

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCv2022/0132

BETWEEN:

JOHNATHAN JOHANNES

Claimant

and

1st NATIONAL BANK ST. LUCIA LIMITED

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Cheryl Goddard-Dorville with Mr. Kareem Alleyne for the Claimant

Mrs. Diana Thomas Hunte with Ms. Cleopatra Mc Donald for the Defendant

2025: June 18;	(Trial)
September 17, 26;	(Trial)
November 26, 27;	(Closing Submissions)
2026: April 2.	(Decision)

Constructive Dismissal – Breach of Contract of Employment – Whether contract test or unreasonableness test be applied – Breach of Implied Duty of Trust and Confidence – The “last straw” Doctrine – Doctrine of Mutuality – Breach of Fiduciary Duty – Conflict of Interest – Duty to Disclose – Account of Secret Profits – Equitable Set-off

JUDGMENT

Introduction

[1] **CENAC-PHULGENCE J.:** The claimant, Mr. Johnathan Johannes (“Mr. Johannes”), was employed by the defendant, 1st National Bank St. Lucia Limited (“the Bank”), as its Managing Director for a fixed term of five (5) years commencing 1st June 2017 (“the contract of employment”). By claim form filed on 21st March 2022, Mr.

Johannes claims damages against the Bank for breach of his contract of employment, as a result of which he says he suffered loss and damage.

- [2] Mr. Johannes alleges that the Bank, acting through the Chairman of its Board of Directors (“the Chairman”/ “Mr. Fulgence”) and the Board of Directors (“the Board”), breached the implied term of mutual trust and confidence contained in the contract of employment. In particular, he contends that the Chairman on several occasions subjected him to severe and unjustified reprimands and made unfounded allegations impugning his leadership and competence.
- [3] Mr. Johannes further pleads that the “last straw” in a series of events demonstrating that the Chairman and the Board no longer intended to be bound by the contract of employment was the Chairman’s direction that he proceed on seventy-one (71) days’ vacation leave on seven (7) days’ notice. He says that this was a unilateral act, contrary to a prior arrangement governing the management of his vacation leave in light of the exigencies of his office, and unsupported by any express or implied term of the contract.
- [4] Mr. Johannes therefore contends that he was constructively dismissed on 19th October 2025 and claims his salary and benefits for the unexpired term of his contract of employment.
- [5] The Bank denies that the Chairman levied severe and unjustified reprimands against Mr. Johannes, and insofar as any expression of reproof, disapproval or criticism of the actions or conduct of Mr. Johannes by the Chairman or the Board may amount to a reprimand, it contends that such expression was justified. The Bank further states that the Chairman did not reprimand Mr. Johannes even in circumstances where reprimand was warranted. It maintains that the mutual duty of trust and confidence was damaged solely by Mr. Johannes’ conduct.
- [6] The Bank counterclaims that Mr. Johannes acted in breach of the contract of employment and/or his fiduciary duties. It contends that, in his capacity as Managing Director, Mr. Johannes was responsible for advising the Board on the strategic

direction of the Bank, including its proposed expansion into Soufriere. The Bank alleges that, in the course of his employment, Mr. Johannes became aware that Parcel No. 0031C 472 ("the Soufriere Property") was available for purchase and, instead of acting in the best interests of the Bank, diverted that opportunity to himself by acquiring the Soufriere Property through J.P. Ventures Limited, concealing the extent of his involvement, and thereafter seeking to lease the property to the Bank without full disclosure.

[7] On that basis, the Bank seeks an account of any secret profits made by Mr. Johannes and an order that he pay to the Bank any sums found due on taking of the account. The Bank further claims the right to set-off any sum found due to Mr. Johannes on the claim against any sum found due to it on the counterclaim.

[8] Mr. Johannes denies that he became aware of the availability of the property by virtue of his position as Managing Director of the Bank. He maintains that he did not conceal his involvement and that he disclosed the matter first to the Chairman and thereafter to the Board. He further asserts that the Bank had no settled intention to purchase that particular property, such that no conflict arose or alternatively, that any conflict was sufficiently disclosed and accepted.

Issues

[9] Having considered the pleadings and the evidence before it, the Court determines that the following issues arise for determination:

1. Whether the claimant was constructively dismissed?
2. Whether the claimant was in breach of his contract of employment and/or fiduciary duty?
3. Whether the doctrine of mutuality prevents the claimant from founding a claim of constructive dismissal?
4. Whether the claimant is entitled to the salary and benefits for the unexpired term of his contract of employment?
5. Whether the claimant is liable to account for all secret profits he made in the acquisition and/or sale of the Soufriere Property?

6. Whether any sum found due to the claimant on the claim should be set-off against any sum found due to the defendant on the counterclaim?

Issue 1: Whether the claimant was constructively dismissed?

The Applicable Law

- [10] Constructive dismissal of an employee is governed by section 132 of the **Labour Act**.¹ It provides as follows:

“132. Constructive dismissal

- (1) An employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled by any statutory provision or contractual term on grounds of constructive dismissal where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship.
- (2) Where the contract of employment is terminated by the employee under subsection (1), the employee shall be deemed to have been unfairly dismissed by the employer and shall be entitled to compensation in accordance with this Act.”

- [11] Counsel for Mr. Johannes has submitted that this section creates an independent statutory basis for constructive dismissal that focuses on whether the employer's conduct has made it objectively unreasonable for the employee to remain in the relationship, separate and apart from the common-law doctrine of constructive dismissal which focuses on identifying a repudiatory breach. Counsel further submits that the Court is required to evaluate whether, on the evidence, the Bank's behaviour satisfied the statutory threshold irrespective of, and in addition to, the stricter common-law test. In effect, Counsel invited the Court to treat section 132 of the **Labour Act** as establishing a broader and self-standing statutory test divorced from the contractual principles governing constructive dismissal.

- [12] I am unable to accept that that is an accurate reflection of the law. It is precisely that misconception which the authorities have sought to dispel.

¹ Cap. 16.04 of the Revised Laws of Saint Lucia, 2020.

[13] The starting point is the well-known case of **Western Excavating (E.C.C.) v Sharp**² where Lord Denning identified two rival tests in relation to the construction of the relevant statutory provision on constructive dismissal; the contract test and the unreasonableness test.

[14] His Lordship set out the contract test as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."³

[15] He then compared it to the unreasonableness test in this way:

"On the other hand, it is said that the words of Sch 1, paragraph 5(2)(c) do not express any settled legal concept. They introduce a new concept into contracts of employment. It is that the employer must act reasonably in his treatment of his employees. If he conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, the employee is justified in leaving. He can go, with or without giving notice, and claim compensation for unfair dismissal."⁴

[16] His Lordship concluded that the contract test is the correct test for constructive dismissal.⁵ He reasoned, among other things, that the statutory language itself points to a legal, contractual inquiry, particularly through the use of terms such as "entitled" and "without notice", which import established contractual principles.⁶ In his Lordship's view, a mere test of "unreasonableness" gives no proper effect to the

² [1978] QB 761.

³ *ibid* at p 769.

⁴ *ibid* at pp769-770.

⁵ *ibid* at p 770.

⁶ *ibid*.

words “without notice”, since those words impose a legal threshold which no test of unreasonableness can adequately capture.⁷ He further observed that Parliament had drawn a distinction between the provisions dealing with dismissal and those dealing with unfairness, and it could not lightly be assumed that the same test was intended to govern both where separate statutory language had been used.⁸

[17] In **Aberdeen City Council v McNeill**,⁹ the Court recognised that **Western Excavating** is properly understood as authority for the proposition that constructive dismissal is governed by the general law of contract.¹⁰ It followed, in the court’s view, that the parties’ rights under section 95(1)(c) of the Employment Rights Act 1996, which governed constructive dismissal, fell to be determined according to the proper law of the contract of employment.¹¹

[18] In my opinion, the same reasoning applies with equal force to section 132 of the **Labour Act**. Although subsection (1) states that constructive dismissal arises where the employer’s conduct has made it unreasonable to expect the employee to continue the employment relationship, that language must still be read in light of the employee’s entitlement to terminate the contract “without notice or with less notice than that to which the employer is entitled”. Those words import a legal and contractual inquiry. They direct the court, not to some free-standing or purely subjective test of unreasonableness, but to the question whether the employer’s conduct was such as in law to entitle the employee to treat the contract as at an end. Section 132 therefore does not displace the common law contract test; rather, it adopts and applies it in statutory form.

[19] In the employment context, one of the principal contractual terms capable of founding constructive dismissal is the implied term of mutual trust and confidence. As explained in **Malik v Bank of Credit and Commerce International SA**,¹² that

⁷ *ibid* at p 771.

⁸ *ibid* at pp 770-771.

⁹ 2014 SC 335.

¹⁰ *ibid* at para [16].

¹¹ *ibid*.

¹² [1997] 3 All ER 1.

term is implied by law into all contracts of employment and requires that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.¹³ It is to be noted that the term imposes reciprocal duties on the employer and employee.¹⁴

- [20] The test of whether there has been a breach of the implied term of trust and confidence is objective.¹⁵ Lord Nicholls in the case of **Malik** put it this way: “The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances.”¹⁶
- [21] Properly understood, the implied term of trust and confidence is therefore not concerned with every instance of managerial criticism, every disagreement, or every robust exchange within the workplace. Employers are entitled to supervise, criticise, question, and manage employees, particularly those in senior office. The law intervenes only where, absent reasonable and proper cause, the employer’s conduct is of such a nature and gravity as to destroy or seriously damage the relationship of trust and confidence. The court must therefore examine not simply what was said or done, but the context in which it occurred, whether there was proper cause for it, and whether, viewed objectively, it crossed the contractual threshold.
- [22] **McNeill** is helpful in clarifying the structure of that inquiry. The court there approved an approach which asks; first, what was the conduct complained of; secondly, whether the employer had reasonable and proper cause for that conduct; and

¹³ See n.13 at p15.

¹⁴ *ibid.*

¹⁵ *Omilaju v Waltham Forest London Borough Council* [2005] 1 All ER 75 at para [14].

