

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2017/0282

BETWEEN:

ASTRA HOLDINGS LIMITED

Claimant

-and-

**INDIRA SALISBURY
As Executrix of the Estate of David Toms, deceased**

Defendant

APPEARANCES:

Mr. Anthony Astaphan S.C, with him Mrs. Carla Brooks-Harris and Ms. Desiree Markham for the Claimant
Mr. Leslie Thomas K.C for the Defendant

2023: October 30th
2024: June 21st

DECISION

[1] **DRYSDALE, J.:** The case involves a claim of breach of fiduciary duty by the late director of the Claimant. The allegation centers around Mr. Toms using the Claimant's funds to purchase shares in a company named Atlantic Properties Limited.

Background

- [2] The case for the Claimant is that its former sole director Mr. Toms, (hereinafter referred to as the “deceased”) acted in breach of his fiduciary duties to the Claimant as in 2002 he allegedly used the Claimant’s funds to purchase shares in his own name and for his personal benefit.
- [3] The funds used by the deceased were funds loaned to the Claimant by the Antigua Commercial Bank (“ACB”) for the purpose of property development of lands known as “the Laurie Bay Lands.” The loan funds were not used for their intended purpose which was known to the deceased as he was the one who applied for and obtained the loan on behalf of the Claimant in his capacity of director.
- [4] The Defendant is the representative of the estate of the deceased. The case for the Defendant is that deceased did in fact draw funds from the Claimant’s loan account for the purpose of purchasing shares. The Defendant however states that the funds used to purchase the shares constituted a repayment of a director’s loan owed to the deceased by the Claimant. The Defendant denies the allegation that there was a breach of fiduciary duties by the deceased and further states that the actions which give rise to this claim occurred in 2002 and are therefore time barred.
- [5] The Claimant denies that there was any director’s loan made by the deceased to it.

The Claimant’s Amended Statement of Claim

- [6] The Claimant states that deceased, was the director and chairman of the Claimant and that he acted in breach of his fiduciary duties to the Claimant.
- [7] The deceased was a citizen of the United Kingdom and managed the Claimant under the authority of a power of attorney issued by its majority shareholder, Arpels Investment Ltd, on a six month, limited and revocable basis.
- [8] The Claimant was the holder of a loan facility at the ACB which it secured and guaranteed by charges over its property known as “the Laurie Bay Lands.”

[9] On 6th February 2002 the deceased acting as director of the Claimant signed a loan facility on behalf of the Claimant at the ACB. The purpose of the loan "was to assist [Astra] with real estate development at Laurie's Bay St. Phillips North." Accordingly the deceased was aware that the loan was for a specific developmental purpose.

[10] That the ACB loan facility was consistently regarded as an asset owned by the Claimant, secured solely for its benefit. The deceased had no authorization to divert or utilize any of the funds from the ACB loan facility for personal gain

[11] In or about June 2002, the deceased withdrew approximately EC \$2.04 million from the loan facility at ACB and purchased shares in a company called Atlantic Properties Limited in his own name. The purchase was executed by ACB cheques drawn on the Claimant's loan facility.

[12] The deceased was registered as shareholder of 66.7% of shares of Atlantic Properties Limited. When the deceased acquired the shares, Atlantic Properties Limited owned 48 acres of land near St. James Club in Antigua (referred to as 'the Savannah land'). Subsequently, approximately 20 acres of the Savannah land were sold to third parties, and the resulting proceeds were neither deposited into the Claimant's bank accounts nor is their current location known

[13] On April 7, 2005, the deceased passed away unexpectedly.

[14] In light of the foregoing the Claimant asserts that the deceased as director of the Claimant breached his fiduciary duty by placing himself in a position of a conflict of interest and used assets of the Claimant without the fullest disclosure and shareholders' approval. The Claimant also denies that there was a director's loan made by the deceased to the Claimant and states that the deceased could not lawfully use its funds on some purported set-off and/or to purchase shares in Atlantic Properties Limited in his own name without the fullest disclosure, knowledge and the full consent or authorization of the Claimant and its shareholders.

[15] Still further or in the alternative, the Claimant contends that the Defendant is estopped from denying that the funds or assets were in fact used by the deceased as she has admitted in paragraph 14 of her amended statement of claim in High Court Claim No. ANUHCv2010/0319 that the Claimant's funds or assets were used by the deceased.

[16] The Claimant says that it is not in possession of any records which would confirm its indebtedness to the deceased, nor is it in possession of any records which show how that indebtedness was incurred.

[17] The Claimant says further that there is no evidence that any informed consent was received by the deceased from the Claimant in respect of his use of the Claimant's loan at ACB for the purchase of 66.7% shares in Atlantic Properties Limited.

[18] By letters dated 7th April 2015 and 4th October 2016 the Claimant through its counsel sought clarification of these matters from the Defendant and the other former executrix of the deceased Estate but never received a response.

[19] By letter dated 27th January 2017, the Claimant through its counsel sought explanations from its former external auditors, Messrs. Pannell Kerr Forster in respect of its 1999, 2000, and 2001 audited accounts which record a director's loan of EC\$3,000,421.00 up from EC\$2,885,898.00 but has never received a response.

[20] In the circumstances, the Claimant denies that it is or was indebted to the deceased and puts the Defendant to strict proof of that indebtedness.

[21] Further, the Claimant states that the use of its loan funds by the deceased to purchase the shares in Atlantic Properties Limited was without proper authority and a breach of his fiduciary duties to it.

The Re-Re-Amended Defence

[22] The Defendant admits that the deceased drew down US\$593,750.00 on the Claimant Company's loan account by banker's drafts in September 2002. These funds were subsequently used on 2nd October 2002 to purchase a 66.7% shareholding in Atlantic Properties in the name of two trusts being, Executive Holdings Limited and Executive Directors Limited.

[23] The Defendant says that the Annual Returns for Atlantic Properties Limited for 2002 lists the deceased as the owner of all issued shares but claims that this is an error as he should not have been listed as the owner as the shares were acquired by the two trusts as previously stated.

[24] The Defendant admits that the deceased obtained a loan from ACB in February 2002 but denies that he improperly diverted funds belonging to the Claimant. The Defendant states further that the deceased's use of the funds did not cause the Claimant's failure to develop the lands at Laurie's Bay. She says that there was development preparation as the deceased drew up plans with an architect from Monserrat for the development of the first 20 acres with 40 villas and that he also had a detailed Environmental Impact Assessment that necessitated the use of a Trinidad-based firm. The Defendant also says that it was necessary to liaise with Government departments about planning permission.

[25] The Defendant states that the funds taken from the Claimant's loan account constituted a repayment by the Claimant of director's loans owed to the deceased by the Claimant, and that it was recorded as such in the Claimant's accounts.

[26] The Defendant also says that the Claimant was indebted to the deceased in the sum of EC\$2,953,089.00 as of 31st January 2002. She goes further to say that the deceased was at all material times a director of the Claimant and that his use of the Claimant's loan funds from ACB constituted a partial repayment of the Claimant's

director's loan debt to the deceased. The Defendant denies that there was any breach of fiduciary duty on the part of the deceased and says that the deceased made full disclosure to the members and shareholders of the Claimant that he used the funds, which were owed to him by way of a director's loan, to purchase the Atlantic Properties shares at the 2002 Arpels Investment annual general meeting held on 28th March 2003.

