself read as follows:

> ***"**That the authorized share capital be increased to $1,001,000 by the creation of 1,000,000 ordinary shares of $1 each, such shares to rank pari pasu in all respects with the existing shares of the company."*

The resolution was passed at the extraordinary general meeting held on the 24th December 2004. No minutes were shown for this 24th December meeting that indicated how the shares were to be distributed.

[15] The court can only be certain that there was indeed a resolution increasing the shares to an additional 1000,000. The amount allotted to the parties was not recorded and remains uncertain. The 1st Defendant said however that the decision to allot the shares was Board approved and that the Board included the Claimant. Yet only the 1st Defendant's signature is on the resolution and the notice of

increase in share capital filed with the Companies Office regarding the resolution dated December 24, 2004.

[16] Regardless of the varying accounts given by the parties as to the nature of the agreement for distributing the shares, the court finds that there was a breach of the 42nd and 44th articles. There was no mention in any resolution as to the way the shares were to be divided and no record of notices sent to the Claimant, the only other shareholder, regarding the offer of new shares and providing a limitation time which upon expiry would allow the directors to freely deal with the shares.

[17] The articles of association are the contractual terms which govern the relationship of shareholders with the company. Although this was a small private company where the shareholders were married to each other it is still expected that there be compliance with the articles. The case of **Benkley Northover v. Eric Northover et al [2014] JMCC Comm. 14**, is instructive. The facts were that Winston Northover founded Winston G. Northover and Associates ltd., a construction company, in 1995 with a share capital of 1000 shares valuing $1.00 each. Three hundred (300) shares were allotted to him and one hundred (100) allotted to one Errol Elliot. These one hundred (100) shares were later transferred to Rohan Northover, one of the founder's 14 children. There were thus two shareholders in the company, the majority shareholder father and minority shareholder Rohan Northover. The father ran the company for the most part by himself. Before he died, and while in hospital he made a will giving his brother, Benkley Northover, his three hundred (300) shares in trust for his children (including Rohan Northover who already had one hundred (100) shares) to share equally. Benkley Northover alleged that the deceased gave four hundred (400) of the six hundred (600) shares not already allotted out of the authorized share capital of one thousand (1000) to him and gave one hundred (100) shares to Benkley's son Norman Northover. Benkley further alleged that Winston Northover made him Managing Director as he did not want Rohan Northover in control of his company but wanted Benkley Northover to do so in the company's best interest and that of his children. When

he died there were disputes as to the validity of the allotment of the shares to Benkley Northover and Norman Northover.

[18] The grounds of the dispute were that:

"(a) There was no properly convened general meeting of the fourth defendant for which notices as required by law were given.

(b) There was no quorum at any meeting that might have been convened by the Directors of the fourth defendant.

(c) There was no consent in writing or sanction of any ordinary resolution passed at a general meeting of the shareholders of the fourth defendant whereby their rights to dividends and voting power were varied.

(d) Any purported transfer of shares by Winston G. Northover, deceased, to Norman Northover is unlawful being in breach of Article 29 (ix).

(e) There was no consideration provided for any shares purportedly allotted to the Claimant. In the alternative, the consideration provided was other than cash and Section 61 of the Companies Act was not complied with."

[19] At para 41 Edwards J. stated:

> *"…...it is generally recognized that shareholders in privately owned family companies are deeply involved in its management. These are privately held corporations where shareholders usually know each other and are often familiar with each other. They rarely have outside directors and the shareholders run these companies at all levels. The result of this is that shareholders generally ignore the formalities of good corporate governance. However, even in these, what are largely family owned companies, Company Laws and the provisions in the Articles of Associations of these companies have to be complied with. It does not matter that some members' shares were obtained by way of gift as long as it is valid. However, common understanding amongst shareholders could override the provisions of the Articles of Association if it is proved to exist: see* ***Benjamin Elysium Investment Pty Ltd*** *1960 (3) S.A. 467 (ECD)."*

[20] The learned judge found that contrary to the requirements of the company's articles the 500 unsubscribed shares were not first offered to Rohan Northover as existing shareholder, in proportion to his existing shareholding. She also stated at para 54 that:-

> *"….There was no evidence that a meeting was held approving, by vote, the issue from the unsubscribed shares, neither was there a vote to issue the shares to anyone other than to the existing shareholders. Article 55 states that no meeting with less than 2 members present is competent to transact the business of the company. There is no evidence of a meeting of both directors or any decision taken by the company in general meeting - para 56. The ultimate conclusion resulting from this breach is that Rohan's rights were breached and the allotment to Benkley and Norman was thereby invalidly made."*

[21] The court held that, the five hundred (500) shares given to Benkley Northover (400) and Norman Northover (100) were unlawfully and improperly allotted, the shareholdings in WG Northover and Associates remained as one hundred (100) ordinary shares held by Rohan Northover, three hundred (300) ordinary shares held by Benkley Northover as executor and trustee of the will of W.G Northover and ordered that the Registry at the Companies Office be rectified to reflect the same.