¹⁶ See n.13 at p 5.

thirdly, if not, whether the conduct was calculated or likely to destroy or seriously damage the relationship of trust and confidence.¹⁷

[23] It is also clear from the authorities that the court may consider the cumulative effect of conduct; see **Lewis v Motorworld Garages Ltd**¹⁸. In that judgment, Glidewell LJ explained the “last straw” principle as follows:

“(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v. W. M. Car Services (Peterborough) Ltd.* [1981] I.C.R. 666.) This is the “last straw” situation.”¹⁹

[24] However, where earlier acts amounting to breach have been affirmed, the employee cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so.²⁰

[25] Thus, a constructive dismissal may arise from a single repudiatory act, but equally it may arise from a series of acts which, taken together, demonstrate a sustained breach of the implied term of trust and confidence. In such cases, the court is entitled to evaluate the employer’s conduct as a whole and to determine whether the final act relied upon was properly regarded as the last in a sequence of conduct amounting to a repudiatory breach. In that sense, the “last straw” doctrine is not a separate cause of action, but a means by which the court assesses cumulative conduct in its full context.

¹⁷ See n.9 at para [38].

¹⁸ [1986] ICR 157.

¹⁹ *ibid* at p169.

²⁰ See n.16 at para [21].

[26] Further, **Western Excavating** makes clear that an employee who seeks to rely on constructive dismissal must not delay unduly in electing to treat the contract as at an end.²¹

[27] However, Browne-Wilkinson J in **W.E. Cox Toner (International) Ltd v Crook**²² explained that this was not, and was not intended to be, a comprehensive statement of the whole law.²³ In that case, the court reiterated that it is not the delay which may be fatal but what happens during the period of the delay and once the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job.²⁴ His Lordship observed as follows:

“Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: *Allen v. Robles* [1969] 1 W.L.R. 1193.... However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: *Farnworth Finance Facilities Ltd. v. Attryde* [1970] 1 W.L.R. 1053.”²⁵

[28] Therefore, the authorities recognise the practical reality that an employee may continue for a time in the hope that matters will improve, that procedures will be regularised, or that the employer will restore the relationship. Delay must therefore be evaluated contextually.

[29] Finally, the employee must resign in response to the breach and not for an unrelated reason, otherwise the claim for constructive dismissal fails. The court in **Jones v F Sirl & Son (Furnishers) Ltd**²⁶ held that the correct question to be asked is whether

²¹ At p 769.

²² [1981] IRLR 443.

²³ *ibid* at para [14].

²⁴ *ibid* at paras [14] and [15].

²⁵ *ibid* at para [13].

²⁶ [1997] IRLR 493.

the breach was the effective cause of the resignation.²⁷ The court acknowledged that it is important to appreciate that in today's labour market, there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of his contract of employment entitling him to put an end to it.²⁸ Therefore, the industrial tribunal was required to find out what the effective cause of the resignation was, depending on the individual circumstances of any given case.²⁹ It was therefore incorrect for the industrial tribunal to take the view that simply because the appellant's departure had been 'prompted by the offer of alternative employment' it therefore followed that she had not left in consequence of the fundamental breaches of contract.³⁰

- [30] It is against those principles that the facts of the present case must be examined. The Court must consider each matter individually and cumulatively and then determine whether the threshold for constructive dismissal under section 132 of the **Labour Act** has been met. In order for Mr. Johannes to succeed on this issue he must establish firstly, that the Bank, by one or more acts or by a course of conduct, committed a fundamental or repudiatory breach of the contract of employment, including the implied term of mutual trust and confidence; secondly, that he resigned in response to that breach; and thirdly, that he did not affirm the contract before resigning. If those elements are established, his resignation is treated in law as a constructive dismissal.

Discussion and Analysis

The ECCB Onsite Report

- [31] The ECCB Onsite Report refers to a regulatory report which highlighted specific deficiencies and areas of concern which the Eastern Caribbean Central Bank ("ECCB") required the Bank to urgently address. Mr. Johannes claims that at a Board meeting of 29th August 2019, the Chairman indicated that he had requested

²⁷ *ibid* at paras [11] and [12].

²⁸ *ibid* at para [10].

²⁹ *ibid*.

³⁰ *ibid* at para [12].

the report and that it had not been submitted, and that directors present either supported that assertion or said they could not recall.

[32] In his witness statement, Mr. Johannes exhibited evidence that he referred the report to the Chairman who then disseminated it to each Director of the Board by letters dated 29th August 2017, and the Directors acknowledged receipt thereof in September 2017. He says that, notwithstanding this, and despite his efforts to explain that an ECCB tracker had been before the Board throughout and that the report had in fact been circulated, the attacks continued, including accusations that he was “making excuses and lying to the Board,” that his poor leadership was the cause of the Board not having the document, and that he was misleading the Board.

[33] I accept that Mr. Johannes’ cross-examination contradicted aspects of his written account. In particular, he stated that the Chairman did not ask for a copy of the report at the meeting, as was stated in his witness statement, but rather that he had never received it. I also bear in mind that Mr. Johannes accepted that the minutes did not reflect any accusations of lying, misleading and poor management. Those matters somewhat weaken the extent to which the Court can treat the gravest version of this incident as reflected in contemporaneous documentation. At the same time, Mr. Johannes’ exhibits do materially support his central complaint that the report had in fact been circulated previously.

[34] Counsel for the Bank submitted that there was nothing unreasonable in the Chairman requesting the ECCB onsite report again, even if it had already been received two years earlier. However, that submission does not fully reflect the Chairman’s evidence under cross-examination. There, the Chairman departed from the apparent premise of the incident and sought to explain that the report in question was not the 2017 ECCB onsite report at all, but an earlier report predating the Claimant’s appointment:

“Q. The misrepresentation that the ECCB Central Bank report was not provided by the Managing Director to the Directors of the Board was another attempt to hamper him in his role as Managing Director?

A. I’ll **share something which I never shared.**

Q. Was it an attempt to hamper him?

A. No. That information is not correct. The letters written to the directors and by the Managing Director to his subordinate staff was a new measure.

The report we were asking Mr. Johannes was not what he referred to.

The report was for the previous audited statement. Up to this day we are still battling with all those reports.

Q. **Did the members of the Board receive the contents of the report of examination from the ECCB?**

A. **We did. The report we were asking about was not that report. The report we were referring to was even before Mr. J came into the Bank**

Q. That other report you refer to when was it communicated to Mr. Johannes that this report was required?

A. I cannot recall that now.” (Emphasis mine)

[35] That shift in explanation materially undermines the certainty of the Bank’s case on this issue and lends support to Mr. Johannes’ complaint that the criticisms directed at him were unfounded.

[36] In my view, this incident forms part of the background of tension and mistrust, but it did not by itself amount to a repudiatory breach by the Bank. Further, even if the criticism made here was unfair or humiliating, Mr. Johannes remained in employment for approximately two years thereafter. I therefore find that this incident was affirmed and cannot independently found the claim, though it may be considered cumulatively.

Project Footprint

[37] Project Footprint was the Bank’s codename for a project in which a consortium of banks in the Eastern Caribbean Currency Union (“ECCU”) came together to purchase the RBC and RBTT business which was being divested throughout the ECCU.

[38] Mr. Johannes claims that the Chairman and Board made spurious allegations which called into question his integrity and leadership in relation to the RBC acquisition, in which he had acted as consortium lead. He says such matters were not properly raised with him or fairly addressed.

- [39] The Bank's case is that Mr. Johannes was charged with authority to negotiate and implement the acquisition of the RBC business in Saint Lucia, Saint Vincent and the Grenadines, and Grenada, within parameters set by the Board. One such parameter, the Chairman says, was the Board's decision at the meeting of 28th May 2019 to acquire the RBC business in Saint Lucia, Saint Vincent and the Grenadines and Grenada, noting that Grenada was the most profitable portfolio, and that Mr. Johannes was specifically instructed to ensure its acquisition. The Bank contends that Mr. Johannes agreed for another member of the consortium to acquire the Grenada portfolio and that this was a significant deviation from instructions.
- [40] Mr. Johannes denies that he exceeded any mandate or acted without authority. He says he acted with the Board's knowledge and within the proper parameters of the transaction. His position is that the Bank was not in a position to have acquired Grenada due to the capital requirements and ECCB approvals, and therefore the criticism levelled later was unfair.
- [41] During cross-examination, the Chairman was unable to identify a clear written directive beyond the general Board minute which had no reference to Grenada, and which stated:
- "Decision
5.4 The Board approved the acquisition of the Vincentian and Grenadian businesses on a motion by Director..., seconded by. Additionally the disaggregation of the business would pose some challenges. The final complicated phase of the transaction would be the migration of customers to the Bank's system. He noted that Project Synergy was easier than Project Footprint."
- [42] His case under cross examination ultimately reduced to the complaint that Mr. Johannes ought to have reverted to the Board once challenges emerged. He stated that they had every confidence in Mr. Johannes and it was likely they would have agreed with his decision. Mr. Johannes accepted that he did not take the decision to the Board.

[43] Further, the Chairman accepted that Mr. Johannes was not reprimanded, nor otherwise signalled to at the material time that he had overstepped the limits of his authority in relation to Project Footprint. The explanation offered was that, had such action been taken, Mr. Johannes might have resigned, and the transaction would not have gone through.

[44] In my opinion, this incident does not amount to repudiatory conduct by the employer. At its highest, this incident reveals a significant disagreement over how a major strategic transaction was implemented and whether Mr. Johannes should have returned for further instructions. Mr. Johannes did not resign in response to this event and remained in office. However, the evidence is significant because it tends to show that, whatever concerns the Board may later have expressed, they were not treated contemporaneously as misconduct warranting reprimand or corrective action. Rather, it suggests that any criticism now advanced is to a significant degree retrospective.

Project Synergy

[45] Project Synergy was the Bank's codename for a proposal to acquire shares in a co-operative bank in St. Vincent and the Grenadines. Mr. Johannes' pleaded case treats criticisms about Project Synergy as further examples of baseless attacks on his leadership and integrity.