[27] The Defendant also says that the withdrawal of the funds and their purpose was in the full knowledge and authority of ACB and that when ACB loaned money to the Claimant it did not require a postponement of the deceased's director's loan debt. The bank therefore did not prevent repayment of the Claimant's debt to Mr. Toms and there was no improper use of the loan funds by him.

[28] The Defendant also takes issue with the Claimant's assertion that "the use of its loan funds by the deceased to purchase 66.7% shares in Atlantic Properties Limited was without proper authority and a breach of his fiduciary duties owed to the Claimant Company" as there was no breach of the deceased's fiduciary duties.

[29] As it relates to the sale of the Savannah lands the Defendant says that the said land transactions are outside of her knowledge and says that the Claimant is put to strict proof with regards to this sale and the alleged whereabouts of the proceeds of this sale. She also denies that the Claimant has ever had any interest in the Atlantic Properties shares beneficially owned by the deceased.

[30] The Defendant states that it is the Claimant who has the legal burden of proving that it is not indebted to the deceased as the Claimant is the party asserting that there is no such debt. She asserts that the Claimant was indebted to the deceased in the sum of \$2,953,089.00 as of 31st January 2002 and that this loan is evidenced by audited accounts signed off by the Claimant's auditors Pannel Kerr Forster. She says further that the director's loan debt owed by Astra to the deceased was properly

recorded in the accounts as a current liability meaning that it was repayable in 12 months from the end of the financial period.

[31] The Defendant also states that the Claimant has no proper basis for denying that it was indebted to the deceased in 2001 and 2002 as this is apparent from (1) the company accounts for the 2001-2 and 2002-3 financial years and (2) the company balance sheet as at 31st August 2001.

[32] Finally, the Defendant says that the Claimant is time barred from bringing the present claim by either sections 7 or 11 of the Limitations Act (1997) or by the doctrine of laches as the actions which precipitated its cause of action allegedly occurred in or around June 2002. The Defendant also notes that no justification for the delay of this claim has been pleaded and says that she has suffered considerable prejudice because of the Claimant's delay in bringing this action. The Defendant says that the evidence of the deceased would have been available had this claim been brought in a timely manner and that the Claimant raised no objection to Mr. Toms actions at the time. She asserts that in the premises it would be inequitable to grant the Claimant relief.

The Reply to the Re-Re-Amended Defence

[33] The Claimant states that since the handing down of the Judgment in High Court Claim No. ANUHCV2010/0319 on 27th September 2016, the name the deceased was, and continues to be recorded, in the Annual Returns of Atlantic Properties Limited as the owner of 667 (66.7%) shares, and not the names of the two trusts as alleged by the Defendant. The Claimant also says that in any event, the improper diversion of funds was caused and executed by the deceased in breach of his fiduciary duties to the Claimant.

[34] Further the Claimant says that the Defendant is the sole signatory to the 2020 Annual Returns of Atlantic Properties Limited, being the last annual returns filed at the Companies Registry which records the deceased with a 66.7% shareholding.

[35] The Claimant admits there was development preparation as stated by the Defendant. However, the actual development of the Laurie Bay lands was never executed or possible as the deceased had diverted the funds, expressly designated for this purpose, for his own personal use and benefit.

[36] The Claimant goes on to say that the deceased acted in breach of his fiduciary duties to the Claimant as director by drawing down on the Claimant's loan account at the ACB to purchase a 66.7% shareholding in Atlantic Properties Limited on 2nd October 2002 in his own name without first informing or obtaining the agreement of the members and shareholders of the Claimant. By the Defendant's own admission, the unlawful diversion and use of funds by the deceased to purchase shares in Atlantic Properties Limited was purportedly disclosed at the 2002 annual general meeting held on 28th March 2003, some six months after the deceased had completed the aforesaid share purchase. There is no record that members of the Claimant ratified or consented, after the fact, to this breach of trust by the deceased.

[37] The Claimant denies that the deceased had the authority to liaise with the ACB as alleged or at all to use the funds for a personal purpose, and that the ACB would not have had authority to permit the use of the Claimant's funds for his personal purposes and benefit unless misled by the deceased's fraud or dishonesty as the deceased acted without the express and unqualified approval of the minority shareholders.

[38] The Claimant says further that the right to drawdown on and use the credit facility for its benefit was an asset of the Claimant. No other person or company had the right to use it. The funds from the ACB were held in trust by the directors for the sole benefit of the Claimant. Consequently, only members of the Claimant could have

authorized ACB to use the funds for a wholly different purpose, and especially for Mr. Toms' personal benefit.

[39] Further, the Claimant continues to deny the existence of an alleged debt owed to the deceased. Notwithstanding a gratuitous reference to "a debt" by a Mr. Kingsley Thorogood in his Interim Financial Report, and in the accounts prepared by the accountants Pannel Kerr Forster, there is no document, record or resolution approving this alleged debt or its terms. Additionally, Pannel Kerr Forster refused to respond to the Claimant's queries on the alleged debt. In any event, there could not be any debt or repayment of this alleged debt without the fullest disclosure and unqualified approval of all the members of the Claimant.

[40] The Claimant denies that its claim is barred by sections 7 or 11 of the Limitation Act 1997 as the Claimant's action is not founded on simple contract nor is the Claimant's action for the recovery of a debt as alleged or at all.

[41] The Claimant also denies that the claim is barred by the equitable doctrine of laches as it would be unconscionable for the deceased to act in breach of his fiduciary duties to the Claimant and without proper authority in diverting funds belonging to the Claimant for his own personal benefit and for the Defendant to benefit from those actions without consequence.

[42] Further, there are the following other reasons, which preclude a claim of laches: (a) The Defendant was at all material times aware that the Claimant was insisting on its rights to the shares, (b) No prejudice has been caused and cannot be caused to the Defendant as she has no right to profit from a flagrant breach of trust on the part of the deceased and (c) It would be inequitable to bar the Claimant from pursuing its claim for the shares.

The Evidence

[43] Four witnesses were presented for trial, namely, Correne Samuel, Kirthley Maginley, Kingsley Thorogood and Indira Salisbury.

The Claimant's Evidence

Correne Samuel

[44] The Claimant's first witness was Ms. Correne Samuel, her witness summary¹ filed on 30th September 2022 was converted to a witness statement and admitted as her evidence in chief.

[45] Her evidence is that she came to know both Indira Salisbury and Kingsley Thorogood when she was employed by the deceased to work at the Claimant as his personal assistant in July 2003.

[46] Upon starting work as the deceased's personal assistant, the Claimant initially operated from 'Island House' on Newgate Street, which was owned by Justin L. Simon KC. The witness states that she became acquainted with Mr. Simon KC, who served as Astra Holdings' landlord. Later, the Claimant relocated its offices to a different location on St. Mary's Street.

