[2020] JMCC Comm 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2019CD00013

BETWEEN	**PHENEE ANTHONY PLUMMER**	**1ST CLAIMANT**
	SEAN FRASER	**2ND CLAIMANT**
	DENBIGH FARMS LTD	**3RD CLAIMANT**
AND	**JOHN GLEN PLUMMER**	**1ST DEFENDANT**
	BRIAN PLUMMER	**2ND DEFENDANT**

Companies Act – Sections 174,193, 213 and 213A- Mining lease granted to 1st Defendant's son - Duty of director – Whether breach of trust- Whether implicit agreement to permit 1st Defendant to make such a decision - Whether 1st Defendant as managing director acted lawfully- Whether duty to disclose- Whether secret profit – Expert report admitted by consent -Whether Defendants entitled to challenge the expert's methods and findings – Remedies - Measure of damages.

Tamara Francis Riley- Dunn and Karlane McFarlane instructed by Nelson-Brown, Guy & Francis for the Claimants.

Keith Bishop and Andrew Graham instructed by Bishop Partners for the Defendants.

Heard: 19th, 20th, 21st, 24th February and 8th April, 2020.

CORAM: BATTS J.

[1] This case concerns a family owned and operated Company. The 1st and 2nd Claimants and the 1st Defendant are siblings. They are also shareholders in the 3rd Claimant, which is a duly registered Company, under the Companies Act of Jamaica. It has its registered office at Race Course P.O. in the parish of Clarendon. Their father Ezekiel Plummer bequeathed to them, and their other siblings, shares in the 3rd Claimant. The 1st Defendant received 10 percent of the shareholding which made him the single largest shareholder. The 2nd Defendant is the son of the 1st Defendant. He became a shareholder in the 3rd Claimant after the 1st Defendant transferred some shares to him (see evidence in cross-examination of 1st Defendant). Since the death of Ezekiel Plummer, on or about the 27th day of April 1975, the 1st Defendant has been the managing director of the 3rd Claimant. This continued until 25th March 2019 (see paragraph 8 witness statement of Vince Plummer filed on 16th December 2019). The Managing Director of the 3rd Claimant is now Vince Plummer.

[2] The dispute between the parties concerns the 1st Defendant's management of the 3rd Claimant, and in particular, his grant of a mining lease to the 2nd Defendant and the sale of other company land. The property leased for mining is located at Denbigh in the parish of Clarendon and is registered at Volume 1467, Folio 152 of the Register Book of Titles (see exhibit 5). It is hereinafter referred to as the said land.

[3] It is not in dispute that most of the 3rd Claimant's shareholders lived outside of Jamaica. The Claimants say that initially the lines of communication were open and decisions collectively made. However, for the last 15 years or so this has not been so. They say the 1st Defendant failed to provide information and stopped participating in board meetings. The 1st Defendant says decisions were never collectively made. It is common ground however that for a long time the 1st Defendant was relied on, or allowed, to take decisions in relation to the 3rd Claimant. Ezekiel Plummer in his will had appointed the 1st Defendant as

Managing Director. This fact, along with the fact that the 3rd Claimant's land was primarily used for agricultural production and that the 1st Defendant is an Agronomist, probably explain the reliance placed on the 1st Defendant by the other directors and shareholders.

[4] The Claimants commenced action by Claim Form and Particulars of Claim on the 21st day of June, 2017. The claim was transferred to the Commercial Division of the Supreme Court. An Amended Claim Form and Particulars of Claim were filed on the 29th day of April, 2019. The statements of case reference two lease agreements, both dated the 31st day of December, 2015, between the 3rd Claimant and the 2nd Defendant. Both leases are signed, on behalf of the 3rd Claimant, by the 1st Defendant and allow for mining on the said land. The 1st and 2nd Defendants owned and controlled Plummer Aggregates Ltd which did the sand mining. The Claimants assert that they have suffered loss and damage in consequence of the entry into the lease agreements.

[5] Although otherwise identical the lease agreements differ as to the mode of computing rent. One lease dated 31st of December, 2015 (exhibit 1) states compensation in the form of an annual rent of One Hundred Dollars ($100JMD) and 10% royalty on all quarry material sold. The other lease dated 31st of December, 2015 (exhibit 2) states that the lessee was to pay rental of $250,000 monthly to the 3rd Claimant. It must be noted that the Defendants allege that exhibit 2 is the true lease agreement. It was not registered on the certificate of title until the 3rd day of October, 2017 (see exhibit 5).