[46] The Bank's defence pleads that, at a meeting in Saint Vincent, Mr. Johannes gave a presentation contrary to the Bank's By-Laws, indicating a different voting principle and a greater degree of authority conferred on the Managing Director than the Board had approved. The Chairman says disciplinary action was recommended but that he instead chose to have a conversation with Mr. Johannes and give an oral admonition.

[47] In reply, Mr. Johannes denies wrongdoing and says the presentation reflected the structure then under discussion and had been circulated in advance. He maintains that he acted within the knowledge of the Chairman and other relevant persons.

[48] In my opinion, this incident is properly to be treated in the same way as Project Footprint. At most, it discloses a disagreement as to whether Mr. Johannes had gone beyond what the Board had approved; it does not amount to repudiatory conduct by the employer. It may, however, be considered as part of the cumulative history between the parties. As in the case of Project Footprint, the absence of any formal contemporaneous reprimand or corrective action similarly suggests that the criticism now advanced is, to an extent, retrospective.

The Meeting with the National Workers Union

[49] Mr. Johannes claims that by email dated 16th June 2021, copied to two other Directors of the Board, the Chairman accused him of being calculative and not providing the level of leadership required as Managing Director in his dealings with the National Workers Union (“NWU”).

[50] The Bank’s position is that the Chairman was justified in describing Mr. Johannes’ conduct as “calculative”. Its pleaded case is that Mr. Johannes had effectively conveyed to the NWU that the Chairman could not be located for a meeting with the NWU, although he was in fact on island and reachable, and that such conduct had the effect, or was capable of having the effect, of scapegoating the Chairman in the context of a sensitive labour issue. The Chairman maintained in his evidence that he had not received any email or telephone call regarding the proposed meeting.

[51] Mr. Johannes’ evidence is that there was no industrial action at the time, and that in June 2021, he requested a meeting with the NWU to discuss two prior instances of industrial action by staff of the Bank and in response, the NWU requested the presence of the Chairman. In his witness statement, Mr. Johannes states that an email was sent to the Chairman with the details of the meeting and he realised on

the day for which the meeting was scheduled that neither himself, nor the Executive Manager-HR, received any confirmation from the Chairman and in those circumstances, he took the view that it was too late to contact the Chairman and therefore gave directions to reschedule the meeting.

[52] The email rescheduling the meeting was sent to the NWU by the Executive Manager-HR which stated that "...We have since through Managing Director, sought the availability of the Chairman, but we have to date been unable to receive a response from him." The Chairman was made aware of this email by the NWU. It is against this backdrop that he proceeded to send the said email to Mr. Johannes, making the allegations mentioned above and asking "what are your plans for me as Chairman." Mr. Johannes' case is that this was a clear example of the Chairman blaming him and highlighting his shortcomings notwithstanding that efforts had been made to secure the Chairman's attendance and that no response had been received.

[53] There are, however, two material inconsistencies in Mr. Johannes' evidence on this issue which are noteworthy. Firstly, his email of 16th June 2021, in response to the Chairman's email stated that: "I would have advised of this via email last week...I will be the first to admit after hitting send ...". This contemporaneous document clearly indicates that Mr. Johannes was indicating that he was the one who sent the email, contrary to his witness statement which states that it was the Executive Manager – HR who was tasked with sending the email, as well as his evidence in cross-examination where, when pressed, he accepted that he did not know of his own knowledge whether an email had in fact been sent to the Chairman:

"Q. You said that you asked Ex Manager-HR to coordinate the Chairman's presence at the meeting with the NWU?

A. To coordinate the full meeting and by extension the Chairman's attendance

Q. I am suggesting that no email was sent to the Chairman.

A. I suppose that you are wrong. An email was sent.

Q. And you have not provided a copy of that email?

A. I did not have it. **I did not send the email.**

Q. And that email was copied to you?

A. No. But the meeting was coordinated and I did not get the email for that.

Q. You do not know if an email was sent to the Chairman then?

A. **According to what I was told** by the Ex Manager HR, an email was sent to the Chair and (another) to organise the meeting and request his presence.

Q. But that is hearsay, you do not know if an email was sent.

A. Fair enough. **I don't know that an email was sent. That is what I was told.**" (Emphasis mine)

[54] The second inconsistency concerns the timing of the decision to reschedule the meeting and Mr. Johannes' justification for rescheduling instead of contacting the Chairman. The email exchange between Mr. Johannes and the Chairman occurred on 16th June 2021 and the meeting with the NWU was scheduled for 17th June 2021. Indeed, in his email of 16th June 2021, Mr. Johannes stated: "**Earlier today** during a catch-up call with ..., she made mention of our meeting for tomorrow and asked whether we received confirmation from the Chairman." (Emphasis mine) These contemporaneous documents are inconsistent with the suggestion in Mr. Johannes' witness statement and cross-examination that it was on the morning of the meeting itself that he concluded it was too late to contact the Chairman: The relevant part of the cross-examination is as follows:

"Q. You asked her to re-schedule with NWU?

A. Yes.

Q. Was that done by email or conversation?

A. Conversation, re-schedule because **there is no way I'm making a call at 10:00 a.m. for a meeting that's happening at 11 a.m.**" (Emphasis mine)

[55] These inconsistencies materially weaken Mr. Johannes' ability to say that the Chairman's criticism was wholly baseless. Notwithstanding, the Court must still determine whether there was reasonable and proper cause for the Chairman's conduct and, if not, whether it was conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence.

[56] The evidence suggests that something had plainly gone wrong in the communication process. Yet no meaningful inquiry appears to have been made of the person who sent the email or of Mr. Johannes before the Chairman proceeded to send an email accusing Mr. Johannes of being calculative and failing to

demonstrate the level of leadership required of a Managing Director. This is especially notable given the Chairman's evidence elsewhere that his preference, when issues arose with Mr. Johannes, was to discuss matters rather than immediately resort to written criticism. Therefore, it is reasonable to assume that this incident was calculated or likely to destroy or seriously damage the relationship of trust and confidence.

[57] That conclusion is reinforced by Mr. Johannes' own contemporaneous response to the Chairman, in which he wrote: "I am tempted to use the expression 'trust me when I say' but will refrain as it appears from your note below it appears that we have some issues of mistrust...". That statement, made at the time of the incident, is telling. It demonstrates that Mr. Johannes himself understood the Chairman's email as revealing a serious breakdown in trust.

[58] I therefore find that this incident did cross the contractual threshold and amounted to conduct capable of seriously damaging the relationship of trust and confidence. However, Mr. Johannes did not resign in response to it. He continued in employment thereafter and remained in office for several months. In those circumstances, I find that, although this incident was sufficiently serious, Mr. Johannes affirmed the contract in relation to it by continuing in employment. It cannot therefore stand alone as the operative breach founding the claim, but it remains relevant as part of the cumulative history.

Suspension of an Executive Manager

[59] Mr. Johannes' case is that he received instructions from one of the Directors of the Board to suspend a senior employee and appoint an investigator, that he responded by letter explaining why he believed there were insufficient grounds on the material provided to him, and that on the evening of 12th July 2021 the Chairman called him in an aggressive tone and said he must "get this woman out of the business" and that he would have seven (7) days to do so. Mr. Johannes further alleges that upon him indicating that his response remains the same, the Chairman threatened that

“then it appears I will have to find a new MD”, and “if you don’t deal with the directive, I will have to deal with you over time.”

[60] In cross-examining Mr. Johannes, Counsel for the Bank sought to clarify that Mr. Johannes did not, in principle, object to the possibility of suspension, but was instead concerned about exposing himself personally to legal risk.

[61] In my opinion, that clarification does not materially undermine Mr. Johannes’ complaint. The essence of his case is not that he objected to any possible suspension in principle, but that when he raised concerns about sufficiency of information and legal propriety, he was met with aggressive and threatening language. If the threats were made in the terms alleged, this was a serious incident and one plainly capable of undermining trust and confidence. It is significant that the Bank did not, on the materials before the Court, plead or particularise a direct alternative account of that conversation in its defence, and the Chairman’s witness statement did not squarely address or expressly deny those words. In cross-examination of Mr. Johannes, Counsel for the Bank relied on the difference in the words used in Mr. Johannes’ witness statement, namely, “Then it appears I will have to find a new MD” and those used in his reply to the defence, namely, “It seems I will have to find a new MD” in order to put to him that the Chairman never said those statements to him. Mr. Johannes rejected that suggestion and maintained that the substance of the threats had been conveyed.

[62] In those circumstances, I accept Mr. Johannes’ evidence that words to that effect were spoken, and that, viewed objectively, they were capable of seriously damaging the relationship of trust and confidence between the parties. However, Mr. Johannes did not resign at that stage. Instead, he remained in the Bank’s employment, legal advice was sought and obtained in relation to the suspension, as he had requested, and the matter continued. In those circumstances, I find that Mr. Johannes affirmed the Bank’s actions by continuing in its employment. Nevertheless, this incident remains an important component of the cumulative factual matrix.

Discussion of Bank Business on WhatsApp

[63] Mr. Johannes' case is that on 31st August 2021 he received an email copied to certain Directors indicating that bank business associated with directors should not be conducted on social media, which he understood to refer to his recent participation in a WhatsApp group. He treats this as another reprimand evidencing micromanagement and erosion of trust.

[64] The Bank's position is that this was a legitimate governance instruction.

[65] The Chairman's email of 31st August 2021 was framed as "further guidance" on governance, but its substance was disciplinary in nature. It instructed that "the bank business associated with directors should not be conducted on social media"; that Mr. Johannes' first call of contact was the Chairman; and that his immediate supervisor was the Chairman and, by extension, the Board. In context, that tone was capable of reinforcing Mr. Johannes' complaint that the Chairman was increasingly micromanaging his actions as Managing Director. The fact that other Directors were copied also contributes to an erosion of trust.

[66] Even so, I do not consider that this incident, standing alone, crossed the contractual threshold. It was, at its highest, a governance direction expressed in a highly authoritative tone. It therefore does not amount by itself to repudiatory conduct, but it is relevant cumulatively as part of the pattern of erosion of trust relied upon by the Claimant. Its timing is also significant. Coming as it did only a few days after the Chairman's direction that Mr. Johannes proceed on seventy-one (71) days' vacation leave, it carries considerable cumulative weight in assessing the state of the relationship between the parties at that stage.