[47] As the sole employee of the Claimant, apart from the deceased and Kingsley Thorogood, she eventually handled all the clerical and administrative tasks required. Her position allowed her insight into much of the Company's corporate business and dealings, although she initially did not have direct responsibility for these matters.

[48] At that time the Claimant's attorney was Marcel Commodore, who was then replaced by Stacey Richards-Anjo. The Company's secretary was Clare K. Roberts KC. Mr. Roberts KC eventually resigned as the company secretary, and Ms. Samuel was asked by the deceased in 2004 to undertake the functions of company secretary.

¹ Index to Trial Bundle 2 at page 31

[49] Between the period January and September 2004, Ms. Samuel recalls that Mr. Thorogood was away from Antigua for some time as he was dealing with a personal family matter and seeking finance for the Claimant. During his absence, the deceased undertook several of the Company's tasks and made plans for the holding of the Company's annual general meeting which had not been held since 2002.

[50] The witness says that she was aware that notices of the Company's annual general meetings for 2003 and 2004 were prepared and issued by the deceased. She was also aware that the AGMs for 2003 and 2004 were scheduled for 29th September 2004 at 3:00pm and 4:00pm respectively.

[51] On 29th September 2004, she accompanied the deceased to the offices of one Stacey Richards-Anjo on Lower Long Street for the 2003 and 2004 annual general meetings which were meetings for the shareholders of the Company.

[52] There were two shareholders of the Claimant namely, Arpels Investments Limited which owned 75%, and the Government of Antigua and Barbuda which owned 25%.

[53] Mr. Simon KC, then Attorney General, turned up for the meetings as the representative of the Government as shareholder, shortly thereafter the first meeting began. This would have been the 2003 AGM. At the time the meeting began there were only three persons in the room; the deceased, Mr. Simon KC and Ms. Samuel. The deceased had earlier informed Ms. Samuel that she would act as secretary for the meetings.

[54] One of the first items for discussion was the appointment of directors for the Claimant. The deceased nominated three persons as Arpels' nominees: himself to continue as a director, and two other persons, one being Kingsley Thorogood and another male director. Ms. Samuel says that Kingsley Thorogood was not present at this meeting as he was not a shareholder.

[55] She says that Mr. Simon KC immediately objected to Arpels having three nominations stating that the Government of Antigua as the other shareholder with a 25% share was entitled to have one director on the Board. The deceased disagreed and insisted that he was entitled to nominate and appoint the three directors whom he had chosen on behalf of Arpels as the majority shareholder.

[56] During this exchange both the deceased and Mr. Simon KC held their ground. When it became clear that Mr. Toms would not concede, Mr. Simon KC walked out stating that he would no longer participate in the meeting.

[57] Ms. Samuel says that she took handwritten notes of this meeting, including the exchange between the deceased and Mr. Simon KC. As was the practice, she subsequently provided the typed notes to the deceased for the minutes of the meeting. She says that she is unable to state what has happened to the handwritten and typed notes she made. She also prepared the minutes of the meeting which she handed over to the deceased, but she does not recall what eventually happened to those minutes.

[58] Upon cross examination Ms. Samuel admitted that she was only called upon to depose on the matters in her witness statement in 2022, some 18 years after the events outlined in her statement. She said that she prepared her witness statement purely from her memory. Ms. Samuel was shown a document which she accepted was the Minutes of the 2002 AGM and accepted that the Minutes record Mr. Kingsley Thorogood as being present despite him not being a shareholder at that time.

[59] Ms. Samuel maintained that Mr. Thorogood was not present at the 2003 AGM as she would not have been required to attend to take notes if he was present as he would have performed this role. When asked whether Indira Salisbury was nominated as a director as opposed to “another male director” at the 2003 AGM she said she could not recall.

Kirthley Maginley

[60] The second witness was Mr. Maginley, his witness statement² filed on 27th February 2019 was admitted as his evidence in chief.

[61] Mr. Maginley is a director of the Claimant, having been so appointed on 10th November 2008 by the majority shareholder, Arpels Investments Ltd.

[62] He says that the Claimant was locally incorporated on 23rd October 1987 with estate development as its main business. Its shareholders are Arpels Investments Ltd holding 14,999,998 shares, the Government of Antigua and Barbuda holding 5,000 shares and Allister Porter (now deceased) and Sir Clare Roberts KC, as incorporators holding one share each.

[63] Mr. Maginley says that he was informed by Mr. Chris Bateson, a director of Arpels Investments Ltd, that the shareholder-company had appointed the deceased to act on its behalf and would issue him a fixed term revocable power of attorney which was renewable every six months to transact the Claimant's business. He says further that it would appear that the Government for some time had no representative on the Board of Directors.

[64] Mr. Maginley continued to state that in early 2015, the Board was notified of a local suit with claim number ANUHCv2010/0319 in which the Personal Representatives of the deceased' estate were suing a number of individuals and their company seeking, *inter alia*, a declaration that the Personal Representatives are the owners of all the issued share capital of Atlantic Properties Ltd which was the registered proprietor of some 40 acres of land in Falmouth & Bethesda; and an injunction against these individuals and their company "acting or holding themselves out either

² Index to Trial Bundle 2 at page 3

individually or collectively as the owners of the issued shares and as directors of the company Atlantic Properties Limited."

[65] Mr. Maginley says that the Board had sight of the Amended Statement of Case filed by the Personal Representatives of the Estate of the deceased, filed on 17th November 2010 and noted paragraphs 13 and 14 (a) & (b) which spoke to the purchase of 100% shares and interest in Atlantic Properties Limited by the deceased, and how he was able to finance the purchase "by drawing from the indebtedness of a company named Astra Holdings Limited whose liability to the deceased in their balance sheet as of the end of the financial year of the 31st August 2001 was in the sum of three million four hundred and twenty one thousand dollars".

[66] Mr. Maginley says that from the records in the Claimant Company's possession, it is noted that the Claimant through the instrumentality of the deceased was granted a loan facility of \$8,500,000.00 by the ACB on 6th February 2002 to assist with real estate development on property owned by the Claimant at Laurie's Bay. He says that no development was undertaken at Laurie's Bay, but the entire loan amount was disbursed with the deceased signing the cheques or authorizing wire transfers or bank drafts in respect of transactions that had nothing to do with the Laurie's Bay development.

[67] He says that the Claimant is disputing the deceased' authority to borrow that sum and is claiming that the Bank's facilitation of the loan drawdown for purposes other than the declared development was a breach of its fiduciary duty. He says further that the ACB statement for the month of June 2002 shows substantial payments made and passing from the Claimant's accounts.

[68] He says that the Claimant is unable to confirm that it was indebted to the deceased in any amount whatsoever. However, he notes that the Financial Statements for the financial year ending 31st August 2001 and prepared by chartered accountants,

Pannel Kerr Forster, reveal a director's loan in the amount of \$2,885,898.00 in 2000, which increased to \$3,000,241.00 for the year 2001.

[69] He says that the Claimant is unable to locate any Minutes or Resolutions of the Claimant Company evidencing that or any other debt to the deceased and that the Claimant is also advised by Chris Bateson that he was unaware of any borrowings by the Claimant from the deceased.