[6] There are several allegations made by the Claimants. The main one being that the Defendants acted in concert and caused the 3rd Claimant to enter into the lease agreements without the knowledge or consent of the other directors or shareholders. It is alleged that the 1st Defendant failed and/or neglected to inform any of the directors that there was sand, or minerals capable of being mined, on the said land. The Claimants further allege that the 1st Defendant has been selling land, belonging to the 3rd Claimant, without the approval or consent

of the other directors and shareholders. The complaint is that the 1st Defendant has done several acts which are unfair to them and profitable to the Defendants. There has, it is said, been a breach of fiduciary duty. The Claimants seek damages, an injunction restraining the 2nd Defendant from mining the said land, an order to set aside the mining lease, an account of profits and the payment of all sums due to the Claimants with interest.

[7] By way of defence the 1st Defendant has alleged that the 3rd Claimant was left solely in his hands. Although there were teleconferences, held on some occasions with his siblings to update them on the running of the 3rd Claimant, he insists that these teleconferences were never for the siblings to tell him what to do. He says that they never objected to his taking decisions and operating the Company until now. He asserts that at all times he acted in the best interest of the 3rd Claimant. The 2nd Defendant, in his defence, asserts that the grant of the lease was within the power and authority of the 1st Defendant.

[8] On the first day of trial counsel, for the Defendants, sought to have the matter adjourned due to the absence of the 2nd Defendant. The court was informed that he was ill and unable to attend . A document purporting to be a medical certificate was presented to me. I rejected the document as it did not describe the 2nd Defendant's condition nor say why he was unable to attend court. It was brought to the court's attention, by counsel for the Claimants, that the 2nd Defendant had been seen in the precincts of the Court of Appeal the day before. This was not denied. The application to adjourn was refused. The 1st Defendant gave evidence at the trial but the 2nd Defendant did not.

[9] After all the evidence was in, each counsel made written and oral submissions. I will reference same and the evidence, only to the extent necessary to explain my decision.

[10] The duty of a company's director is contained in sections 174 and 193 of the Companies Act. Section 213A provides remedies where a company has been

operated in a manner that is oppressive or unfairly prejudicial. These sections state:

Section 174

> *"(1) Every director and officer of a company in exercising his powers and discharging his duties shall-*
>
> *(a) act honestly and in good faith with a view to the best interest of the company; and*
>
> *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.*
>
> *(2) A director or officer of a company shall not be in breach of his duty under this section if the director or officer exercised due care, diligence and skill in the performance of that duty or believed in the existence of facts that, if true, would render the director's or officer's conduct reasonably prudent.*
>
> *(3) For the purposes of this section, a director or officer shall be deemed to have acted with due care, diligence and skill where, in the absence of fraud or bad faith, the director or officer reasonably relied in good faith on documents relating to the company's affairs, including financial statements, reports of experts or on information presented by other directors or, where appropriate, other officers and professionals.*
>
> *(4) In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates.*
>
> *(5) The duties imposed by subsection (1) on the directors or officers of a company is owed to the company alone."*

Section 193:

> *"(1) A director or officer of a company who is-*
>
> *(a) a party to a contract or proposed contract with the company; or*
>
> *(b) a director or an officer of any body or has an interest in any body that is a party to a contract or proposed contract with the company; or*

(c) an associate of a person who is a party to a contract, proposed contract or has an interest in any body that is a party to a contract or proposed contract with the company, shall disclose in writing to the company or request to have entered in the minutes of meetings of director the nature and extent of his interest.

(2) The contract referred to in subsection (1) shall be subject to the approval of the board of directors of the company and, subject to the provisions of the First Schedule, the director concerned shall not be present during any proceedings of the board in connection with that approval.

(3) ……

(4) The disclosure required by subsection (1) shall be made-

(a) in the case of a director of a company-

(i) at the meeting at which a proposed contract is first considered;

(ii) if the director was not interested in a proposed contract, at the first meeting after he become so interest; or

(iii) if a person who is interested in a contract later becomes a director of the company, at the first meeting after he becomes a director.

(b)……

(5) …

(6) ...

(7) A contract between a company and one or more of its directors or officers, or between a company and another body of which a director or officer of the company is a director or officer, or in which he has an interest, is neither void nor voidable-

(a) by reason only of that relationship;

(b) by reason only that a director with an interest in the contract is present at, or is counted to determine the presence of a quorum at a meeting of directors

or a committee of directors that authorized the contract, if the director or officer disclosed his interest in accordance with this section and the contract was approved by the directors and was reasonable and fair to the company at the time it was approved.

(8) Where a director or officer of a company fails to disclose in accordance with this section, his interest in a material contract made by the Company, the Court may, upon the application of the Company, set aside the contract on such terms as the Court thinks fit."