[22] In the instant case there is no evidence of an agreement to equally allot the shares. There is also no resolution outlining the allotment and no record that the Claimant, a shareholder entitled to notice of the offer was so notified and had refused the shares, before they were all allotted to the 1st Defendant. The allotment was therefore invalid and the interests of the shareholders in SSP APTEC have not changed. The Claimant has one hundred (100) and the 1st Defendant has nine hundred (900). The interests of the Claimant and 1st Defendant in the 3rd Defendant remain as equal shareholders.

Whether the removal of the claimant as a director, shareholder and/or company secretary of the 2nd Defendant and or 3rd Defendant was done in accordance with the Companies act of Jamaica and/ or the Articles of incorporation of the company.

[23] Article 82 of the Articles of association of SSP APTEC states that:-

> *"the company may by ordinary resolution, remove any director before the expiration of his period of office not withstanding anything in these articles or in any agreement between the company and such director, and may by ordinary resolution appoint another person in his stead."*

[24] Article 77 states that:

> *The number of directors may at any time thereafter be increased or reduced as the company in general meeting shall determine. In the event that the number of directors is determined as one, or only one director is appointed, any provision in these articles relating to a quorum would be in applicable and that director shall have all the rights and be entitled to exercise all the power of directors contained in these articles.'*

Article 55 states that:

> *"No business shall be transacted at any general meeting unless a quorum of members is present and such quorum shall consist of not less than two members present in person or by proxy."*

Article 117 states that 'the **directors** shall appoint a secretary ….

Article 51 states that,

> *"A meeting of the company other than an annual general meeting or a meeting for the passing of a special resolution shall be called by 14 days' notice in writing at least."*

Section 130 of the Companies Act requires notice and the presence of at least two company members for there to be a valid meeting.

[25] Mr. Peart stated that he never resigned as director but was unlawfully replaced. Counsel for the Claimant sought to argue that there were only two shareholders and therefore only two members and so no quorum could have met in the Claimant's absence. Further there is the question of notification to the Claimant. Section 179 (2) of the Companies Act states that:

> *"Special notice shall be required of any resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director under this section the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting."*

[26] The Claimant was entitled to notice of a meeting where he was being removed as a director and where new directors were being appointed. The 1^{s} Defendant insisted that the Claimant was aware of these appointments and that a notice was sent to the Claimant regarding meetings, however no evidence has been produced to show exactly what was done to notify the Claimant. Articles of association 51-

52 clearly set out the need for at least a written notice and the contents of such a notice. The non-compliance with the articles of association and the Companies Act invalidates the removal of the Claimant and the appointments of Mr. Horace Williams and Mr.Gairey Palmer.

FRAUD

[27] Mr. Stewart cited the case of **Derry v Peek** 14 App Case (1889) P. 337 where the House of Lords through Lord Herschell stated: "

> *Fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false. A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud."*

[28] Counsel also referred to the case of **Leroy McGregor v Verda Francis** [2013] JMSC Civ. 172 where Simmons J stated "It is settled that a charge of fraud must be pleaded and sufficiently particularized" and also made reference to the principle set out in **Paragon Finance plc v DB Thakerar &Co. (a firm)** [1999] 1 All ER 400 where Millett L.J. said:-

> *"It is well established that fraud must be distinctly alleged and as distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud…"*

[29] Counsel argued that the Claimant had not included in his claim form or particulars of claim all the facts on which he relied, as was required under the Civil Procedure Rule 8.9(1). Further that he had not set out the assets of which he alleged misuse and only mentioned the motor vehicle belonging to the company and the land for the first time in his witness statement. Mr. Stewart submitted that since the Claimant did not say what the misuse was, then the court should not be asked to infer a fraudulent intention from general allegations.

[30] Counsel submitted that the 1st Defendant's evidence that she had used the proceeds of the car sale to repay debts for the 2nd Defendant was not challenged by the Claimant and no proof had been offered by him to show her personal benefit

from the sale. Neither did he offer any evidence to contest the 1st Defendant's evidence that the land was taken back by the mortgagee and sold to pay off debts of the 2nd Defendant. It was pointed out that the Claimant in cross examination admitted that he had no knowledge of the misuse of the assets by the 1st Defendant

[31] Counsel also highlighted that although the Claimant gave evidence that the 1st Defendant fraudulently submitted documents to the Registrar of Companies purporting them to be signed by him, in his pleadings he stated that it was the 2nd Defendant that fraudulently submitted the documents. This was not amended and as a result, the uncertainty should be resolved in the 1st Defendant's favour. Mr. Stewart finally submitted that no *actus reus* or *mens rea* for fraud had been proven.

[32] Mr. Williams asked the court to consider the demeanor of the first Defendant and to find that she was not a witness of truth.

THE LAW

[33] At page 374 of **Derry v Peek** (supra), Lord Herschell states:

> *"… the authorities establish the following propositions: First , in order to sustain an action of deceit there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."*

The court must therefore determine on a balance of probability, what the 1st Defendant honestly believed when she acted in this matter for which fraud is alleged.

The Evidence

[34] The particulars of claim stated at paragraph 15 that the 2nd Defendant fraudulently submitted documents to the Registrar of Companies purporting them to be signed by the Claimant. At paragraph 16 it stated that the 2nd Defendant fraudulent and unilaterally made changes to the structure of both the 2nd and 3rd Defendants by having the Claimant deregistered as director and company secretary and unilaterally appointed Mr. Horace Williams and Gairey Palmer as directors of the company.

[35] It was in his witness statement, which stood as his evidence in chief, that the Claimant alleged for the first time that on April 3, 2008, the 1st Defendant acting on her own behalf and as agent of the 2nd Defendant deposited with the Registrar of Companies, annual returns for 2006 - 2007, which bore forged signatures purporting to be his. The Claimant did not make this claim against the 1st Defendant in the claim form. He made the allegations in the particulars of claim, but against the 2nd Defendant and makes no mention of the 1st Defendant. No amendment was made to the documents to reflect this notion of agency which appeared in the witness statement.

[36] Repeatedly in the particulars of claim, the Claimant made reference to the fraud of the 2nd Defendant. There were times in his witness statement where he interchanged the 1st and 2nd Defendants, calling the 2nd Defendant "her". The 1st Defendant was the managing director of the 2nd Defendant company. She was not the company and they were not one and the same. This particular of the fraud is unclear as to the identity of the correct Defendant. While the Claimant points out the many allegations against the 1st Defendant in taking documents to the Registrar of Companies the fact is, he alleges in his particulars of claim that it was the 2nd Defendant who did so. No amendment was made to the statement of case to state that the 1st Defendant acted as agent of the company. I see no need therefore to address this issue any further.

The 1st Defendant using the assets of the 2nd and 3rd Defendants for her sole benefit and to the exclusion of the Claimant.

[37] The Claimant has given no evidence of any assets belonging to the 3rd Defendant. It has not been disputed that the assets of the 2nd Defendant, being the motor vehicles and lands were sold and that several bank accounts of the company were closed. The issue is what became of the proceeds of the sale. The Claimant states that they were used by the 1st Defendant for her sole benefit. The 1st Defendant was adamant that they had been used to clear the debts of the 2nd Defendant. The Claimant must prove that the proceeds were used for the 1st Defendant's sole benefit and he did not do so. He did not dispute that there was a mortgage on the land, that the company suffered under the recession or that it eventually went bankrupt. He has put nothing before the court to support his allegations of misuse.

[38] The Claimant has not given evidence of what the proceeds were and what they were used for hence he has failed to show any fraudulent intent on the part of the 1st Defendant. Until he knows what was done he cannot say with certainty that it was done with a fraudulent mind. Fraud must be "distinctly alleged and distinctly proved." The court agrees however that as part owner of the company, he does have the right to a proper account of how the assets were disposed of and how the proceeds were used.

Damages

[39] The issue of the Claimant's wrongful dismissal by the 2nd Defendant has been settled by the default judgment. Mr. Williams urged the court to therefore close all considerations regarding that question, noting that the judgment takes effect from the date it was filed. He cited the CPR Part 42.8 along with several well established cases such as ***Workers Savings and Loan Bank Limited v Winston McKenzie*** (1996) 33 JLR 41D which confirmed this position.

[40] Counsel submitted that since the Claimant was paid $145,000.00 gross or $103, 546.26 net, he is due a gross sum of fourteen million five hundred thousand

($14,500,000.00) or net sum of ten million, three hundred and fifty four thousand six hundred and twenty six dollars ($10,354,626.00) for non-payment of salary for 100 months to August 2016. He also submitted that a sum was due for vacation pay at two weeks per year, a total of twenty weeks up to August 2016 and at a weekly pay of $25,886.565 ($103,546.25/4), his total would be $517,731.30. The claim was in total $10,872,357.30

[41] Alternatively he argued that the compensation due was the amount of salary to cover the notice period. He noted that in this case no notice period was given in the contract. It stated "…*We reserve the right to terminate the agreement with immediate effect if it is deemed that continuing such an arrangement would not be in the interest of the company*." In the absence of an express notice period, he argued that a reasonable one was to be presumed, based on all the circumstances, taking into account factors such as the level of management exercised by the former employee. He cited the case of **Marilyn Hamilton v United General Insurance Company ltd. [2013] JMCC Comm.18**

[42] He argued that the court would have to determine the date from which this notice period would be calculated and submitted that one (1) year's notice was reasonable. He also submitted that the date of filing the claim was the date from which notice was to run as that is taken as the time from which the Claimant accepted the breach of his contract. He calculated the compensation from April 2008 to May 2011, at a monthly net pay of $103,546.26 totaling $3,417,026.58, the vacation pay for two weeks per year since his employment as $51,773.14 multiplied by 9 totaling $465,958.26 and the notice pay as the monthly pay multiplied by 12 totaling $1,242,555.12. The total compensation due he submitted would be $5,125,539. 96.

[43] The case of **Marilyn Hamilton v United General Insurance Company** (supra) is indeed instructive.

At paragraphs 127-128 of the case Sinclair-Haynes J states:

*"The **author of Trolley's Employment Handbook** Twenty First Edition at paragraph 48.6, in dealing with the issue of the termination of employment vis-a vis the contractual notice period wrote:*

> *'The contract of employment will usually specify the period of notice to be given to terminate the contract; indeed, the written particulars given to the employee must include the length of notice which the employee is obliged to give or entitled to receive (see 8.5 **Contract of Employment**)".*

*"If the contract is not for a fixed term and the notice period has not been expressly agreed, there is an implied term that it may be terminated upon reasonable notice (see **Reda v Flag Ltd.[2002] UKPC 28, [2002] IRLR 747**). The court will determine what amounts to reasonable notice. Factor's taken into account include the seniority and remuneration of the employee, his age, his length of service and what is usual in the particular trade. As a very rough guide a period of two weeks or one month might be appropriate in the case of a manual worker, three months in the case of a senior skilled workers or middle management, and between three months and one year in the case in the case of more senior managers. However, the period of notice must be determined on the particular facts of each case. (For a discussion of the factors, see Clarke v Fahrenheit 451(Communications) Ltd."*

*"The Privy Council in the Bermudian case of **Reda &Anor v Flag Ltd. (Bermuda) [2002] UKPC 38** at page 18, enunciated:*

> *"The appellants observe that dismissal without cause is not the same as dismissal without notice, and submit that the implication of a requirement of reasonable notice would accordingly not be inconsistent with the express terms of the contract. So far, their Lordships agree with them. But they part company from them at the next stage of their argument viz. that all contracts of employment are , as a matter of law, subject to an implied term that they are terminable on reasonable notice , and that such a term can be displaced only by clear words: see Lefebvre v HOJ Industries Ltd [1992] 1SCR 831".*
>
> *"In their Lordships' view there is no such rule. The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied term that it is determinable by notice: see Chitty on Contracts(28th Ed.) at para 13-025. The implication is made as a matter of law as a necessary incident of a class*

> *of contracts which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and are accordingly terminable by reasonable notice in the absence of express provision to the contrary. Lefebvre v HOJ Industries Ltd was such a contract. But there is no need for the law to imply such a requirement where the contract is for a fixed term."*

[44] The court believes this case sets out adequately the proper treatment for a claim for damages for dismissal without notice. This is not simply a case of breach of contract, but breach of an employment contract of no fixed duration. I accept the second of the Claimant's Counsel's approach for the treatment of this matter. In the **Marilyn Hamilton** case (supra) the period of notice accepted by the court was one (1) year. She had five (5) years of service. Briefly the facts in the ***Marilyn Hamilton*** case (supra) were stated at page 2 of the case by Sinclair-Haynes, J:

> *"The services of Marilyn Hamilton (claimant) as the Information and Technology Systems Manager for Advantage General Insurance Limited (defendant) were unceremoniously terminated on the 28 July, 2006. She was accused of introducing pirated software into its environment, which endangered the organization's reputation. Ms. Hamilton has sued the defendant for breach of contract. She claims that the manner and circumstances of her dismissal were in breach of the implied term of trust and confidence in her agreement for employment. She is also seeking damages for financial loss she suffered as a result of the defendant's breach which: a) caused her to suffer depression and anxiety; b) affected her future employment prospects; c) defamed her character. She further seeks payment of the defendant's pension contributions and loss suffered as a result of the wrongful termination of her employment. Her contract of employment provided for a minimum of one month's notice. She was paid that amount."*

The court found that she had been wrongfully dismissed.

[45] In the instant case, notice would have been from the date of the breach in May 2008. His having gone back to the premises in 2009 or 2010 to try to work did not result in any change in the circumstances. He had already been dismissed and denied entry. I would distinguish the circumstances here with the **Marilyn Hamilton** case (supra). The Claimant was not stigmatized thus preventing him from working. He did not allege depression or anxiety associated with the dismissal and he was not defamed in the circumstances of his dismissal. He had however

been in a management position and was operating a specialty division of the 2nd Defendant. He had worked at the company from its inception in 1997 and had been a director from then and later company secretary. He had been entitled to vacation periods and other benefits.

[46] He is entitled to recover payment in lieu for these vacation periods and his salaries outstanding since May 2008. His evidence was that he was last paid on 25th April, 2008. Regarding the length of his notice period I would use nine months as an appropriate time. Despite the 1st Defendant being the managing director of the company the Claimant had been a partner in their business and had an expectation to continue there. He was not however, unable to reorganize himself and indeed the undisputed evidence from the 1st Defendant is that he set up his own business. While the notice period for senior managers in the Information technology field is as stated in **Marilyn Hamilton** (supra) – twelve (12) months, the Claimant was not a trained manager in the field. The evidence is that he had been working in the company and had familiarity with other areas but it was the 1st Defendant who had the training. He could not expect therefore to be entitled to the entire twelve (12) months.

[47] It is therefore ordered and declared that:

i. The allotment of the one million (1,000,000) shares in the 2nd Defendant to the 1st Defendant is invalid and the Claimant retains 100 shares in the 2nd Defendant and the 1st Defendant retains 900 shares in the 2nd Defendant.

II. The removal of the Claimant as a director and company secretary of the 2nd Defendant is invalid as same was not done in keeping with the Articles of Association of the 2nd Defendant, SSP Aptec Limited.

III. The 1st Defendant is to provide an account of all the assets of the 2nd Defendant company and how said assets were disposed of and make same available to the Claimant within ninety (90) days of the date of this order.

IV. The aforementioned account shall be verified on Affidavit with all exhibits certified and attached thereto.

V. The register of members of SSP Aptec Limited (2nd Defendant), be rectified by striking out one million (1,000,000) shares of the share capital of the company purportedly held by the 1st Defendant.

VI. The 1st Defendant shall file with the Registrar of Companies a return of allotment reflecting the rectified shareholdings in relation to the 2nd Defendant, within ninety (90) days of this order.

VII. The 1st and 2nd Defendants shall file with the Registrar of Companies annual returns and all other documents as may be required reflecting the rectified shareholdings in the aforementioned paragraph, within ninety (90) days of this order.

VIII. Notice of all such rectifications shall be given to the Registrar of Companies.

IX. Notice of appointment/change of directors dated 1st February, 2010 is cancelled and the Claimant is duly declared the lawfully appointed secretary and a director of the 2nd Defendant.

X. The 1st Defendant shall within thirty (30) days of this order take all steps as are necessary to rectify the Register of Directors and company secretary and file amended returns or notices as may be necessary to give effect to the order made in paragraph 9.

XI. The appointments of Horace Williams and Gairey Palmer as directors and/or secretary of the 2nd Defendant (SSPAptec) were invalid having been effected contrary to the Articles of Association of the company.

XII. Damages awarded to the Claimant against the 2nd Defendant as follows:

- Net earnings from May 2008 to May 2011 (37 Months) @ $103,546.26 per month = $3,831,211.62
- Vacation leave pay for 9 weeks @ $51,773.14 per year = $465,958.26
- Notice pay for 9 months @ $103,546.26 per month = $931,916.34
- Damages awarded to the Claimant against the 2nd Defendant are treated as Special Damages. Interest on Special Damages awarded at the rate of 3% per annum from the 25th day of May 2008 to the date of judgment.

XIII. Seventy percent (70%) of the costs to the Claimant against the 1st Defendant to be taxed if not agreed. Thirty percent (30%) of the costs to the Claimant against the 2nd Defendant to be taxed if not agreed.

XIV. Liberty to apply.