[70] Letters were written to the Executrices of the deceased' estate, Sir Clare Roberts KC, and Mr. Wilbur Harrigan of Pannel Kerr Forster for information on the alleged debt to the deceased but no response has been forthcoming except from Sir Clare who advised that he does "not recall any loans to or from the director".

[71] Mr. Maginley says that from the records, instead of drawing down and utilizing the loan monies for the declared development purpose for the benefit of the Claimant, the deceased used part of the loan funds and purchased shares in his own name in Atlantic Properties Limited.

[72] Mr. Maginley's evidence is that the purchase of that shareholding was neither disclosed to nor ratified by the shareholders of the Claimant.

[73] He also says that on 27th September 2016, Madam Justice Henry, delivered her judgment in Claim No. ANUHCv2010/0319 and made a declaration that the Personal Representatives of the deceased, are the owners of 66.7% of the shares of the company registered as Atlantic Properties Limited. Mr. Maginley's position is that the deceased acted in breach of his fiduciary duty and that consequently he holds the shares in Atlantic Properties Limited in trust for the Claimant.

[74] During cross examination counsel for the Defendant, Mr. Thomas KC, showed the witness a balance sheet for the Claimant for the year ended 31st August 2001 which listed a Director's Loan in the amount of just over \$3,000,000.00 audited by Pannell

Kerr Foster. Counsel noted that the balance sheet predates Mr. Maginley's involvement with the Claimant which only began in 2008. Mr. Maginley agreed and admitted that he had no personal knowledge of a director's loan from the deceased.

[75] When asked whether he had any basis to deny the director's loan to the deceased, Mr. Maginley's reply was that the Board was not informed of the loan, and that it had never been brought to their attention.

[76] Mr. Maginley acknowledged that the government as a minority shareholder, was invited to the 2002 Annual General Meeting. He also confirms that the government representative attended the meeting and that the minutes of the AGM was provided to the representative.

[77] He confirmed that no witness statement was provided by the government's representative regarding this matter.

[78] Mr. Maginley was questioned about the significant delay in bringing this matter and agreed that the issue was raised approximately 15 years after the transaction was completed and 10 years after the death of the deceased.

[79] On re-examination, Mr. Maginley stated that the Board became aware of the loan in 2015. He further mentioned that the government's representative at the meeting was present for a brief period as there was a dispute over the directorship, and that the representative did not participate in the meeting. He admitted also that the absence of the government's representative resulted in the government losing the opportunity to make representations.

The Defendant's Evidence

Kingsley Marcus Thorogood

[80] Mr. Thorogood was the Defendant's first witness, he provided a witness statement³ and a supplementary witness statement⁴ filed on 15th March 2018 and 11th February 2020 respectively. These witness statements were admitted as Mr. Thorogood's evidence in chief. He also provided an amended second supplementary witness statement⁵ dated 15th August 2022 which was also admitted as his evidence in chief.

[81] According to Mr. Thorogood's testimony, he was acquainted with the deceased. When the deceased sought professional assistance to advance the Claimant, he discovered that the deceased had lost his former legal and financial advisor, Alistair Campbell Porter. The deceased was actively seeking to fill this void and address the challenges arising from his colleague's passing.

[82] He says that he and the deceased established a good personal rapport and that he became attracted to replacing Alistair Porter with the investment opportunity the deceased had indicated during his visit to Antigua. That the deceased arranged for him to be acquainted with the Claimant's financial situation with a view to seeking an investment in the majority shareholder of the Claimant being Arpels Investments Limited over which the deceased demonstrated that he had effective and direct control.

[83] On 26th September 2000, the deceased's Secretary/Bookkeeper gave him extracts from the records of the Claimant. It was requested that he review them prior to a discussion with the deceased on the second leg of a flight to the United Kingdom from Grenada where they spent half of the flight talking over matters.

[84] Mr. Thorogood says that the Claimant is a Company incorporated in Antigua and Barbuda on 23rd October 1987. The subscribers were Alistair Campbell Porter and Sir Clare Roberts KC. Sir Clare was connected to Antigua Commercial Bank

³ Index to Trial Bundle 2 at page 9

⁴ Index to Trial Bundle 2 at page 22

⁵ Index to Trial Bundle 2 at page 36

Mortgage Company, later becoming the Bank's Chairman and had been the company secretary since the Claimant Company's incorporation.

[85] Mr. Thorogood says that when the deceased introduced them, he recognized that Sir Clare had been key to resolving a dispute with the Government in 1986-1987 out of which the Claimant emerged with his advice.

[86] After the return flight, he remained in contact with the deceased and carried out due diligence into Arpels Investments Limited through a company search by Jordans on his own initiative. The information obtained from the search showed that two men namely Christopher Bateson and Ian Bertram were Arpel's directors, and that Ian Bertram was also the company secretary.

[87] After having reviewed the paperwork received and further meetings with the deceased, he concluded that he would be prepared to outlay £50,000 for a 5% holding in Arpels Investments Limited in view of the underlying land values in the Claimant.

[88] In view of this decision and on the basis that they would visit the Company Managers of Arpels Investments Limited in the Isle of Man, he proceeded to start making payments totalling £50,000.00.

[89] The witness stated that on 14th October 2000 he and the deceased agreed to a payment programme for a 5% shareholding and the deceased signed a letter of confirmation that both men would visit the Company's managers after their return from Antigua during November 2000 to formalize the 5% shareholding allocation in Arpels Investments Limited.

[90] He says that there was never any mention about the powers of the deceased being restricted and it was evident that the deceased was in full control of Arpels & the

Claimant long before the powers of attorney were mentioned by Christopher Bateson.

- [91] Subsequently, a letter dated 14th February 2001 posted from Hong Kong to where Ian Bertram moved was received at his then address in the UK confirming his 5% shareholding in Arpels Investments Limited.
- [92] Following his completion of the required investment value in April 2001, Mr. Thorogood says he was free to proceed with a further 5% shareholding in Arpels Investments Ltd under the option stated in a letter dated 30th November 2000 which had no time limit.
- [93] He also says that he has seen the witness statement of Indira Salisbury and agrees with the history as set out therein, particularly with regards to the ownership of the Claimant.
- [94] He says that Arpels owns 75% of the shares in the Claimant and that the Antigua High Court has ruled on these matters as referenced in the Defendant's witness statement.
- [95] In the circumstances Mr. Thorogood says that he cannot see how the board of directors of the Claimant can bring this action nor does he think they are the proper board of directors. He says he agrees with the Defendant's statement based on his personal knowledge of the structure of the Claimant and the majority shareholder being the Defendant, his view is that the board of directors of the Claimant cannot bring this action.
- [96] In his amended second supplementary witness statement Mr. Thorogood states that he is a Chartered Accountant and that from January 2000 to April 2005 he was the finance director-designate of the Claimant. In that capacity he was responsible for preparing the company accounts.