Section 213A (1) and 2

"(1) A complainant may apply to the Court for an order under this section.

(2) If upon an application under subsection (1), the Court is satisfied that in respect of a company or of any of its affiliates-

(a) any act or omission of the company or any of its affiliates effects a result;
(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner;
(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner, that is oppressive or unfairly prejudicial to, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of."

Complainant is defined by section 212(3) as :

"(a) a shareholder or former shareholder of a company or an affiliated company;

(b) a debenture holder or former debenture holder of a company or affiliated company

(c) a director or officer or former director or officer of a company or an affiliated company."

[11] In short the 1st Defendant as managing director of the 3rd Claimant had a duty to act honestly and in good faith, in the best interest of the company and to exercise the care, diligence and skill that a reasonably prudent person would exercise in the circumstances. Section 174(4) requires directors to have regard to the interest of the company's shareholders, among other factors, when determining what is in the best interest of the company. It is also a breach of duty to fail to disclose an interest in a contract. Counsel for the Claimants relied on the cases of ***Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821, Joni Kamille Young Torres v Ervin Moo Young et al [2016] JMSC Civ 17 (unreported judgment of Sykes J as he then was)*** and ***FHR European Ventures LLP and others v Cedar Capital Partners LLC [2014] UKSC 45***, as support in law for the proposition that the 1st Defendant had a duty to act in good faith, in the best interest of the company and for a proper purpose. The law in this matter is not in dispute. It is a factual question whether the actions of the Defendants were in breach of their respective duties.

[12] The Claimants do not dispute the fact that the 1st Defendant had the power to legally enter into the lease agreements. They admit that over the years he often acted unilaterally, see witness statements of Sean Fraser filed 16th January 2020 paragraph 9 and Phenee Anthony Plummer filed 10th January 2020 paragraph 9. The Claimants say efforts were made to communicate about company affairs, by means of teleconference, emails and video conferencing, with the 1st Defendant during the years that he was managing director. The 1st Defendant's evidence is to much the same effect (see paragraph 4 of his witness statement filed on the 20th February 2020. It is clear, and I so find, that the other directors and shareholders were not involved in the management of the Company.

[13] Counsel for the Claimants submitted that in signing the lease agreement, without informing the Claimants about the 2nd Defendant's interest as well as his own, the

1st Defendant deprived them of an opportunity to make an informed decision. Furthermore the 1st Defendant, in failing to present a business plan to the other directors prior to signing the lease, denied the Claimants of the opportunity to collectively make a decision on whether to either lease the property or mine it themselves. Counsel further submits, that the lease was on terms which were manifestly unfavourable to the 3rd Claimant. As such the 1st Defendant did not act in the best interest of the Company. It is further submitted, by counsel for the Claimants, that the 1st Defendant did not act honestly or in good faith because he failed to disclose material information relating to the lease agreement and because he earned a secret profit. This the Claimants aver is the reason the 1st and 2nd Defendants created a company to do the mining. It is further evidence of a lack of good faith. It shows that the Defendants placed their personal interest above that of the Claimants.

[14] I accept the 1st Defendant's evidence that he was more or less permitted to make decisions in relation to the 3rd Claimant. He did have implicit authority to act as he did when he leased the company's land without the board of directors or shareholders' prior approval. He had prior to this sold and mortgaged company land in much the same way. As said by the Claimant's witness Jennifer Plummer, during cross-examination, it was a matter of trust:

> *"Q: In these many years when John Plummer was Managing director did you ever ask him to account for proceeds of sale of sugar*
>
> *A: We trusted our brother to do best for us and company".*

[15] I find however, and it is manifest, that the 1st Defendant breached this trust. He entered into the mining lease without informing the other directors or shareholders of the valuable minerals discovered on the said land. He had failed to advise them that his son and himself, using another company, intended to profit from the said lease. In his own words when cross-examined:

> *"Q: The lease who did you discuss its terms with before it was signed*

A: The manager, I took, when my son came I figured. If he would do it. As managing director I took that sole responsibility. Did not discuss it with anybody. Wish to also add that when I took that decision we have people in Clarendon, Paul Chin, Custos. If I called them they would not give more than $100,000 per month to mine. So I told Brian offer $250,000 that's why I did it. We wanted money".