The direction to take 71 days' vacation leave

[67] Mr. Johannes alleges that by email dated 25th August 2021 the Chairman requested that he take all his outstanding leave before 31st December 2021 without any proper

explanation or justification. At the time, Mr. Johannes had 71 days of accrued vacation leave.

[68] Mr. Johannes argues that there was no express or implied contractual term entitling the Board to compel him to proceed on mandatory leave in that manner; that his outstanding leave had long been managed by exception because of the exigencies of his office and that it had been agreed that his leave would be regularized in 2022. He alleges that the sudden request to take all 71 days before year-end was arbitrary, unilateral, unexplained and calculated to remove him from the Bank at a crucial time. He contends that, in substance, it amounted to a suspension in everything but name. Mr. Johannes' pleaded case is that this direction was the "last straw" in a pattern of conduct which demonstrated that the Board no longer wished to be bound by the contract of employment.

[69] The Bank denies that any agreement had been reached to regularise Mr. Johannes' leave in 2022 and says the direction was justified by the Bank's vacation policy; by a Board Decision of 30th July 2020 regarding accrued leave; by repeated discussions with Mr. Johannes about his excessive leave balance; by the need for succession planning; by the fact that the acquisition stage of Project Footprint had been completed; and by the financial risk posed by allowing Mr. Johannes' leave to continue to accrue close to the expiry of his fixed-term contract.

[70] The Bank further argues that Mr. Johannes had failed to produce a satisfactory leave proposal which provided for longer periods, and that the exception which may once have existed for the managing director no longer applied by 30th April 2021. The Bank admits that there is no express provision in Mr. Johannes' contract for mandatory leave, but denies that there was no power to require him to take leave. It argues that the discretion to send an employee on leave lies with the Bank as employer, whether legislatively, under section 99 of the **Labour Act**, or by convention or custom.

[71] Section 99(4) of the **Labour Act** provides that the employer shall determine the date on which vacation is to commence. However, subsection (4) cannot be read in isolation so as to confer an unqualified unilateral power on the employer. It must be construed alongside subsection (1), which expressly contemplates agreement between employer and employee as to the period or periods of vacation. That statutory context justifies, and indeed requires, the Court to consider the parties' actual agreement and course of dealing in relation to Mr. Johannes' leave, including the acknowledged exemption.

[72] The Court accepts that an exemption was in place in relation to Mr. Johannes when he was employed at the Bank. The Chairman himself accepted in cross-examination that he had gone to the Board to obtain that exemption for Mr. Johannes. It is equally not in dispute that, on 25th August 2021, the Chairman wrote to Mr. Johannes directing that he proceeds on all of his accrued vacation leave before the end of the year. The real issue, therefore, is whether that exemption came to an end, and if so, when. In resolving that question, I place considerable weight on the contemporaneous documents. That approach is consistent with the general principle, urged by the Bank in its closing submissions, that contemporaneous documents are often the safest guide where memory has shifted.³¹

[73] The Bank seeks to rely on a Board Meeting on 30th July 2020 to argue that the exemption in relation to Mr. Johannes had come to an end. However, the minutes for that meeting on this point states generally:

“9. Management Updates

a. Vacation Paper

9.1 With respect to vacation leave entitlement the following was noted.

-2019 vacation leave was extended to 31st August, 2020

-2020 vacation leave was extended to 30st April, 2021

-2021 vacation leave to be taken as stipulated within the policy”.

³¹ See *Onassis v Vergottis* [1968] 1 Lloyd's Rep 403 at 43 as applied by this Court in *Viville v Viville* SLUHMT2015/0178 at para [16].

[74] The minutes did not identify Mr. Johannes specifically by name, did not expressly revoke the exemption previously acknowledged in his favour, and did not state that the special arrangement for the Managing Director was at an end. I do not consider that it can simply be assumed that the July 2020 minutes silently withdrew that exception which had hitherto been afforded to Mr. Johannes.

[75] The Chairman's own cross-examination also reveals its general nature. When pressed as to whether there was in fact any Board meeting at which the decision was taken that Mr. Johannes should proceed on 71 days' vacation leave before the email was sent, he stated as follows:

“Q. When did you and your Board make the actual decision for Mr. Johannes to proceed on leave?

A. I cannot recall.

Q. Was it at a Board meeting?

A. For us to take decisions of the Board it would be at a Board meeting. We cannot take it outside the Board meeting.

Q. Is there a Board meeting where the decision was taken to have Mr. Johannes proceed on 71 days' vacation leave prior to you sending this email?

A. **There will not be a Board meeting specifically to Mr. Johannes.** There would be a Board meeting according to the policies that all staff have to proceed on leave. That's the convention.

Q. Are there any minutes of Board which reflect the decision to send Mr. Johannes on 71 days' vacation leave?

A. What I can indicate is that there are minutes indicating that the vacation policy must be adhered to and in adhering to the vacation policy it would mean that Mr. Johannes would have to proceed on vacation.” (Emphasis mine)

[76] In my view, this evidence materially weakens the Bank's position that there was a clear Board decision specifically requiring Mr. Johannes to take 71 days' leave and its attempt to elevate the general July 2021 Board decision into a specific Board decision that Mr. Johannes himself should proceed on 71 days' leave. This is further supported by the fact that the Bank did not call as witness any other Director of the Board.

[77] There is also a letter from the Chairman to Mr. Johannes dated 9th April 2020 which is of significance. In that letter, the Chairman wrote: "there are a number of employees who have outstanding leave as at 2019. As such, it is critical that all

employees proceed on vacation on or before June 30, 2020 as failure to do so will result in the forfeiting the leave. **We note that there is an exemption for the managing director**" (Emphasis mine). The use of the plural "we" is important. It demonstrates that, at least as at that date, the Board was of the position that Mr. Johannes stood outside the general vacation policy applicable to staff. Against that background, I do not consider that the Bank can rely without more on the general Board minutes of 30th July 2020 regarding the extension and carrying forward of leave entitlement as though it necessarily applied to Mr. Johannes in the same way as to all other staff.

- [78] On this issue of whether Mr. Johannes failed to produce a satisfactory leave schedule and failed to comply with repeated requests to take vacation, there is contemporaneous email correspondence which sheds further light on the manner in which his leave was being managed. On 12th July 2021, Mr. Johannes wrote to the Chairman requesting vacation from 19th July to 16th August 2021 as part of what he described as the existing vacation management plan for his role. He explained that the plan had thus far involved taking the Friday and Monday following Board meetings as leave days, and that a second phase of the plan was linked to the announcement of the election date, with a "second big vacation" then scheduled for December.
- [79] The Chairman's response that same evening is significant. He noted that Mr. Johannes was requesting "a longer vacation period" and a deputy managing director would need to be recommended; that the notice being given was "very short"; and that "there are a few issues that must be settled."
- [80] That exchange sits uneasily with the Bank's later attempt to characterise the 25th August 2021 directive as no more than the straightforward implementation of a general leave policy. If, in mid-July, the Chairman considered that a significantly shorter period of leave was a long vacation leave in light of the fact that there were important issues to be settled, it calls for explanation why, little more than six weeks

later, Mr. Johannes was directed to proceed on 71 days' leave before year-end. The contrast tends to support Mr. Johannes' case that the August directive was not simply the routine application of policy, but a marked and unexplained change in approach.

[81] I have also considered the Chairman's later suggestion that, after April 2021, Mr. Johannes was no longer required in the same way because one of the major projects had been completed. That submission must be viewed against the contemporaneous July correspondence itself which suggests that on the contrary, even by mid-July 2021, the Chairman himself considered that there were still important matters requiring attention before Mr. Johannes could absent himself for an extended period.

[82] In light of the foregoing, I find it difficult to accept that there was reasonable and proper cause for the Bank's directive.

[83] The Bank is certainly correct that employers may regulate leave and are entitled to concern themselves with succession planning. However, the Court must look at all the circumstances. This was not a modest or ordinary leave-management decision. It effectively removed Mr. Johannes from the workplace for almost the whole balance of the working year. Viewed objectively, and against the history that preceded it, the directive to take 71 days' leave was conduct likely to seriously damage the relationship of trust and confidence. Whether characterised as the culmination of a deteriorating relationship or as a drastic and unexplained interference with Mr. Johannes' performance of his role, it amounted to a repudiatory act on which the Claimant was entitled to rely.

[84] It must now be determined what was the effective cause of Mr. Johannes' resignation. The most important contemporaneous documents that must be considered are: (i) Mr. Johannes' letter dated 5th September 2021 to the Board of Directors, and (ii) Mr. Johannes' resignation letter dated 19th October 2021 to the

Chairman which provide a clear window into Mr. Johannes' state of mind and the true reason for his eventual resignation.

[85] Mr. Johannes' resignation letter of 19th October 2021 confirms that the operative cause of his resignation was the unexplained direction to proceed on 71 days' leave and the failure of the Board to address his grievance about it. While rumours and public speculation may have aggravated the situation, I find that they were not the effective cause of his resignation.

[86] I further find that Mr. Johannes did not affirm the breach. In the letter of 5th September 2021, he did not accept the direction to proceed on 71 days' leave. On the contrary, he described himself as feeling "disconcerted and unsettled" by the request and set out, in careful detail, his understanding of the prior arrangement reached with the Chairman concerning the management of his accumulated leave and sought an audience with the Board "at its soonest opportunity" and in any event before the vacation was to begin, with a view to understanding the basis of the direction.

[87] I further find that Mr. Johannes did not delay in his response to the breach. His letter of 5th September 2021 was a prompt protest and request for an audience to which no response had been received. Part of the intervening period was occupied by sick leave. His resignation on 19th October 2021 followed the absence of any satisfactory response to his grievance. In these circumstances, this was not mere delay amounting to affirmation but a short period of continuing objection while awaiting engagement and clarification.

Conclusion

[88] In light of the forgoing discussion, I therefore find that Mr. Johannes was constructively dismissed and as such, was entitled to treat the contract as at an end and to resign without notice.

Issue 2: Whether the claimant was in breach of his contract of employment and/or fiduciary duty?