- [97] He says that the deceased put a substantial amount of his own money into the Claimant by way of director's loan and that in the 2000-2001 financial year the amount owed by Astra to the deceased was EC\$3,000,421 which reduced to EC\$2,953,089 by 31st January 2002.
- [98] In 2002, he coordinated the transaction in which the deceased purchased a 66.7% shareholding in Atlantic Properties Limited. At that time, the beneficial owners of Atlantic Properties Limited were Robin Chapman, Citron Holdings Limited and Andrew Goodenough, each of whom held a one-third share of the company. Atlantic Properties Limited was managed by Executive Directors Limited and Executive Holdings Limited.
- [99] Meanwhile, the deceased entered into an agreement with the shareholders of the Claimant to purchase their respective shares in Atlantic (66.7% of Atlantic) for a purchase price of US\$625,000.00. A deposit of US\$31,750.00 was paid and the rest was payable upon completion.
- [100] On 17th June 2002 he and the deceased were due to fly to Nassau in the Bahamas to complete the agreement. The deceased wanted to complete the agreement even though the investors' funds were not available. With the agreement of the Claimant's corporate manager at ACB, the deceased drew the required funds from the Claimant's bank account. At the last-minute the deceased obtained urgent authorisation from the Ministry of Finance to take the funds out of Antigua.
- [101] In any event, completion was delayed until October 2002, because of which the original bank drafts were cancelled, and new bank drafts were issued. On 1st October 2002 Executive Directors Limited and Executive Holdings Limited executed declarations of trust in which the deceased was named as the beneficial owner of two-thirds of the shares in Atlantic.

[102] In the Claimant's accounts, the funds withdrawn on 17th June 2002 were debited to the deceased's loan account. In effect, the payment of the purchase price stemmed from a repayment by Claimant to the deceased of part of the EC\$2.95 million the Claimant owed to the deceased.

[103] Mr. Thorogood says that the shareholders of the Claimant were fully apprised of this at the next Annual General Meeting. He referred to the minutes of the Claimant's 2002 AGM (held in March 2003) in which his Interim Financial Report clearly referred to "the Return of the Director's Loan Account of circa EC\$1.6m used temporarily to secure a contract completion..." He also says that the Government as minority shareholder received the minutes of the AGM at that time and must have been aware of this matter.

[104] According to Mr. Thorogood the intention of the deceased was always that the purchase of the shares in Atlantic would benefit the Claimant.

[105] The Claimant was involved in providing services to the Savannah Estate (the lands owned by Atlantic). Mr. Thorogood says that he and the deceased were always candid both with the shareholders and with the ACB about the deceased's ownership of Atlantic and the Claimant's intended business relationship with Atlantic. He pointed to several contemporaneous documents which he says confirms this. The documents he referred to include the deceased's opening remarks to the 2003 Annual General Meeting of Astra (held in September 2004) and the Interim Financial Statement to the 2003 Annual General Meeting of the Claimant in which it was made clear to the shareholders by Mr. Thorogood that it was anticipated that the Claimant would derive significant income streams through the deceased's acquisition of Atlantic.

[106] Mr. Thorogood says that the documents show that he and the deceased were fully open and honest with the shareholders about the Claimant's relationship with Savannah/Atlantic and the fact that money had been spent on the development of the Savannah Estate. He says that he and the deceased considered this to be a

reasonable business decision in anticipation of the Claimant deriving significant revenues from Savannah in the future. At no point was it suggested to the shareholders that the Claimant would itself acquire any shareholding in the Savannah lands or Atlantic. Mr. Thorogood says that it was made clear that these shares were owned by the deceased.

[107] Mr. Thorogood also says that a Confidential Briefing Report that he prepared for Chris Bateson in 2005 after Mr. Toms' death shows that he explained clearly that the Claimant had no direct interest in Atlantic.

[108] Mr. Thorogood says that the deceased's 66.7% shareholding in Atlantic was his alone. It was not purchased with the Claimant's funds and was not purchased on the basis that it would be beneficially owned by the Claimant. Rather, the funds were drawn from the Claimant and debited to the deceased's existing director's loan account with the Claimant and were recorded in the Claimant's accounts.

[109] As for the role of Mr. Justin Simon KC, Mr. Thorogood says that Mr. Simon KC was the landlord of Astra at his Newgate Street Chambers known as Island House until the Claimant moved to Astra House on St Mary's Street on 31st August 2003. In his capacity as Attorney-General Mr. Simon KC received letters on 3rd September 2004 and 6th September 2004 which conveyed notifications of annual general meetings, agendas and minutes to the minority shareholder. He did not raise any issues at the meetings or during the deceased's lifetime about the ownership and/or financing of Atlantic Properties Ltd.

[110] On 29th September 2004 Mr. Simon KC attended the Claimant's annual general meetings in person. The deceased proposed that Indira Salisbury be appointed a director of the Claimant, which Mr. Simon KC opposed as he wanted the Government to be represented on the Claimant's Board. Mr. Simon KC had no right to make any such demand as that was contrary to the 1987 settlement under which the Government gained a 25% minority shareholding in Astra with no representation on the Board.

[111] According to Mr. Thorogood, Mr. Justin Simon KC is an obvious witness of fact and can confirm that the deceased was indeed the chairman and controlling mind of Astra when he was Attorney-General.

[112] Mr. Thorogood says that he was actively involved in the affairs of the Claimant from October 2000 until the unfortunate demise of the deceased on 7th April 2005 and that he has a full recollection of all its affairs.

[113] As for the statement of Correne Samuel, Mr. Thorogood says that he knew Ms. Samuel and that she was indeed the Claimant's employee. He says however, that some aspects of Ms Samuel's statement are not correct. In particular, he says that he was present at the 2003 and 2004 AGMs on 29th September 2004 and contrary to her assertion those present were himself, Ms. Samuel, the deceased and Justin Simon KC (who arrived late and left early).

[114] He says that although he had been off island, he had been assisting the deceased by composing the notices for the 2003 and 2004 AGMs, the agendas and the letters to the various shareholders. Mr. Thorogood says that he flew to Antigua from Gibraltar (via London) on 9th September 2004 and was in Antigua until 9th October 2004. One of the principal purposes of his trip was to attend the 2003 and 2004 AGMs on 29th September 2004. He says he was the Company's Finance Director Designate at the time and was heavily involved in all aspects of the management of the Company and that he drafted several documents in preparation for the AGMs and finalized them all with the deceased in readiness for both meetings. In the circumstances he therefore finds it surprising that Ms. Samuel should assert that he was not present.

[115] He says that at the AGMs, the directors nominated aside from the deceased, were himself and Indira Salisbury. There was no other male director nominated. He states that Mr. Simon KC objected to Ms. Salisbury's and his appointments on the

ground that he considered that the Government as minority shareholder should be represented on the board. The deceased strongly opposed this suggestion.