He later on stated that*:*

"Q: After the licence was received Plummer Aggregates was formed

A: Yes

Q: Owned by you and your son

A: Yes and others

Q: Is it also true the others is your wife

A: Yes

Q: Casilda Young known as company secretary

A: No

Q: Is Casilda a director of Plummer Aggregates

A: No

Q: At anytime a director

A: She is not a director. Helped form the company. "

[16] The 1st Defendant failed to put a stop to the mining operation even after the Claimants found out about it, complained, and asked for it to be stopped. He refused to hand over the mining operations to the 3rd Claimant. In his words:

"Q: When your shareholders of Denbigh Farms at any point in time did they ask you to terminate mining lease

A: No nobody. They say I should not sign lease to my son but put in Denbigh Farms

Q: Did they ask you to do that

A: They ask

Q: Did they ask you to do that

A: No. They suggest it should be done. Also say they will incorporate, money in it but no money came forward.

Q: You saying shareholders of Denbigh would put money in lease agreement. How make money

A: The business plan. My brother Clive and Haughton they were trying to develop a Company at the time and Clive wanted us. They saw plan and said money would be used. He was going to talk to my sister where the castor oil company and develop castor project.

Q: Did your brother and sister ask you to stop this and let Denbigh do mining.

A: Yes they recommended that

Q: You never put a stop to it

A: You know why? If I had gone to others to mine land they would not say one word about it but because is me and my son."

[17] The 1st Defendant stated that his son, the 2nd Defendant, was knowledgeable about the mining of sand and was the one who found the sand on the land. This was his reason for entering into the lease agreement rather than have the 3rd Claimant mine for itself. I do not find this to be a reasonable explanation. In the first place the 1st Defendant acknowledged that the 1st Claimant, who is his brother and a fellow shareholder and director of the 3rd Claimant, had experience working at a bauxite mining company:

"Q: Tony is Phenee Anthony Plummer

A: Know him as Tony all my life

Q: He was involved in mining

A: He worked at Alcoa don't know if he did mining there."

The 2nd Defendant may therefore not have been the only person in the family with the requisite knowledge of mining. Secondly and, even if he was, the 2nd Defendant, could have been retained to use his expertise on behalf of the 3rd Claimant.

[18] The 1st Defendant stated that the only reason, the Claimants have an issue with the lease agreement, was because it was himself and his son (see evidence at paragraph 16 above). This is true and goes to the heart of the case. It suggests the agreements were entered into for the improper purpose of self-enrichment and enrichment of his son. The 1st Defendant got defensive when confronted about his duty to disclose the presence of sand on the said land. This was his evidence during cross-examination:

> *"Q: Suggest you had a duty to disclose presence of sand on the land before entry of lease*
>
> *A : Disagree I did not know the quality of sand. I did not believe him. Is when he started to mine I believe. The reason I did not disclose it because I did not believe sand was there*
>
> *Q: When you found out you should disclose*
>
> *A: Disagree. Because when Brian went to Houghton they Houghton and Clive leaked it to the other directors. We had a meeting to join up with castor business and sand mine".*

The word "leaked" suggests to the court that the Defendants had withheld the information. I so find. I also find, as alleged by the Claimants, that the Defendants' intention was to profit from the mining operation. The 1st Defendant wilfully did not disclose to the directors or shareholders of the 3rd Claimant the existence of sand on the land, the agreement to lease the land to his son, or the profits to be made.

[19] I find also that the 1st Defendant failed, to exercise the care diligence and skill of a reasonably prudent person, when he did not insist on the 2nd Defendant providing tonnage records of all material mined. This is despite the fact that both

lease agreements required such information to be available to the 3rd Claimant, see exhibit 2 clauses 4 and 7(8) and exhibit 1 clause 7(5) and clause 4. When asked in cross examination, about this failure, the 1st Defendant stated:

> *"Q: Do you have an accounting of weight of all quarry material sold by Plummer Aggregates Ltd*
>
> *A: `I don't have it but it could be checked out. We don't have a scale there*
>
> *Q: Generally speaking do you think it is fair to mine and not pay lease while mining*
>
> *A: Explain*
>
> *Q: Do you think its fair to mine and not pay lease*
>
> *A: No."*

[20] The 1st Defendant stated that he used the money, collected from the lease agreement, as remuneration. During cross-examination he agreed that, even though article 88 of the articles of association of the 3rd Claimant (see exhibit 4) allows for remuneration of the managing director after approval by a general meeting, his remuneration was never approved. Additionally no receipt, either for remuneration or reimbursement for travelling, was provided to the court to confirm the assertion that earnings from the lease were used for the purposes stated. The following exchange occurred during cross-examination:

> *"Q: Paragraph 10 of witness statement money paid set off*
>
> *A: Yes*
>
> *Q: Was there a resolution passed by Denbigh Farms setting sum for salary*
>
> *Obj: Please ask witness to wait outside. What is required. But the articles say that if when took job then*
>
> *J: But the witness will say so*
>
> *A: We spoke about it over the years. From my father died I have not received a cent*

Q: Was a resolution passed

A: No direct figure. But I worked

Q: Did you present any account to directors of Denbigh Farms re your travelling

A: I did not, no funds low and to make company continue I did it.