The Applicable Law

- [89] It is a settled rule of equity that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect.³² This principle was stated by Lord Cranworth L.C. in **Aberdeen Railway Co. v Blaikie Brothers**³³ and has since been repeatedly affirmed in cases of the highest authority:

“A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.”³⁴

- [90] The phrase “possibly may conflict” was considered by Lord Upjohn in **Boardman v Phipps**.³⁵ His Lordship opined that:

“In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.”³⁶

- [91] The duty of directors to disregard their own private interests when a conflict arises was expressed in **Mercantile Credit Association (Liquidators) v Coleman**³⁷ in this way:

‘It is of the highest importance that it should be distinctly understood that it is the duty of directors of companies to use their best exertions for the benefit of those whose interests are committed to their charge, and that they

³² Regal (Hastings) Ltd v Gulliver [1967] 2 A.C. 134 at 137.

³³ [1843–60] All ER Rep 249.

³⁴ *ibid* at p 252.

³⁵ [1966] 3 All ER 721.

³⁶ *ibid* at p 756.

³⁷ (1871) L.R. 6 Ch. App. 558.

are bound to disregard their own private interests whenever a regard to them conflicts with the proper discharge of such duty.”³⁸

[92] A clear illustration of the application of these principles is found in **Industrial Development Consultants Ltd v Cooley**³⁹. In that case, the court rejected the defendant’s argument that a fiduciary relationship did not exist since the relevant information had been communicated to him privately and not in his capacity as managing director.⁴⁰ The court held that the defendant had only one capacity at the time, namely that of managing director of the plaintiff company.⁴¹ Accordingly, information coming to him while he occupied that office, and which was of concern to the company and relevant for it to know, was information which it was his duty to pass on.⁴² By instead embarking on a deliberate course of conduct which placed his personal interests as a potential contracting party in direct conflict with his continuing duty as managing director, he was held to have acted in breach of fiduciary duty by withholding relevant information and guarding it for his own personal purposes and profit.⁴³

[93] Clause 29 of Mr Johannes’ contract of employment stipulates that he was required to “adhere to the Bank’s Corporate Governance Policy, the Bank’s By-Law No.1, the Banking Act #3 of 2015, Eastern Caribbean Central Bank regulations and guidelines and any other applicable laws and regulations in St. Lucia, relevant to the performance of your duties”.⁴⁴

[94] The statutory fiduciary duty is found in section 97 of the **Companies Act**,⁴⁵ which provides:

³⁸ *ibid* at p 563.

³⁹ [1972] 2 All ER 162.

⁴⁰ *ibid* at p 173.

⁴¹ *ibid*.

⁴² *ibid*.

⁴³ *ibid*.

⁴⁴ See p 311 of TB 3, Part A, Vol 1.

⁴⁵ Cap. 13.01 of the Revised Laws of Saint Lucia 2020.

“97. Duty of care

- (1) Every director **and officer** of a company in exercising his or her powers and discharging his or her duties shall—
 - (a) **act honestly and in good faith with a view to the best interests of the company**; and
 - (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- (2) In determining what are the best interests of a company, a director shall have regard to the interests of the company’s employees in general as well as to the interests of its shareholders, except that the interests of its shareholders shall in all cases prevail.”⁴⁶ (Emphasis mine)

[95] Section 91 of the **Companies Act** further codifies the duty of disclosure where there is a conflict of interest as follows:

“91. INTERESTS IN CONTRACTS

- (1) A director or officer of a company—
 - (a) who is a party to a material contract **or proposed material contract** with the company; or
 - (b) who is a director or an officer of any body, or has a material interest in any body, that is a party to a material contract or proposed material contract with the company,shall disclose in writing to the company or request to have entered in the minutes of meetings of directors **the nature and extent of his or her interest**.
...
- (3) The disclosure required by subsection (1) shall be made, in the case of an officer of a company who is not a director—
 - (a) **after he or she becomes aware that the contract or proposed contract is to be considered**, or has been considered, at a meeting of directors of the company;
 - (b) if the officer becomes interested after a contract is made, after he or she becomes so interested; or
 - (c) if a person who is interested in a contract later becomes an officer of the company, after he or she becomes an officer.”⁴⁷ (Emphasis mine)

⁴⁶ *ibid*, s. 97.

⁴⁷ *ibid*, s.91.

- [96] I bear in mind that the Bank has relied in particular on section 110 of the **Banking Act**⁴⁸ and clause 5.5 of the Bank's By-Law No. 1. I am of the view that those provisions do not form the basis on which this issue falls to be determined for the reasons which immediately follow.
- [97] Section 110 of the **Banking Act** applies to directors. The Act defines a "director" as including a person in accordance with whose directions or instructions the directors of a company are accustomed to act.⁴⁹ However, the contract of employment makes clear that the Managing Director was accountable to the Board, and the Bank's case throughout has been that Mr. Johannes was required to implement the instructions and directions of the Board, and not vice versa. Further, the **Banking Act** separately defines an "officer" as including, among others, a chief executive officer.⁵⁰ It is common ground that Mr. Johannes, as Managing Director, was also the Chief Executive Officer. In those circumstances, I do not find that Mr. Johannes was a director for the purposes of section 110 of the **Banking Act**. His position is more aptly considered as an officer under the **Companies Act**.
- [98] Similarly, clause 5.5 of By-Law No. 1 is directed to directors. The interpretation section of the By-Law draws a distinction between the "Board of Directors", an "Officer", and an "Executive". "Board of Directors" means the Board of Directors of the Bank; "Officer" means a member of the Board of Directors and a member of the executive of the company; and "Executive" includes, among others, the Managing Director. The draftsman having taken care to define these categories separately, I do not consider that clause 5.5 can properly be construed as applying to the Managing Director in the absence of express language extending it to an officer or executive.
- [99] In light of the foregoing, the Court must therefore consider: firstly, whether Mr. Johannes stood in a fiduciary relationship to the Bank in relation to the matters in

⁴⁸ Cap 12.01, Revised Laws of Saint Lucia, 2020.

⁴⁹ *ibid*, s.2.

⁵⁰ *ibid*.

question; secondly, whether there was a conflict, or a real sensible possibility of conflict, between his personal interest and his duty to the Bank; and thirdly, if so, whether that conflict was cured by proper and sufficient disclosure.

Discussion and Analysis

- [100] The Bank's pleaded case is that from about 2019 the Board had resolved to explore the establishment of a branch in Soufriere and that Mr. Johannes, in his capacity as Managing Director, acquired knowledge of the Bank's interest in securing suitable premises there. The Bank says that in September 2020, the Board instructed Mr. Johannes to carry out an analysis for opening a branch in Soufriere and to enquire into the cost of a building which had been previously occupied by another bank (the Soufriere Property) and to make an offer. The Bank contends that Mr. Johannes diverted the opportunity to himself by purchasing the Soufriere Property through a company J.P. Ventures Limited, concealed the extent of his involvement, and later sought to lease the property to the Bank without making full disclosure.
- [101] Mr. Johannes' case is that he did not conceal his involvement, that he was wholly transparent in his undertakings as and when the matter unfolded, that he disclosed his interest first to the Chairman and later to the Board, that the Bank had no fixed intention to purchase that particular property, and that no conflict arose, or alternatively that any conflict was sufficiently disclosed and accepted. He also says that he learnt of the availability of the property through his own banking relationships and not by reason of his position as Managing Director of the Bank.
- [102] In light of the authorities, Mr. Johannes' argument that he did not learn of the opportunity by virtue of his position is of no real consequence. There is no dispute that, as Managing Director of the Bank, Mr. Johannes stood in a fiduciary relationship to the Bank. The real issue is whether, in relation to the Soufriere Property, he placed himself in a position where his personal interest conflicted, or had a real sensible possibility of conflicting, with his duty to the Bank, and, if so, whether that conflict was cured by proper and sufficient disclosure.

- [103] As with the earlier issue, I remind myself of the guidance in **Onassis v Vergottis**, that contemporaneous documents are always of utmost importance where recollection has shifted.
- [104] I accept, as a matter of fact, that by 2020 the question of the Bank establishing a presence in Soufriere was very much within the scope of Mr. Johannes' functions as Managing Director. The Board minutes of 24th September 2020 show that the Board discussed the Bank having a presence in Soufriere, noted the commercial opportunity there where another bank had been closed, and directed that an analysis be carried out and that the Managing Director enquire into the cost of the property and that an offer be made. Mr. Johannes was tasked with undertaking the relevant analysis.
- [105] I have considered Mr. Johannes' argument that the Bank had, at most, an interest in establishing some form of presence in Soufriere rather than in acquiring that specific building. Even if that were so, it would not absolve Mr. Johannes. The critical point is that Mr. Johannes, while under a duty to advance and protect the Bank's interests in the proposed expansion into Soufriere, placed himself in a position where his own interest in the Soufriere Property conflicted with his duty.
- [106] I also accept the Bank's submission that the order in which the interests arose does not assist Mr. Johannes. Even if his personal interest pre-dated the Bank's formal Board decision, once the subject matter came within the scope of his fiduciary duties as Managing Director, he was bound to prefer the Bank's interests and to deal candidly with the conflict. A prior personal interest does not trump a present fiduciary obligation.
- [107] In those circumstances, the Soufriere Property was not some wholly extraneous private investment unconnected to the Bank's business. It had become, at the latest by 24th September 2020, a matter directly touching the Bank's expansion strategy and one in relation to which Mr. Johannes was acting in his fiduciary capacity. It

follows that if, at or before that time, Mr. Johannes had a personal interest in acquiring that same property, he was under a strict duty to make full and frank disclosure of the nature and extent of that interest and to avoid participating in the Bank's consideration of the matter unless and until the conflict was properly addressed.