[116] Mr. Thorogood agrees with Ms. Samuel that Mr. Simon KC's attendance at the meeting was very short as he arrived late and left early. He did not partake in the standard corporate procedure of progressing through the agendas for the 2003 and 2004 AGMs. However, Mr. Simon KC had every opportunity to do so, and to raise any questions he might have had about the Atlantic transaction or about any other aspect of the Claimant's corporate affairs. The full reports to the AGM, including the Interim Financial Statements, were available on a side table for issue in accordance with the meeting agenda. They were therefore available for Mr. Simon KC to review but he chose not to do so. Aside from the appointment of directors, the only other matter raised by Mr. Simon KC was that he considered that the auditors, Pannel Kerr Forster, might have a conflict of interest because they also audited ACB. If Mr. Simon KC had stayed for the duration of the meeting, he would have been present when the Interim Financial Statements were presented to the AGM.

[117] As for the director's loan debt to the deceased, Mr. Thorogood says that when he met the deceased there were no annual accounts for the Claimant since incorporation, which was inhibiting its progression since the death of Alistair Porter (who had been the deceased's solicitor and a director of the Claimant). Mr. Thorogood states that he was requested to bring matters up to date, which he did. He says that he carried out this work mainly at the deceased's family home in England, where he spent much time collating paperwork which included bank statements and invoices. He arranged for audited accounts to be prepared by Pannel Kerr Forster from incorporation in 1987. He gave his full working papers to Pannel Kerr Forster for them to fulfil their role as the Claimant's auditors, and he recalls clarifying everything to their satisfaction. According to Mr. Thorogood it was established, from records that formed the basis of the annual accounts, that the

deceased had put a substantial amount of his own money into the Claimant by way of director's loan.

[118] He says that the deceased director's loan account was shown correctly as a liability in the Claimant's accounts to 31st October 1988 and was the subject of Note 5 which stated that "no interest is being charged on the amounts loaned to the Company by the Director and the repayment terms have not been specified".

[119] Mr. Thorogood says that the director's loan debt was always recorded in the accounts under the current liabilities (repayable within 12 months from the end of the period). Therefore, withdrawals made during a financial year were charged to the deceased' director's loan account.

[120] Mr. Thorogood also says that from his own knowledge that when ACB made the loan to the Claimant, they did not require a postponement of the deceased' director's loan debt.

[121] Mr. Thorogood says that he has been shown the letter disclosed by the Claimant in which Sir Clare Roberts KC states that he does not recall any loans to or from the deceased. He says he finds this very surprising. After the Claimant's audited accounts were drawn up, the Claimant was able to make a presentation to ACB following the introduction by Sir Clare as Company Secretary and Chairman of ACB Mortgage & Trust Co Limited. He says that Sir Clare was fully aware of their content and the significant inward value which the deceased had introduced into the Claimant Company over the years since its incorporation in 1987.

[122] Mr. Thorogood also says that the deceased did apprise Pannel Kerr Forster of the Atlantic transaction via letter. The auditors had no issues with the information presented to them and certified the audited accounts.

[123] Mr. Thorogood says that the Claimant is wrong to suggest that the deceased's use of the ACB loan facility was the reason for the non-development of the Laurie's Bay lands. A significant amount of work was done by him and the deceased towards developing those lands. The development work included the initial road cutting after months of prior preparation involving site investigations and the preparation of concept plans and working drawings with architects based in Montserrat. He says that development was not progressed as he and the deceased were hindered by improper dealings by external parties.

[124] He also says that he disagrees with the allegation that the deceased breached his fiduciary duties to the Claimant. He explains that although the ACB loan facility was arranged for the purpose of developing the lands at Laurie's Bay, there was no prohibition on using it for other purposes. In fact, the use of the ACB loan facility to complete the Atlantic transaction was done with the full knowledge and consent of ACB. Further when ACB provided the loan facility, they did not require a postponement of the deceased' director's loan debt.

[125] As for whether the shareholders were notified of the Atlantic transaction Mr. Thorogood's evidence is that he and the deceased were open and honest with the shareholders about the return of funds from the deceased' director's loan account. Mr. Thorogood made reference in his financial report to the 2002 AGM on 28th March 2003 to the Chairman having identified "two significant acquisition opportunities in April/May 2002." He further made reference to "the Return of the Director's Loan Account of circa \$1,600,000.00 used temporarily to secure a contract completion". He says that this is recorded in the 2002 AGM minutes which shows that these matters were disclosed to the shareholders. In the circumstances Mr. Thorogood rejects the suggestion that there was any breach whatsoever of the deceased's fiduciary duty as a director.

[126] Under cross examination Mr. Thorogood admitted that there was no agreement evidencing the existence of the director's loan to the deceased. He also said that he

never saw any resolution from the shareholders approving the loan to the Claimant from the deceased.

[127] Mr. Thorogood also admitted that neither he nor Mr. Toms ever requested permission from the shareholders of the Claimant to get approval of the use of the Claimant's loan facilities at ACB before using the funds in June and October 2002.

[128] When asked whether it occurred to him to write to Mr. Simon KC about Mr. Toms' use of the Claimant's loan facility funds after Mr. Simon KC walked out of the 2003 AGM Mr. Thorogood answered "no".

Indira Salisbury

[129] Ms. Salisbury is the executor of the estate of the deceased which is the Defendant. She provided a witness statement⁶ filed 15th March 2018 and a supplementary witness statement⁷ filed on 15th September 2022. These witness statements were admitted as Mrs. Salisbury's evidence in chief.

[130] In her first witness statement Ms. Salisbury goes into extensive detail about the history of the deceased activities as director of the Claimant. She asserts that the Claimant's board of directors is not properly constituted nor duly appointed and so cannot bring this action against her.

[131] She also notes that the court in ANUHCv2010/0319 previously ruled that the deceased owns 66.7% of shares in Atlantic Properties Limited free of all competing interests. She says that the deceased was a director of the Claimant, and that this fact is confirmed by several documents dated between 2004 and 2007. She further states that the High Court in ANUHCv2005/0545 made it clear that the deceased was the controlling mind of Arpels Investments Limited.

⁶ Index to Trial Bundle 2 at page 14

⁷ Index to Trial Bundle 2 at page 52

[132] In her supplementary witness statement, she says that she did not have any involvement in the deceased's business dealings during his lifetime. She was not involved in the transaction in which he purchased a majority shareholding in Atlantic Properties Limited in 2002. She also says that she has no personal knowledge of the circumstances of that transaction. She goes on to say that although the deceased did attempt to nominate her as a director of Astra Holdings Limited in 2004, she was not involved in the management of Astra during his lifetime.

[133] Ms. Salisbury explains that the constant litigation since the deceased's passing has been very difficult and stressful for her. She says that she does not have a good understanding of legal matters, her memory is often poor and that she becomes confused easily. She also claims not to have a good understanding of the documents relating to Astra and says that she is reliant on her lawyers to help her to understand the same.

[134] She says that the Claimant brought this litigation against her in 2017, some 15 years after the Atlantic purchase and 12 years after Mr. Tom's death and that this very late claim has caused her serious prejudice. She also notes that since the deceased has been dead since 2005, he cannot give evidence in his own defence. The only witness who can give evidence of the Atlantic transaction from his personal knowledge is Mr. Kingsley Thorogood who was involved in this matter directly. In the circumstances she asks the Court to find that it is inequitable to allow the Claimant to proceed with this claim after so many years.

[135] There was no cross examination of this witness.

FINDINGS OF FACT

[136] The deceased was the sole director and controlling mind of the Claimant from 1987 until February 2005. He subsequently died in April 2005.

[137] In 2002 the deceased as Director of the Claimant negotiated with ACB for a commercial loan in the sum of \$8,500,000.00 the purpose of which was the development of lands at Laurie Bay. The loan was approved, and the Claimant received the monies.

[138] Subsequently the deceased withdrew a significant sum from the Claimant's loan account, and used the money to purchase shares and interest in Atlantic Properties Limited.

[139] By virtue of a decision of the Learned Justice Clare Henry in Claim Number ANUHCV2010/0319 the estate of the deceased, represented by the Defendant, was declared to be the owner of 66.7% shares of the company registered as Atlantic Properties Limited.

Issues

[140] The primary question for the court to determine is if the Claimant has successfully demonstrated a breach of fiduciary duty. Additionally, to reach a conclusion on this matter, several related issues will need to be addressed specifically:

- i. Whether there was a director's loan?
- ii. Whether the deceased director's disclosure in the financial statements or at the AGM sufficiently resolved the inherent conflict and countered the allegation of a breach of fiduciary duty?
- iii. Whether this claim is subject to laches or is time barred?

ANALYSIS

Issue 1: Whether there was a directors' loan

[141] The Claimant denies the existence of a director's loan to it. This assertion is based on a thorough review of their records which the Claimant contends revealed no

evidence supporting the existence of such a loan. The Defendant references the financial statements for the years 2000 and 2001 which identifies a director's loan as a liability of the company.

[142] The evidence that a director's loan was disclosed in the financial statements are not by itself sufficient to find the existence of a director's loan. Whilst this is persuasive this must be assessed in the context of all the evidence.

[143] The Claimant's evidence that no documentary evidence was found concerning the director's loan, was corroborated in part by Kingsley Thorogood who in cross examination admitted that there was no loan agreement documenting the director's loan. In fact, Mr. Thorogood who was employed by the deceased some 13 years after the incorporation of the Claimant stated that he accepted the deceased's word that he had invested monies into the Claimant with a substantial sum being invested upon incorporation and other small sums throughout the life of the Claimant. Although the witness later suggested that this was corroborated by documentary evidence, no such evidence was produced to the court to substantiate this. Particularly no bank statements from the Defendant to the Claimant, resolutions, promissory notes, internal memorandums or board minutes for the relevant period were produced by the Defendant indicating that such investments were made. It is indeed peculiar that, despite claims of the deceased being a shrewd businessman, he failed to safeguard his substantial interests through proper documentation. Furthermore, considering that the deceased was the sole director, such measures could have been implemented effortlessly without opposition from anyone. Considering the absence of documentation for the director's loan, which contradicts the Defendant's reputed business acumen, this lends credence to the Claimant's suggestion that the loan was fabricated.

[144] Of further concern is the fact that no clear terms of the alleged director's loan including the term, interest⁸ and repayment which ordinarily would lend some legitimacy to it was identified. The duty of complete transparency required of a director extends far beyond simply reporting an alleged loan amount in the financial statements. It is imperative to provide a comprehensive and precise account of all details related to the loan's date and conditions. Good corporate governance requires that significant financial transactions be properly documented and approved to ensure transparency and accountability.

[145] Additionally, the fact that the director's loan was recorded several years after the alleged investment is highly unusual. The long delay in documenting such a significant transaction coupled with the lack of proper historical documentation undermines the credibility of the claim.

[146] Although an auditor's report was produced as part of the disclosure documents, which report appears to certify the accuracy of the financial statements this document is hearsay evidence as the auditor was not called on to testify and the report was not attached to any appropriate witness statement. Without the direct testimony of the auditor, the Claimant is denied the opportunity to cross examine about the report's content and methodology. Without an expert report or a witness statement from the auditor the validity of that report is undermined and is unable to be produced to prove the truth of the matter being the validity of the financial statements and the associated director's loan.

[147] Furthermore, given the evidence of the Defendant's witness about the lack of source documents which an auditor's report would rely on to justify the director's loan, this casts doubt of the accuracy on the report which accepted the accuracy of the financial statements.

⁸ Kingsley Thorogood admitted that the reference to the loan being interest free was a notation that he had made and that this was not based on any agreement.

[148] Thus, without proper documentation it becomes difficult to validate the existence and legitimacy of the director's loan. It is trite that he who alleges must prove. In this case the Defendant having alleged that there was a proper loan, bears the burden of proving its validity. Given the lack of necessary documentation and approval, the Defendant has not met the requisite standard of proof for the court to find that there was a proper and valid director's loan.

[149] Given the court's finding there was no proper director's loan, the repayment of the loan was therefore improper as there was no legitimate basis for the payment.

Issue 2: Whether the deceased director's disclosure in the financial statements or at the AGM sufficiently resolved the inherent conflict and countered the allegation of a breach of fiduciary duty

[150] Should my assessment regarding the legitimacy of the director's loan be incorrect. I will address whether the deceased director's disclosure in the financial statements or at the AGM sufficiently resolved the inherent conflict and countered the allegation of a breach of fiduciary duty.

[151] In **Industrial Development Consultants Ltd v Cooley**⁹ the court in discussing the duty to pass on information which was relevant for the company to know stated as follows:

"The first matter that has to be considered is whether or not the defendant was in a fiduciary relationship with his principals, the plaintiffs...The defendant had one capacity and one capacity only in which he was carrying on business at that time. That capacity was as managing director of the plaintiffs. **Information which came to him while he was managing director and which was of concern to the plaintiffs and was relevant for the plaintiffs to know, was information which it was his duty to**

⁹ [1972] 2 All ER 162

pass on to the plaintiffs because between himself and the plaintiffs a fiduciary relationship existed..." (emphasis mine)

[152] In his text **Commonwealth Caribbean Company Law** author **Andrew Burgess**¹⁰ comments on the no conflict rule and states as follows:

"Put simply, the unyielding rule is that the only effective way of directors and officers avoiding the no-conflict rule is for them to make full disclosure to the shareholders in general meeting for approval or ratification of the contract."

[153] The fiduciary duty of a director demands a high level of responsibility, especially regarding financial matters or personal profit-making. Consequently, it was the deceased director's obligation to maintain accurate and prompt¹¹ financial records. Such records would verify the legitimacy of the loan and dispel any suspicions among shareholders or other stakeholders about improper conduct, ensuring that the transaction was conducted fairly and transparently. Unfortunately, this was not the case. The evidence before the court is that the director's loan was made by the deceased at the point of incorporation and that he lent other sums of money to the Claimant as the years passed. There is no evidence which demonstrates that this loan was approved by the shareholders or that they knew of its existence at the time it was made. The eventual revelation of a director's loan, lacking substantial corroborative details long after its supposed inception, did not meet the stringent standards expected of a director's duties.