Q: In respect of the lease did you get permission from Board of Directors to take the rent for the lease to pay yourself

A: I did not"

[21] The failure to keep tonnage records deprived the 3rd Claimant of the ability to check the honesty of the 1st Defendant's remuneration claims and overall management of the Company. The 1st Defendant, when presented with his inability to produce any financial records, gave evidence which was inconsistent with an earlier statement. In an affidavit, filed on 17th of July, 2017 at paragraph 10 (exhibit 7) the 1st Defendant had stated that the financial records of the 3rd Claimant were prepared and ready for delivery. However, in his witness statement, filed on the 20th February, 2020, he stated at paragraph 11 that it was not possible to audit the accounts because they were destroyed in a fire. When asked during cross-examination which statement was true he stated that it was true that the records were destroyed in a fire. This is the exchange that occurred:

"Q: You say in paragraph 11 there was a fire when was it

A: Don't remember but I think when Tony was there

Q: When was he there

A: Don't remember, ask him

Q: Was fire before 2017

A: Yes

Q: Did you keep any backup copies of accounting

A: No

Q: *These records were prepared (the ones destroyed) by accountants*

A: *Yes. Mrs Francis (called her Ms Young)*

Q: *Casilda Young Francis*

A: *Correct*

Q: *Recall swearing to an affidavit on 17th July 2017*

A: *Don't understand*

Q: *Recall signing a document in July 2017*

A: *About what*

Q: *Look at this document. Affidavit, last page is that your signature*

A: *I think I see it*

Q: *Look at paragraph 10 of that affidavit*

Paragraph 10 your evidence that

A: *Could I read more*

Q: *Oh tell me when you are through*
[reads document]

Obj: *Of the view that since evidence given if she wishes to use follow procedure*

J: *Allow question to be asked*

Q: *In that document did you say the audited account would have been ready and available in 2017*

J: *What is inconsistency*

Q: *State date at the end of the document when signature appears*

A: *17th July 2017*

J: *Repeats Question re paragraph 10*

Q: Withdraw Question. Did you say account from 2000 to 2017 was prepared and delivered to the auditors at paragraph

A: It says so

Q: Which is true Mr Plummer that fire destroyed documents or documents were sent to auditors

A: Ms Young had made payments of the accountants

J: Which is true

A: Para 11 is true what is in paragraph 10 of affidavit about account being prepared and delivered to auditors is not true."

Paragraph 10 of the 1st Defendant's affidavit does not say the accounts had been delivered. It said they were "*prepared for delivery to the auditors*". However the affidavit is dated 17th July 2017. The witness stated that the fire which destroyed the accounting records occurred prior to the year 2017. The inconsistency is significant. It has caused me to doubt the 1st Defendant's credibility

[22] The expert report of Blastec Consultants dated January 2018, was admitted in evidence, by consent, as exhibit 6(b). It is intended by the Claimant to replace another report, dated January 2017, and also admitted by consent as exhibit 6(a). The report is long on technical terminology but short on clarity. There was no cross examination of the expert who gave no oral evidence. The report demonstrates the enormous amount to be earned from the minerals. It provides motivation for the 1st and 2nd Defendants' conduct.

[23] I do not find the 1st Defendant's evidence, explaining the reason for there being two lease agreements, to be credible. Neither lease was in the 3rd Claimants favour. The 1st Defendant, if he had obtained expert advice, would either have negotiated for a higher rental or have had the 3rd Claimant do the mining itself. I have come to this conclusion after giving due regard to the expert report of Blastec Consultants (exhibit 6b) as well as the 2nd Defendant's business plan

(exhibit 8). The expert report, when considering the value based on minimal market threshold, stated (page 16):

> *"The consultancy saw it prudent to apply the minimal material market threshold to value material found within the research area. The method for same being the juxtaposition of a royalty collection scenario being taken as the lowest possible profit collection arrangement. In this context an investor would only yield a proportion of the value material. Research conducted for the Clarendon quarrying market indicate a typical situation where land owners who collect royalties from quarry operators generally collect JA $100 per ton of material won regardless of processing."*

The lease (exhibit 1) offered only rental of $100.00 per year and 10 percent of royalty collected. The other lease (exhibit 2) offered $250,000 per month as rental. In Blastec's opinion, for 100 acres (which is the acreage mentioned in the lease), the value of the lease would be $19,297,894.74 per year (page 18 of exhibit 6(b). The business plan anticipated earnings of $6,000,000 per week with costs per week of 2,290,000 (exhibit 8 paragraph 1.1 and the expenditure sheet). I reject the 1st Defendant's assertion that he could obtain no higher rental. This is because he never tried .His evidence in this regard is speculative and opinion based .An opinion he is unqualified to give.