- [108] Mr. Johannes' position is that he did disclose his interest at an early stage. He asserted that he informed the Chairman on or about 17th August 2020, in the presence of another employee of the bank, Mr. Peter Aimable ("Mr. Aimable") that he had an interest in the Soufriere Property. The Bank disputes this and says that this occurred rather sometime in October 2020. Mr. Johannes further says that the matter was then disclosed to the Board at the meeting of 29th October 2020 and again on 19th August 2021, and that no objection was raised. It is therefore necessary to determine whether these disclosures met the statutory requirement, that is, disclosed in writing to the company or requested to have entered in the minutes of meetings of directors the nature and extent of Mr. Johannes' interest.
- [109] Even if I assume in Mr. Johannes' favour that some private conversation occurred with the Chairman in August 2020, I do not consider that this carried the matter far enough for the purposes of his fiduciary duty. A private by-the-way conversation with the Chairman, unrecorded in the minutes and unsupported by the evidence of the other employee claimed to have been present, whom interestingly, Mr. Johannes did not call as a witness, cannot on its own amount to the disclosure required.
- [110] More importantly, Mr. Johannes' own case creates difficulty for him at the Board meeting of 24th September 2020. If, as he says, his interest already existed by August 2020, then by 24th September 2020, he attended a Board meeting at which the Board expressly discussed the Soufriere Property, directed that an offer be made to purchase, and tasked him with the analysis in relation to the Bank having a presence in Soufriere. Yet there is no record of any disclosure by him at that

meeting of his own interest in acquiring the same Soufriere Property. Even accepting Mr. Johannes' version that the Chairman already knew something of his interest, he was still participating in a Board discussion about the same property without ensuring that the Board as a whole was fully informed of the conflict.

[111] The next major event was the meeting of 29th October 2020. The minutes of that meeting record at the beginning that there were no declarations of conflict made and further into the meeting, it recorded that Mr. Johannes disclosed that a consortium of ex-Barclays employees had put in an offer to acquire the Soufriere Property; that he and another employee, Mr. Aimable had been approached to be part of the consortium; that no conflict of interest with 1st National Bank had been identified; that the relevant persons were bound to secrecy; and that the bid had been accepted. The Chairman's evidence was consistent with that record.

[112] Mr. Johannes, however, sought in cross-examination to suggest that the statement that "no conflict of interest with 1st National Bank had been identified" was made by the Board and not him. However, in the same vein, he accepted that there had been a conflict, and that it is the duty of the person who believes there is a conflict to make the declaration:

“Q. When you enter a director's meeting the first item well after attendances are recorded is whether there's any conflict of interest

A. Right

Q. On 24th Sept 2020, the Board had instructed you to enquire about the CIBC building that you had been invited ...

A. Yes

Q. On 29th Oct you're disclosing to the other members of your Board that you had been invited to join a consortium

A. Yes. That's the disclosure

Q. And there was no conflict

A. So they said

Q. The Board's minutes say there were no conflicts were not identified. And there was no conflict because you simply had been approached

A. No

Q. You had been approached

A. I cannot say why they said there was no conflict

Q. But wasn't it your responsibility to make a declaration

A. If I'm reading this correctly,

Q. No, No. **We are asking about who is responsible to make a declaration of conflict of interest**

A. **The person who believes there is a conflict.**" (Emphasis mine)

[113] Even if I accept that Mr. Johannes disclosed at the meeting of 29th October 2020 that he and Mr. Aimable had been approached to join the consortium, this falls short of the full disclosure required. Mr. Johannes sought to explain in cross-examination that the minutes should have reflected that the extent of his interest was not that he had merely been approached but that he was part of the consortium and that he and the consortium made a bid. This is what he said:

"Q. It goes on to say, he advised that the bid made by the consortium was accepted.

A. You see how disjointed it sounds. So if it reads like I'm making the statement it should read he disclosed that the consortium of ex Barclays employees. **It should read Peter Aimable and himself have been approached by the consortium. He and the consortium made a bid to...**

Q. It does not say that

A. Right. And I'm just saying. It is confusing the way it is written

Q. No No No. **It does not say that. It goes on to say he advised that the bid made by the consortium was accepted**

A. **Yes, agreed.**" (Emphasis mine)

[114] However, I also note that Mr. Johannes accepted that there contained an errors and omissions part of the minutes where this could have been corrected if it was not an accurate reflection of his disclosure:

"Q. You read the minutes, yes. You particularly pay attention to action items that you need to deal with and there's a section that says errors and omissions.

A. Yes indeed

Q. You did not identify an error or omission here

A. I missed it.

Q. And now you recognise it

A. No. I recognised it when I had to revisit it to do my WS. You pay more attention to it then.

Q. But it would have been an important thing. You are familiar with the by-laws of the Bank if there was a conflict of interest

A. Yes

Q. So it would have been important if there was a conflict

A. Right. Yes, I was at the meeting and it was said that there was no conflict of interest."

- [115] I agree that this disclosure was so important that if Mr. Johannes knew he made the necessary disclosure, he should have sought, at the very least to correct the first part of the minutes that record that no declarations were made. Therefore, I accept that the minutes of 29th October 2021 stand as a true record of the disclosure made and that no declarations of conflict of interest were made. Moreover, the minutes indicate that he withheld further information on grounds of confidentiality. The Bank is correct to submit that such limited disclosure did not tell the Board the true extent of the conflict, in that he had accepted to be part of the consortium, the degree of his personal involvement, the status of his own interest, the implications for the Bank, or the fact that he was placing himself in a position where he could profit personally from a property which the Bank was considering either as an asset or as premises for expansion. Nor did it amount to informed Board consent to Mr. Johannes pursuing the property for himself.
- [116] Mr. Johannes' later conduct reinforces that conclusion. In January 2021, he presented the Soufriere analysis to the Board, including as one option the lease of the very property in question. The documentary evidence shows that on 30th January 2021, when one of the directors asked whether the Bank could pursue outright purchase of that property via email in response to Mr. Johannes' presentation, Mr. Johannes responded that it was "not currently an option that is available." On the evidence, that answer was materially misleading by omission.
- [117] The documentary evidence before the Court shows that J.P. Ventures Limited was incorporated on 5th March 2021, with Mr. Johannes as one director and Mr. Aimable as the other; Kingsman Corporate Services Limited, corporate secretary of J.P. Ventures Limited's, was incorporated on 21st March 2021; the Board of Directors of the vendor resolved to sell the Soufriere Property to J.P Ventures on 31st March 2021; and the Agreement for Sale was executed on 29th April 2021, one of the signatories being Mr. Johannes himself as Director of J.P. Ventures Limited.

[118] Thus, it is clear that at the date of the Director's inquiry on 30th January 2021, the Soufriere Property was in fact available. The dates of the documentary evidence, particularly the fact that the Agreement for Sale stated that the board of the vendor resolved to sell to J.P. Ventures Limited on March 31st 2021, calls into question the statement made by Mr. Johannes that a bid made by a consortium had already been accepted by 29th October 2020. Even if the Court were to accept that a bid had already been accepted and as such he considered the purchase of the Soufriere Property by the Bank as an option not available, this was his opportunity once more to state the extent of his interest, that is, that he was a part of a consortium whose bid had already been accepted.

[119] The significance of that omission is that Mr. Johannes was not a passive bystander to the matter. He was the person tasked with analysing Soufriere options for the Bank, and he placed before the Board a proposal which included the rental of a property in which he had a personal interest. That was a plain conflict situation. His personal interest, as a prospective purchaser of the Soufriere Property through a vehicle in which he had or expected to have an interest, stood in direct conflict with his continuing duty as Managing Director to advance the Bank's interests in relation to suitable premises for its Soufriere expansion.

[120] In those circumstances, Mr. Johannes' fiduciary duty required him to disclose fully the information concerning the Soufriere Property which came to him while he occupied that office and which was of concern to the Bank and relevant for it to know. Instead, the evidence shows that he continued to act in relation to the Soufriere expansion while withholding the full nature and extent of his involvement and diverting the opportunity to himself through J.P. Ventures Limited. By embarking on that course of conduct, Mr. Johannes acted in breach of fiduciary duty, withholding relevant information and preserving it for his own personal purposes and profit.

- [121] However, the events do not end here. Another conflict arose when a letter dated 27th April 2021 found its way into the Board Meeting of 29th April 2021. By that letter, J.P. Ventures Limited, through its corporate secretary, Kingsman Corporate Services Limited, offered the Soufriere Property to the Bank for lease. Mr. Johannes eventually accepted in cross-examination that he instructed that the letter be sent and that the letter did not transparently identify the persons behind J.P. Ventures Limited.
- [122] The Bank's complaint that Mr. Johannes was effectively inviting the Bank to become a tenant of a property in which he had a personal interest is, in my opinion, well-founded. Mr. Johannes' evidence that the Board already knew of his involvement does not answer the point. This was not merely a continuation of an already disclosed transaction as Mr. Johannes appeared to think. It was a fresh and acute conflict, because Mr. Johannes' personal interest in maximising rental return stood in direct conflict with the Bank's interest in making the most advantageous commercial decision for itself.
- [123] The issue now is whether the extent of his interest had in fact been fully and clearly disclosed so that the Board could make an informed decision. The minutes of the meeting of 29th April 2021 states that no declarations of conflict were made. The Bank points to the minutes of a Board meeting of 8th July 2021 recording that no conflict of interest declarations were made, and to the Chairman's evidence that at that meeting he asked who were the directors behind the Soufriere Property, whereupon Mr. Johannes identified himself, Mr. Aimable and unnamed shareholders. Mr. Johannes disputed aspects of the minute and later suggested it was inaccurate. However, I regard his shifting position on the minutes generally as diminishing the weight of his challenge. Here, the documentary record is materially more consistent with the Bank's account than with Mr. Johannes' attempt to portray a history of complete transparency. Indeed, the documentary evidence before the Court shows that Mr. Johannes had 50% shareholding and Mr. Aimable held the other 50% shareholding of J.P. Ventures Limited, which as at this date had already

entered into an Agreement for Sale with the vendor of the Soufriere Property. Therefore, there were no other unnamed shareholders.