[154] Further at the 2003 and 2004 annual general meetings the Interim Financial Statements which disclosed the debt to the deceased were available on the side table for issue in accordance with the meeting agenda. The Defendant's witness has said that Mr. Simon KC could have reviewed the financial statements but chose

¹⁰ page 251

¹¹ Section 149 of the Companies Act refers

not to do so. The evidence on behalf of the Defendant is that if Mr. Simon KC had stayed for the duration of the meeting, he would have been present when the Interim Financial Statements were presented, and he would have been made aware of the loan. The Defendant's witness also said that Mr. Simon KC failed to raise any questions he might have had about the Atlantic transaction or about any other aspect of Astra's corporate affairs prior to leaving the AGM which is why he was not made aware of these matters.

[155] The Defendant's rationale for the director's failure to disclose the loan and the intended use of the Claimant's capital is unpersuasive. Directors are obliged to keep shareholders adequately informed about matters of importance. Merely stating that such information was available, yet ignored by shareholders, does not fulfil this obligation. Good governance mandates that this information be provided a reasonable time prior to the annual general meeting, ensuring individuals have sufficient time to peruse, comprehend, and highlight any issues they may need further explanation. This process is crucial for the matters to be addressed with due diligence at the AGM. The Defendant's suggestion that the minutes were merely placed on a side table implies that they were not proactively distributed, indicating a failure to meet the necessary standards of disclosure expected of a director to counter allegations of a breach of fiduciary duty.

[156] Additionally, I dismiss the idea that the loan's disclosure in the financial statements at the annual general meeting would suffice in meeting the director's obligation to disclose. More substantial proof was required to authenticate the loan and to thoroughly inform the shareholders about the company's debt to the deceased. It was essential to share the loan's conditions and details before its arrangement to properly execute this responsibility. Similarly, the director needed to reveal his plans to use the Claimant's funds to purchase shares of Atlantic.

[157] In the circumstances I find that the director's duty to disclose details of the loan along with the intended use of the Claimant's funds was not properly discharged and that this constituted a breach of Mr. Toms' fiduciary obligations to the Claimant.

Issue 3: Whether the claim is subject to laches or is time barred

Laches

[158] Laches is an equitable defence that can bar a party from asserting a claim if that party has unreasonably delayed resulting in prejudice to the opposing party. The learned authors of **Halsbury's Laws of England**¹² explains the concept of laches in this way:

“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation 'equity aids the vigilant, not the indolent' or 'delay defeats equities'. A court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay ('laches').”

[159] Laches is applied at the discretion of the court and thus is based on the specific circumstances of the case. The Defendant argues that the claim was commenced 15 years after the Atlantic shares acquisition transaction and 12 years after the death of the deceased. That further the shareholders have known about the transaction since at least 2004. This the Defendant claims, is evidence of unreasonable delay. The Claimant argues that its records were taken by the deceased and the ONDCP and as such this information was not available.

[160] The Defendant's submissions erroneously suggest that the minority shareholder's knowledge has been conflated with that of the Claimant. It is essential to recognise that the Claimant as a company, possesses a separate legal identity. This identity

¹² 4th ed, vol 47 paragraph 254

is independent and distinct from that of the government, despite the latter being a minority shareholder.

[161] There is no contention regarding the fact that from 1987 to 2005, the deceased held the position of Director and was the controlling mind within the Claimant. The director's loan was settled during his tenure. Consequently, it is implausible that he would have contested the repayment capacity of the loan or conducted himself in opposition to his own interests. Hence, the period for potentially assessing the applicability of laches should logically begin after the year 2005.

[162] The Defendant has not disputed the claim that the ONDCP seized most of the Claimant's documents, or that they were in its possession. There appears to be some validity particularly relating to the latter, since the majority of the documents, especially the financial ones which are of interest, were disclosed by the Defendant. The documents revealed by the Claimant include a letter dated 15th March 2012 inquiring about the director's loan from 2000/2001 from the company's secretary, followed by a letter three years later referencing a notice of repayment from the bank and the disclosure that the Defendant had as part of other proceedings stated that director's loan had been settled using the Claimant's loan account.

[163] Based on all available evidence, it seems that the Claimant company lacked the necessary financial documents to recognize that there was a claim for a director's loan and that that loan had been settled by the Defendant utilizing funds from a bank's loan facility in its name. The earliest date that the Claimant Company became aware of this, which the court acknowledges, was on or about 7th April 2015.

[164] Additionally, despite being contacted and asked for help regarding this issue, the Defendant did not reply or provide any assistance. Furthermore, even though in another case the deceased acknowledged using the Claimant's loan facility to pay himself and buy shares in a different company, it wasn't until the 2016 decision in favour of the Defendant that such evidence was recognized as valid. Therefore, I find that the Claimant did not unreasonably delay in instituting these proceedings in 2017.

[165] The Defendant contends that the delay in initiating these proceedings is prejudicial because the deceased director is no longer available to provide evidence in his defence. However, the deceased passed away in 2005, soon after his last power of attorney expired and while he was still actively engaged with the Claimant. Since the deceased was the principal decision-maker of the Claimant, it is unlikely that any legal action taken after his death would not encounter the same difficulties.

[166] The Claimant has demonstrated that there was no undue delay, and that the Defendant would have suffered prejudice regardless, thus the defence of laches is unsuccessful, with the Defendant not meeting the required standard for it.

Limitation

[167] The defendant contends that this claim is statute barred as having contravened section 7 and 11 of the Limitations Act. Section 7 of the Limitations Act deals with straightforward contractual disputes and does not pertain to more complex legal matters such as claims for breach of fiduciary.

[168] On the other hand, section 11 pertains to statutory claims and establishes a six-year timeline for commencing such actions. However, for the clock to start running, it is crucial for the claimant to have been aware of the breach or for the breach to be discoverable through reasonable diligence. In the case of **Gresport Finance Ltd v Carlo Battalagia**¹³ the Court of Appeal examined the test of reasonable diligence. Henderson LJ, endorsed the well-known dictum of Millett LJ in *Paragon Finance*, where Millett LJ stated:

“The question is not whether the plaintiffs should have discovered the fraud sooner, but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish

¹³ [2018] EWCA Civ 540

that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable limitation period is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree.”

[169] Considering the discussion of laches, where inter alia the court noted that the absence of relevant documents which were in the possession of the defendant and the ONDCP which hindered the claimant’s ability to discover the breach, until it was brought to its attention through a court matter in 2015 which was confirmed in 2016, I find that it was not possible for the claimant to have discovered the breach earlier. Therefore, the claim for breach of fiduciary duty does not fall within the scope of section 11.

Order

[170] In light of the foregoing, it is hereby ordered as follows:

- i. Judgment is entered for the Claimant.
- ii. That the Claimant is declared to be the owner of the 66.7% shares in Atlantic Properties Limited which are currently registered or are entitled to be registered in the name of the Defendant pursuant to claim number ANUHCV2010/0319.
- iii. It is hereby declared that the 66.7% shares in Atlantic Properties Limited until registered by the Claimant are held on trust by the Defendant.

- iv. The Claimant is awarded prescribed costs
- v. Interest

Justice Jan Drysdale
High Court Judge



By the Court

Registrar