[24] The Blastec report assumes a land area of 100 acres because that is what is stated in both lease agreements. That is the assumption used, by the expert, to compute reserves and value the material. In fact the evidence, from all parties, is that the acreage actually mined by the 2nd Defendant is not 100 but 35 acres, see witness statements of Jenifer Plummer Barrett paragraph 25 as amended,

Sean Fraser paragraph 25 as amended, Phenee Anthony Plummer paragraph 25 as amended. The 1st Defendant attempted an explanation for the discrepancy:

> *'J: How many acres of land you lease for mining*
>
> *A: Is about 80 acres and twenty sold. Is about 35 acres I lease*
>
> *J: How the lease says 100 acres and you say 35 acre*
>
> *A: Don't know. The new highways they bought out 30 odd acres. So is about 80 acres. I don't know"*

All witnesses said, and even amended their witness statements to say,35 acres were in fact mined. Neither party sought to have the expert re-assess his conclusion based on the reduced acreage. It therefore places the court in a dilemma particularly as it relates to assessing damages. What is clear, nevertheless, is that in entering a lease which stated 100 acres, on those terms, the 1st Defendant was in breach of his duty of care as a director.

[25] The general principle is that a director of a company with interest in a proposed agreement or transaction, whether directly or indirectly, must declare the nature and extent of that interest to the other directors. If he acquires a benefit which came to his notice as a result of his fiduciary position, or through an opportunity resulting from that position, the general equitable rule is that applicable to agents. He is to be treated as having acquired the benefit on behalf of his principal. The benefit is therefore owned by the principal who has a proprietary as well as personal remedy against the agent. This is to prevent self-dealing and, to ensure that, persons in a fiduciary position act solely and primarily in the best interest of the principal. Failure to adhere to the principle means that the director is obliged to account to the company for any profit thereby made. He will be treated as having acquired the profit on behalf of the company see the ***FHR European Ventures*** **LLP** case (cited at paragraph 11 above).

[26] In ***Boardman and Another Appellants and Phipps Respondent [on appeal from Phipps v Boardman] [1967] 2 A.C. 46****,* the court found that the defendants were liable to account for the profits. It was decided that liability in a fiduciary relationship does not depend on fraud or an absence of bona fides. A person in a position of trust owes a strict duty. The defendants in that case had to account for the profits made, notwithstanding their good intentions, because they had not obtained the informed consent of the beneficiaries of the trust. In coming to their decision the majority (Lords Cohen, Hodson and Guest) applied **Regal (Hastings) Limited v Gulliver and others [1942] 1 Aller 378.** In that case Lord Russell of Killowen stated at page 386 :

> *"My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."*

[27] Other remedies, available to the Claimants, can be found in the Companies Act.

Section 213 A (3) states:

> *"(3) The Court may, in connection with an application under this section make any interim or final order it thinks fit, including an order-*
>
> *(a) restraining the conduct complained of;*
>
> *(b) appointing a receiver or receiver-manager; (c) to regulate a company's affairs by amending its articles or by-laws, or creating or amending a unanimous shareholder agreement;*

(d) directing an issue or exchange of shares or debentures;

(e) appointing directors in place of, or in addition to, all or any of the directors then in office;

(f) directing a company, subject to subsection (4), or any other person to purchase the shares or debentures of a holder thereof;

(g) directing a company, subject to subsection (4), or any other person to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures;

(h) varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract;

(i) requiring a company, within the time specified by the Court, to produce to the Court or an interested person, financial statements or an accounting in such forms as the Court may determine;

(j) compensating an aggrieved person;

(k) directing rectification of the registers or other records of the company;

(I) liquidating and dissolving the company;

(m) directing an investigation to be made; or

(n) requiring the trial of any issue."

[28] It is therefore unnecessary for me, in this case, to find either fraud or dishonesty. Indeed, having seen and heard the 1st Defendant give evidence; I do not think he was motivated by an intention to steal. He acted with a misplaced sense of entitlement. He had run the 3rd Claimant throughout the years almost singlehandedly in both good times and bad. The bad times seem to have outnumbered the good. The mining lease was, it seems, his opportunity to recoup for his efforts over the years. He was wrong to think so. In acting as he

did he failed in his duty to the 3rd Claimant of which he was the managing director. The 1st Defendant made a secret profit, from the opportunity presented and knowledge obtained, in his capacity as a fiduciary being a director and shareholder of the 3rd Claimant. The 2nd Defendant was a knowing participant in this breach of duty. The 1st and 2nd Claimants, either as shareholders and/or directors, have *locus standi*. By entering into the lease agreement(s) with his son on such advantageous terms, the 1st Defendant operated the affairs of the 3rd Claimant and used his power as director in a manner which was unfairly prejudicial to the other shareholders and directors. Relief pursuant to section 213A is permissible.

[29] The Claimants are therefore entitled in equity, as well as pursuant to sections 193(8) and 213A(3)(h) of the Companies Act , to have the lease agreements set aside and removed from the certificate of title to the property. The 3rd Claimant is entitled to an account of profits or damages for loss suffered due to the Defendants' conduct. I therefore order that the lease agreements be set aside and declared null void and of no legal effect. The Registrar of Titles is permitted to remove the lease dated 31st day of December, 2015 and registered on the 3rd day of October, 2017 from the relevant Certificate of Title. Having seen and heard the 1st Defendant give evidence, I believe, an order for him to account will be an act of futility. The Defendants shall therefore pay compensation, to the 3rd Claimant, in the form of damages as a result of the entry into the lease. I shall also grant an injunction restraining the 1st and 2nd Defendants whether by themselves, their servants and/or agents or otherwise howsoever from any mining, reclaiming or other activity in relation to the said land.

[30] As regards the alleged wrongful sale or mortgage of the 3rd Claimant's land, the evidence in support of which is at paragraphs 15 and19-23 of the witness statement of Jenifer Plummer Barrett filed on the 17th December 2019, I find no evidence of wrong doing. There was no evidence that the transactions were at an undervalue or otherwise prejudicial .The question appears to be whether the proceeds were used for the benefit of the 3rd Claimant. This can only be

determined by an examination of the relevant books and accounts. The Claimants are now in control of the 3rd Claimant. They also have in their favour an order of the court providing for such an examination. This notwithstanding no evidence was placed before me to suggest any irregularity. I therefore make no order in relation to the land sold or mortgages granted.

[31] I will not be making an order directing the 1st Defendant to deliver up accounting records. An order directing this to be done was already made on the 18th day of July, 2017, by the Honourable Miss Justice Yvonne Brown and still stands. This order was never complied with by the 1st Defendant. The Claimants have not taken steps to enforce it. Similarly, I agree with the Defendants' counsel that the order, sought by the Claimants for the appointment of a new managing director, is now moot. I will not be making an order regarding same either.

[32] On the question of damages, counsel for the Claimants presented to the court three options for its assessment. Option one was for the court to order that the money received by the Defendants from the sale of minerals must be paid to the 3rd Claimant. Option two was for the court to assess damages based on the 3rd Claimant's lost opportunity to lease its lands for optimal rates. The final method suggested, for the calculation of damages, was an award based on the royalty the 3rd Claimant might have earned by mining the land itself. For reasons outlined, at paragraph 24 above and 33 below, there is insufficient evidence available for me to apply any of these approaches to the assessment of damages. I will instead use the evidence of Blastec in the only way it can be helpful.

[33] The expert report, premised as it is on 100 acres of land, is not a reliable guide to the true rental available in the market. It is unsafe to assume that the per acre rate applicable to 100 acres is the same appropriate for 35 acres. Similarly the report does not assist in the determination of profits earned or to be earned on the 35 acres actually granted to the 2nd Defendant. The report also makes no provision for the cost of inputs necessary to generate the income. The Blastec

report does however indicate the price per ton of material. It also indicates the amount of material already removed as at December 2017 (paragraph 4.1 page 8 of report exhibit 6(b). At page 13 of his report the expert makes an adjustment for material previously extracted. He calculates that 20,361.6 tons of sand and 15,998.4 tons of shingle were removed .He valued the sand at $1200 per ton and the shingle at $500 per ton .He therefore concluded that the total value of aggregate removed was $24,433,920 (sand) plus $7,999,200 (shingle), totalling $32,433,120.00. It is that sum, on the evidence provided, which will put the 3rd Claimant in the position it would have been in had the mining lease not been granted. The 1st Defendant, as we have seen, says the rental earned went to pay his remuneration. This was not approved by the board or supported by any documentation. There is no documentary evidence that rent was ever paid. It will therefore be disregarded for the purposes of my award. There is no counterclaim by the 1st Defendant for remuneration or directors fees or other compensation .It does not therefore arise for my consideration.

[34] Counsel for the Defendants, in his closing written and oral submissions, endeavoured to discredit the expert report and its conclusions. He wished, among other things, to contend that: (a) the report did not give a precise date of the field visits (b) the time periods noted were “bizarre” (c) the expert ought not to have relied on the surveyor’s report of GK Rose (d) the report was not addressed to the court (e) the report did not give details of the instructions received or underlying facts (f) the report had no summary (g) there was no evidence pursuant to the Evidence Act that the computer used to do the calculations was working properly. These and other criticisms I refused to entertain at that stage of the proceedings.

[35] This court has repeatedly stated that trial by ambush is discouraged. Fairness dictates that a party ought not to be lulled into a false sense of security by the other party, agreeing to a report being put in evidence and then, taking points which run counter to that agreement. Pre-trial hearings are designed to allow for ventilation of such issues. Parties may object to reports for many reasons

including a want of form or credibility. If there are issues with the expert's qualifications, techniques or methods a party has several options. He may refuse to consent to the report going into evidence. He may apply to be permitted to call an expert of his choosing. He may, prior to trial, interrogate the expert. He may even agree the report on condition that the expert is made available to be cross-examined. What he ought not to do is allow the other party to build his case on a report he thinks is agreed when in fact it is not. There is another reason to preclude the Defendants' intended line of attack on the report. It would be unfair to the expert. He, not having been called as a witness, was not given an opportunity to answer the concerns. It is his professional reputation which is at stake. A party who wants to challenge his methods, techniques or conclusions cannot do so without giving the expert an opportunity to defend them. The Defendants posed no questions to the expert nor did they seek to have him cross-examined. This court will not countenance such unfair conduct.

[36] This is not to say that a party who agrees to a report going into evidence, without the need to call the expert, cannot invite a court to reject the expert's opinion. The expert evidence, as with all other evidence, is subjected to the scrutiny of the tribunal making findings of fact. So for example the court may be invited to reject an expert accident re-constructionist's opinion, as to the speed of a car, in preference to the evidence of the driver of the said car .It is always in the final analysis for the trial judge or jury, even in the face of an expert report tendered by consent, to say whether and how much of that evidence they accept .Inviting a court to reject evidence, because of irrelevance or inconsistency with other evidence, is permissible. Parties should not however agree reports with conflicting conclusions unless it is intended to call the respective experts. Parties should not agree an expert report, and thereafter challenge that expert's competence or findings, without affording him an opportunity to respond. Finally it ought to be a rare case indeed in which the unchallenged opinion, stated in an agreed expert report, is rejected.

[37] The Blastec report exhibit 6(b) was admitted in evidence by and with the consent of the parties. There was no cross-examination of the expert. There is no evidence, expert or otherwise, to challenge his most important findings .Damages, payable by the Defendants, will be assessed based on the value, stated in the report, of material removed. The 3rd Claimant, in so far as money can do so, is to be put in the position it would have been in had the mining lease not been granted. The value of material removed is to be returned. On the evidence that is $32,433,120. I am well aware that the expert considered material removed as at December 2017. There is no evidence as to whether and how much has been removed since that date. Blastec was not asked to provide an updated report. I am also aware of the possibility of an order for an investigation in that regard (Companies Act section 213A(m). I do not think it is in the best interest of the company to make such an order. Having seen and heard the parties giving evidence it is apparent that mutual love and respect continues to exist. This should be encouraged if the 3rd Claimant is to be profitably operated in future. Extending this litigation, by ordering such an investigation, will not assist that process. It is time, I think, for this litigation to end.

[38] My decision is therefore as follows:

1) Judgment for the 3rd Claimant against the 1st and 2nd Defendants in the amount of $32,433,120.

2) The lease agreements dated 31st December, 2015 are set aside being null void and of no legal effect and the Registrar of Titles is permitted to remove the said lease from the Certificate of Title registered at Volume 1467 Folio 152 of the Register Book of Titles.

3) The Defendants are restrained whether by themselves, their servants or agents or otherwise howsoever from mining, reclaiming or otherwise acting in relation to or upon all that parcel of land at Denbigh Clarendon and

registered at Volume 1467 Folio 152 of the Register Book of Titles.

4) Costs to the 1st 2nd and 3rd Claimants against the 1st and 2nd Defendants to be taxed if not agreed.

David Batts
Puisne Judge