[124] Mr. Johannes relies heavily on the declaration made on 19th August 2021 as proof that he acted openly and that no objection was raised. I accept that on that date he did make an express declaration of conflict of interest as it pertained to the rent proposal and indicated that he was a director and shareholder of the property in question. In his witness statement, Mr. Johannes argues that the way in which the minutes were recorded is misleading, in that he could not be a director and shareholder of the property itself and what he disclosed was that he was the director, shareholder and beneficial owner of a now formed company, J.P. Ventures Limited, and that that company was still in the process of acquiring the Soufriere Property. He further says that having satisfied himself that no issue of conflict had been raised and he had given full disclosure, he consented as a director of J.P. Ventures Limited to the company executing the Deed of Sale on 1st September 2021.

[125] Even if I accept Mr. Johannes' version of what the 19th August 2021 minutes should have stated, I do not accept that the nature and extent of this interest would have been fully disclosed in accordance with section 91(1)(b) of the **Companies Act**. In cross-examination and supported by the documentary evidence before the Court, Mr. Johannes accepted that his company had already signed the Deed of Sale on 12th August 2021. He then sought to explain that the signed document was being held by his attorney pending his instruction to release it. At a minimum, this shows that the transaction had already moved forward materially before him making the August declaration and seeking consent on which he seeks to rely so heavily.

[126] Further, I do not accept that it met the requirement of section 91(3)(a) of the **Companies Act** as he was aware that the proposed lease had come before the Board as early as the 29th April 2021 Board meeting and again on the 8th July 2021 Board meeting. His disclosure on 19th August 2021 was therefore late.

[127] Moreover, I accept the Bank's submission that the 19th August 2021 declaration related to the then pending decision on the lease proposal, not to the earlier acquisition of the Soufriere Property. Mr. Johannes' own cross-examination makes this plain. He said the disclosure was made as it pertained to item 9.1 and because something was happening at that meeting where a decision had to be made and he wished to recuse himself. That supports the Bank's point that the August disclosure was prompted by the immediate leasing issue and not by any prior disclosure of the purchase conflict.

Conclusion

[128] In light of the foregoing discussion, I find that Mr. Johannes breached his fiduciary duty under section 97 of the **Companies Act** in relation to his acquisition of the Soufriere Property and section 91 of the **Companies Act** when he, through J. P. Ventures Limited, attempted to lease same to the Bank.

[129] As a result, I further find that Mr. Johannes breached his contract of employment which required him to adhere to the applicable laws of Saint Lucia relevant to the performance of his duties.

Issue 3: Whether the doctrine of mutuality prevents the appellant from founding a claim of constructive dismissal?

The Applicable Law

[130] A further point emerging from **McNeill** is that an employer cannot ordinarily justify its own repudiatory conduct by pointing to some prior wrongdoing on the part of the employee, unless and until it has itself acted lawfully on that wrongdoing in a manner known to the law. The decision emphasises that even where an employee may have been in breach of contract, that does not, without more, absolve the employer of its continuing obligation not to act in breach of the implied term of trust and confidence. The employer remains bound to act properly, fairly and with reasonable cause in the manner in which it manages or investigates the employee.

[131] In that case, the court accepted the doctrine of mutuality is relevant but rejected the Employment Appeal Tribunal's decision that because the appellant was in breach of the implied obligation not to destroy or damage the relationship of trust and confidence, the principle of mutuality of contractual obligations operated in such a way as to relieve the respondents from their corresponding obligation, and so the appellant could not rely on the respondents' breach of their obligation to maintain trust and confidence as a basis for constructive dismissal. It was held that this finding was erroneous.⁵¹

[132] The court explained that had the breach been known at the time, the respondents might have elected to treat such misconduct as a sufficiently material breach of contract to warrant dismissal.⁵² Alternatively, they might have withheld performance of their obligations to provide work and pay salary by, in effect, suspending the appellant until he tendered proper performance of his contractual duties.⁵³ That alternative would have been an application of the remedy of retention, based on the mutuality principle.⁵⁴ Neither of these events occurred, however, therefore the respondents' obligation to maintain mutual trust and confidence remained in place.⁵⁵

[133] It is important to note however, that, the employee's breach will be relevant to the remedy granted. In **McNeill**, the decision of the Employment Tribunal was reinstated, and part of the Employment Tribunal's decision was that the award to the claimant was reduced by 50% owing to the claimant's contribution by his conduct to his dismissal.⁵⁶

Analysis

[134] According to the Chairman's witness statement, in or about July 2021 he became aware of documents showing that Mr. Johannes was a director and shareholder of

⁵¹ See n.9 at paras [32]-[33].

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ See n.9 at paras [5] and [83].

J.P. Ventures Limited. Under cross-examination, he accepted that Mr. Johannes' breach of fiduciary duty was tantamount to misconduct or even serious misconduct but sought to explain that they did not raise the allegation with Mr. Johannes because the investigation had not been completed and any prior actions would be premature:

"Q. So an investigation is being conducted which involved an employee of the Bank, Mr. Johannes, and he was not advised as to what the allegations were that warranted the investigation.

A. He would have been advised after the investigation was completed. Had we done anything before that we would have been acting prematurely. There is a process we had to follow

Q. You agree that if you are investigating an employee the employee should be aware of the allegations

A. How could I agree to something of that nature. If Mr. Johannes had said he was part of J.P. Ventures the situation would have been different. He was at the meeting. He never shared any information with us. If the gentleman sat there and we pick up something we can't just go there and say anything."

[135] I am unable to accept that explanation. On the Bank's own evidence, even if Mr. Johannes had not expressly stated that he was part of J.P. Ventures Limited, the Bank was already in possession of the company's incorporation documents which revealed that connection. In those circumstances, there was plainly sufficient material to raise the allegation with Mr. Johannes and to take such lawful interim steps as might properly be warranted, including suspension pending the completion of an investigation. What the Bank did instead provides a proper basis for Mr. Johannes' contention that the mandatory vacation was being used as suspension in all but name, which is not an acceptable course. The Bank's own case was that the Bank could not financially risk paying out Mr. Johannes' accrued vacation leave. On that evidence and given the information already available to the Bank from its searches, I am driven to conclude that the Bank sought to have Mr. Johannes exhaust his accrued vacation leave before taking formal action on the suspected breach.

[136] I am mindful that, in **McNeill**, the Employment Tribunal had concluded that the employer's decisions to lift and then reimpose suspension were taken in an effort to

exhaust the employee's entitlement to sick pay.⁵⁷ The court observed that such a conclusion was open to criticism as speculative because there was no factual basis for it beyond the employee's own evidence.⁵⁸ The present case is different. Here, there is a factual basis for the inference, namely, on the Bank's own evidence that one of the reasons for requiring Mr. Johannes to proceed on vacation leave was to avoid the financial consequences of having substantial accrued leave. In those circumstances, the inference that the vacation directive was being used as a mechanism to manage, and effectively defer, the consequences of acting on Mr. Johannes' breach is not speculative but grounded in the evidence and in my opinion, that course of action by the Bank was inappropriate.

Conclusion

- [137] By virtue of the fact that the Bank did not properly act upon or investigate Mr. Johannes' breach at the material time, its own obligation to maintain trust and confidence remained in full force. I therefore find that notwithstanding his own prior breach, Mr. Johannes is not barred from founding his claim for constructive dismissal on the Bank's breach of the implied term of trust and confidence.

Issue 4: Whether the Claimant is entitled to the salary and benefits for the unexpired term of his contract of employment?

The Applicable Law

- [138] In **Mackenzie v AA Ltd**⁵⁹, the court confirmed that the 'least burdensome' performance rule for assessing damages for wrongful dismissal is the applicable rule. I find that the same approach applies equally to cases of constructive dismissal, since the **Labour Act** deems an employee who was constructively dismissed as having been unfairly dismissed, and the compensation recoverable for unfair dismissal and wrongful dismissal is the same under the **Labour Act**.

⁵⁷ See n.9 at at para [49].

⁵⁸ *ibid* at para [78].

⁵⁹ [2022] All ER (D) 42 (Jul).

[139] In that case, Bean LJ noted that the original and classic statement of the 'least burdensome' rule is to be found in remarks of Maule J in **Cockburn v Alexander**.⁶⁰

“... the question upon a breach of the contract is, what is the condition in which the plaintiffs would be if the Defendant had performed the contract. Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the Defendant.”⁶¹

[140] In **Lord Lavarack v Woods of Colchester Ltd**,⁶² Diplock LJ explained that:

“The general rule as stated by Scrutton LJ in *Abrahams v Herbert Reiach Ltd*, that in an action for breach of contract a Defendant is not liable for not doing that which he is not bound to do, has been generally accepted as correct and in my experience at the Bar and on the Bench has been repeatedly applied in subsequent cases. The law is concerned with legal obligations only and the law of contract only with legal obligations created by mutual agreement between contractors – not with the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do. So if the contract is broken or wrongfully repudiated, the first task of the assessor of damages is to estimate as best he can what the plaintiff would have gained in money or money's worth if the Defendant had fulfilled his legal obligations and had done no more.”⁶³

[141] The Court of Appeal in **Mackenzie**, in applying the rule, held that in the context of contracts of employment it is difficult to imagine a clearer case of the application of the rule than where the contract expressly gives the employer a choice between dismissal with a requirement that the employee works out his notice and dismissal with payment in lieu of notice.⁶⁴ The court opined that the whole point of a payment in lieu of notice (“PILON”) clause is to give the employer that choice and to avoid the argument that dismissal with pay in lieu is a repudiation.⁶⁵

⁶⁰ (1848) 6 CB 791.

⁶¹ *ibid* at p 814.

⁶² [1966] 3 All ER 683.

⁶³ *ibid* at p 690.

⁶⁴ See n.55 at para [36].

⁶⁵ *ibid*.

Analysis

- [142] In the present case, clause 26 of the contract of employment⁶⁶ provided that the contract could be terminated for any reason recognised under the Labour [Code] Act and that, in accordance with the contractual exit arrangements, either party was required to give three months' notice of early termination. Section 12(2) of the **Labour Act** likewise recognises that a contract of employment may be terminated by either party, subject to the provisions of the Act concerning unfair dismissal and notice of termination. The contractual notice period of three months exceeds the statutory minimum, and section 153(3) of the **Labour Act** expressly preserves such contractual arrangements, while also recognising that either party may waive notice or accept payment in lieu thereof. In those circumstances, the contract did not guarantee Mr. Johannes remuneration for the whole of the unexpired fixed term irrespective of circumstances. Rather, it gave the Bank a lawful mechanism by which the contract could be brought to an earlier end upon three months' notice or the equivalent payment in lieu thereof.
- [143] Applying the least burdensome mode of performance rule, I find that the proper measure of Mr. Johannes' contractual recovery is confined to what he would have received had the Bank lawfully exercised that right of early termination. That would be three months' salary, in the sum of \$69,000.00. He is not entitled, as damages for constructive dismissal, to the entirety of the salary and benefits referable to the unexpired balance of the fixed term, because the Bank was under no legal obligation to retain him for that whole period if it could lawfully terminate earlier on notice.
- [144] I have also considered the effect of Mr. Johannes' own breach. As I have already found, Mr. Johannes was in breach of fiduciary duty and related contractual obligations. Following **McNeill**, I further find that this is an appropriate case to take into account Mr. Johannes' own breach when assessing the damages recoverable. In those circumstances, I consider it just to further reduce the amount otherwise recoverable for constructive dismissal by 50%.

⁶⁶ See p 310 of TB 3, Part A, Vol 1.

Issue 5: Whether the Claimant is liable to account for all secret profits he made in the acquisition and/or sale of the Soufriere Property?

Applicable Law

[145] The equitable rule against secret profits has long been strictly applied. In **Cooley**, Roskill J, referring to **Parker v McKenna**,⁶⁷ cited the well-known statement of James LJ:

“I think it is very important that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.”⁶⁸

[146] It is also of importance that fiduciary liability does not depend on proof that the principal itself would certainly have obtained the opportunity or benefit in question. In **Cooley**, Roskill J rejected the argument that no account should be ordered because the relevant contract was one which the plaintiffs themselves could never have secured.⁶⁹ His Lordship opined that, when one looks at the way the cases have gone over the centuries it is plain that the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant.⁷⁰ It was therefore irrelevant that, as a result of the order to account, the principal would receive a benefit which they would not otherwise have received.⁷¹ Accordingly, because of his breach of duty, the defendant was liable to account to the plaintiffs for all the benefit he had received or would receive under the contract with the gas board.⁷²

⁶⁷ [1874-80] All ER Rep 443.

⁶⁸ *ibid* at p 456.

⁶⁹ See n.39 at p 175.

⁷⁰ *ibid*.

⁷¹ *ibid*.

⁷² *ibid* at p 176.

[147] Lord Guest in **Boardman v Phipps** held that the only defence available to a fiduciary in such a position is that the profit was made with the full knowledge and informed assent of the principal.⁷³ In the absence of such knowledge and consent, the fiduciary will be required to account.

Discussion and Analysis

[148] Originally, the Bank sought a declaration that Mr. Johannes held his shares in J.P. Ventures Limited, or so much of the value of that company as was attributable to the Soufriere Property, as constructive trustee for the Bank. By the time of trial, however, the Soufriere Property had already been sold, and the Bank expressly accepted in its closing submissions that it had abandoned the constructive trust remedy. The Bank therefore now claims only for an order for an account of profits and payment over of such sums as may be found due.

[149] The Bank pleads, in particular, that Mr. Johannes should be required to pay over all profits made in respect of the acquisition and subsequent sale of the Soufriere Property. In support of that contention, it relies on the fact that the Agreement for Sale was expressed to be for a total consideration of \$825,000.00, whereas the Deed of Sale recited consideration of \$540,520.00, and it therefore seeks to treat the difference as profit.

[150] A closer examination of the documents, however, shows that the Agreement for Sale distinguished between immovable property, valued at \$540,520.00, and movable property, valued at \$284,480.00. The subsequent Deed of Sale reveals that only the immovable property was in fact conveyed. I do accept, however, that the property was later sold by J.P. Ventures Limited for \$1,007,942.00.

[151] The difficulty, however, lies in the fact that the Bank has not joined J.P. Ventures Limited as a defendant to the counterclaim. In those circumstances, it would not be procedurally fair, nor juridically sound, to make an order effectively determining the

⁷³ See n.35 at p 752.

company's liability or directing payment of the company's profits without the company being before the Court. Further, on the evidence as it has been developed before the Court, Mr. Johannes was one of two directors of J.P. Ventures Limited and held a 50% shareholding. The Court cannot on the present record determine that personal profit by a rough calculation of taking the difference between the company's purchase price and sale price and awarding the whole of that sum against Mr. Johannes.

[152] The proper course, in my view, is therefore to confine the relief to profits or financial benefits personally received by Mr. Johannes, directly or indirectly, by reason of his interest as one of two directors and a 50% shareholder in J.P. Ventures Limited, from the acquisition and subsequent sale of the Soufriere Property and not the entirety of any profit made by the company itself.

[153] It has already been established that Mr. Johannes did not receive consent from the Board and in any event, they could not have given informed consent as they were not privy to the full nature and extent of his interest. As such I find that the defence identified above⁷⁴ is not available to him.

[154] Counsel for Mr. Johannes also sought to establish in cross examination of the Chairman that the Bank did not have the relevant regulatory approval to enter into the Soufriere market. As the authorities have established, this is not a relevant consideration.

[155] I therefore conclude that the Bank is entitled to an order that Mr. Johannes render an account of the profits personally received by him, directly or indirectly, from or in connection with the acquisition and/or subsequent sale of the Soufriere Property through J.P. Ventures Limited, and to a consequential order that he pay to the Bank such sum as is found due upon the taking of that account.

⁷⁴ At para [147].

[156] I should address a further point arising from the Bank's closing submissions. In addition to maintaining its claim for an account of secret profits, the Bank went on to submit, in the alternative, that it should receive equitable compensation for losses said to have been suffered by reason of Mr. Johannes' diversion of the Soufriere opportunity, including what it described as the inability to acquire the Soufriere Property and the consequential loss of business. That alternative claim was advanced under the prayer for "further or other relief".

[157] The decision in **Ocean Conversion (BVI) Ltd v Attorney General**⁷⁵ is directly instructive on the limits of a prayer for "further or other relief". Bannister J rejected an attempt to advance a new claim for mesne profits merely by reliance on such a prayer, holding that it would be wrong to assess such a claim in the absence of pleadings and evidence, and observing that "further or other relief" could not be used to found a new investigation of a materially different claim at that stage.⁷⁶ He relied on the following passage from Lord Millet in **Yambou Development Company Limited v Kauser**⁷⁷ a decision of the Privy Council at page 147:

"Their Lordships are not willing to entertain the claim in the absence of proper pleadings and evidence, without the benefit of the judgments of the local courts, and in circumstances in which counsel for the respondent has had insufficient opportunity to give proper consideration to the claim and presents argument upon it."

[158] In **Dews Pro Builders Limited v Christopher K. Martin**⁷⁸ it was further held that it is settled law that parties to litigation are bound by their pleadings and the court is equally bound by the parties' pleadings.⁷⁹ Thus, the court recognised that it is not the duty of the court to enter into an inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.⁸⁰

⁷⁵ BVIHCV2008/0192 (delivered 28th October 2009) unreported.

⁷⁶ *ibid* at paras [24] and [26].

⁷⁷ (2000) 59 WIR 141.

⁷⁸ ANUHCVP2025/0007 (delivered 11th March 2026), unreported.

⁷⁹ *ibid* at paras [29]-[34].

⁸⁰ *ibid* at para [31].

[159] The same reasoning of both cases applies here. A claim for equitable compensation would have required materially different factual and legal inquiries from those engaged by the pleaded case. As the Bank's own closing submissions correctly recognised, the remedies of an account of profits and equitable compensation address aspects of the breach: the former is concerned with profits gained by the fiduciary, whereas the latter is concerned with losses suffered by the principal. The Bank itself submitted that a claimant must elect between them for the same breach. Having chosen and pleaded a claim focused on secret profits, the Bank cannot, at the stage of closing submissions, enlarge the case into a substantially different claim for compensation based on alleged loss where Mr. Johannes had no opportunity to answer such a case.

[160] In those circumstances, the general words "further or other relief" cannot fairly be invoked to introduce, at the close of the case, an altogether different relief founded on loss rather than profit. I therefore reject the Bank's submissions for equitable compensation.

Issue 6: Whether the Defendant can set-off any sums due from the Claimant to the Defendant against any sums found due from the Defendant to the Claimant?

The Applicable Law

[161] The Bank claimed a right of set-off as an alternative to an account in its counterclaim. I would decline to grant such relief since I have already granted the order for an account of profits and for the reasons which immediately follow.

[162] Mr. Johannes' claim for constructive dismissal has succeeded on its own legal footing. I have already found that, notwithstanding his breach of fiduciary duty and related obligations, that prior wrongdoing did not preclude him from maintaining and succeeding on the constructive dismissal claim.

[163] Further, the effect of Mr. Johannes' own breach has already been reflected in the Court's assessment of the relief, in that the damages otherwise recoverable by him has been reduced by one half.

[164] In those circumstances, I am satisfied that there would be no injustice in enforcing Mr. Johannes' claim without allowing any amount which may be recoverable on the counterclaim, to operate as a set-off against it.

Order

[165] In light of the foregoing discussion, I make the following Order:

1. Judgment on the claim is entered for the claimant.
2. Judgment on the counterclaim is entered for the defendant.
3. The defendant shall pay to the claimant the sum of \$34,500.00, together with interest thereon at the statutory rate of 6% per annum from the date on which the claimant's final emoluments were paid to the date of payment.
4. The defendant shall pay to the claimant prescribed costs on the sum of \$34,500.00, such costs being assessed in the sum of \$6,980.00.
5. The claimant shall, within sixty (60) days of the date of this judgment, render an account of all profits personally received by him, directly or indirectly, by reason of his interest as one of two directors and a 50% shareholder in J.P. Ventures Limited.
6. Upon the taking of that account, the claimant shall pay to the defendant all sums found due thereon, together with interest thereon at the statutory rate of 6% per annum from such date as the Court may determine upon completion of the account;
7. The defendant's costs on the counterclaim are reserved until the determination of the account.

[169] I wish to thank Counsel for their submissions in this matter.



**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar