

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2008-01113

BETWEEN

GRACE KENNEDY (TRINIDAD AND TOBAGO) LIMITED

CLAIMANT

AND

**DHANESHWAR DEOLALL also known as
BHOLA MARAJ**

1ST DEFENDANT

AND

PROJECT MANAGEMENT CONSULTANCY SERVICES LIMITED

2ND DEFENDANT



Before the Honourable Madame Justice C. Pemberton

Appearances:

For the Claimant: Mr. C. Kangaloo instructed by Ms. N. Bisram

For the Second Defendant: Mr. K. Garcia instructed by Mr. A. Ramoutar

JUDGMENT

[1] The Claimant (“GKL”) brought this action to recover certain sums of money \$1,356,830.00 from the Second Defendant (“PMCSL”) together with interest at the rate of 5.5% per annum from 19th September 2005 until judgment.

[2] **BACKGROUND**

GKL is a limited liability company in the provision of financial services, of which foreign exchange trading is an authorised activity. The First Defendant is Dhaneshwar Deolall, also known as, Bhola Maraj. I shall refer to him as (BM) is a fraudster, **now** well known to all concerned.

[3] On 14th September 2005 employees of GKL were lured into preparing and parting with a certified cheque in favour of “Bhola Maraj” drawn on Republic Bank Ltd who were their bankers. The cheque was in the amount of \$3,142,500.00 TT. BM came to GKL’s offices, presented them with a RBTT Manager’s Cheque in the sum of \$500,000.00US. GKL parted with the Republic Bank TTD Cheque in exchange for the RBTT USD Cheque. BM therefore made off with TTD cheque. He attempted to withdraw \$700,000.00 from Republic Bank. For reasons unknown, BM returned to GKL seeking to have the RBTT cheque returned to him. This adventure was fruitless. BM took leave of GKL never to return.

[4] The following day 15th September 2005 BM returned to Republic Bank and requested that the following transactions be made on his behalf:

- Issuance of several Manager’s cheques to
 - Himself in the sum of \$785,625.00
 - Himself in the sum of \$571,295.00
 - Ryan Singh in the sum of \$785,625.00
- Cash in the sum of \$1million.

This request was fruitful.

[5] On 16th September 2005 BM again made his way to Republic Bank. This time he re-negotiated the two cheques drawn on himself for a single cheque payable to PMCSL in the sum of \$1,356.830.00.

[6] PMCSL was a Limited Liability Company providing Project Management and other services. Its directing mind and management was in the person of Dr Allan Bachan

("AB"). PMCSL deposited this cheque with its bankers on or around 19th September 2005.

[7] There is no dispute that these funds are the result of a fraud perpetrated by BM on GKL. In fact, the saga of these readily admitted fraudulent funds did not end there. PMCSL treated with this deposit by issuing the following cheques on the said 19th September 2005:

- To Laurie Diaz Construction Company \$906,830.00
- To Junior Thomas \$60,000.00

[8] It is not disputed that Laurie Diaz, Junior Thomas and AB are known to each other. The evidence will show how well.

[9] In any event, sometime on or around 26th September 2005 GKL was informed that the RBTT USD cheque was a forgery. It was worthless as a negotiable instrument and had no cash value.

[10] Those facts therefore prompted GKL to sue both BM and PMCSL for the return of their monies represented by the Republic Bank Cheque dated 14th September 2005. Both parties were served. BM never entered an appearance or a defence. A Default Judgment was secured. The matter continued against PMCSL for the reliefs stated above. I recommended that the parties mediate this matter, but was informed at the Mediation referral Hearing that GKL was disenchanted with my making any such Order. The matter proceeded to trial.

[11] **PLEADINGS**

CLAIMANT'S CLAIM – GKL

These facts were repeated in the Statement of Claim filed on 22nd May 2009. GKL's claim is couched in the following terms:

- (1) as money had and received by PMCSL to GK's use and/or repayment of the said sum by way of restitution;

- (2) an Order for the repayment of the said sum;
- (3) injunctive relief as against PMCSL from “parting with the said sum... or any part thereof to the Claimant”...
- (4) damages for conversion.

None of the claims was expressed to be in the alternative in the prayer.

[12] **DEFENDANT’S DEFENCE – PMCSL**

PMCSL admitted receiving a cheque in the sum of \$1,356,830.00. PMCSL stated that these sums were received as **agent**. Part of the sums were admittedly paid to Laurie Diaz Construction Company (“LDCCL”) as **principal**, the sum of \$906,830.00 and the other part \$60,000.00 was paid to Junior Thomas upon instruction of the principal – LDCCL. These sums were paid out prior to receiving notice of GKL’s claim. All in all PMCSL is stating that it changed its position in good faith.

[13] PMCSL is therefore defending its position on the ground that it would be inequitable for GKL to seek re-payment of those sums from its coffers. In fact GKL is not entitled to recover the sums as alleged “or at all”. GKL has suffered no loss or damage which PMCSL must be ordered to make good.

[14] The defence however does not stop there. It goes on to explain the relationship between PMCSL and LDCCL, who it describes as “its client” who it “afforded limited office accommodation” at its offices. Junior Thomas is described as one who “did odd jobs and errands” for PMCSL “and no more”.

[15] Mr. Kangaloo gave comprehensive closing submissions. Counsel made reference to the fact that in its defence, PMCSL stated that it does not continue to retain monies obtained by the transaction. The evidence disclosed that the sum of \$389,563.69 remains in the said account.

[16] **MATTERS AT TRIAL**

Before the trial, both Mr. Kangaloo and Mr. Garcia agreed that the sums of money, unused by PMCSL from the initial deposit and which stood in its bank account belonged to GKL. GKL is therefore entitled to a judgment of \$389,563.69. The two outstanding issues are those of interest and costs on this amount.

[17] Further there is no contest that there is an identified trail of movement of \$1,356,830.00 out of the deposit made of \$3,148,500.00. There is no contest as well that this sum of money belongs to GKL and was deposited to the account of PMCSL. There is no contest that GKL is on solid ground in its claim for restitution. The contest relates to whether PMCSL was an innocent recipient of these funds.

[18] The parties also presented to the court and the court agreed that the sole issue to be tried is

Whether PMCSL can defend this matter by proving that it changed its position in good faith in dealing with monies belonging to GKL.

PMCSL will successfully defend this case for restitution, if I am convinced that PMCSL had changed its position **in good faith**. Two points therefore stand for determination.

- (1) Was there a change in PMCSL's position?
- (2) Was this change made in good faith?

[19] **EVIDENCE**

(1) GKL'S WITNESSES

STACY HENRIQUES

Ms. Henriques testified that she was the Financial Controller of GKL. One facet of her job was an in depth knowledge of the financial gains and losses of the Company. She stated that she has full *“control, custody and knowledge of all the financial books... and access to all documents ... I am ultimately responsible for all the financial operations...”*. Ms Henriques continued that if *“there is a fraud perpetrated on GKL, the books, documents and records concerning this fraud would fall within my control and custody, and I would possess collective knowledge of same”*. Ms Henriques then proceeded to tell the court of GKL’s encounter with BM.

[20] On September 14, 2005 BM presented GKL’s representative with the RBTT bank draft. The draft was dated 9th September 2005, and made payable to Grace Kennedy (Trinidad and Tobago) Limited, for the sum of US\$500,000.00 drawn from the Bank of New York. On the basis that the USD cheque was valid, Ms Henriques informed the court that GKL issued written instructions to their Banker, Republic Bank Limited to issue a cheque in favour of BM drawn on its account in the sum of \$3,142,500.00. This was in purported exchange for the USD cheque presented to GKL by BM.

[21] Ms. Henriques stated that by letter of September 28, 2005 she was informed by Republic Bank Limited, that the RBTT Bank Limited USD Managers’ cheque presented by BM was fraudulent and further GKL’s account had been debited with the TTD equivalent as per instructions. GKL issued a letter to RBTT Bank Limited requesting an enquiry into the transaction, and the fraud was confirmed.

[22] Ms. Henriques noted that upon investigation it was revealed that the cheque drawn from Grace Kennedy’s Bank Account be disbursed as follows:

- (a) The issuance of Manager’s Cheque no. 12419516 in the name of Bholia Maraj in the sum of \$785,625.00;
- (b) The issuance of the Manager’s Cheque in the name of Bholia Maraj in the sum of \$571,205.00;

- (c) The issuance of the Manager's Cheque in the name of Ryen Singh in the sum of \$785,625.00; and
- (d) Cash in the sum of \$1,000,000.00.

[23] Investigations further revealed that the two cheques issued to BM were cancelled and one cheque in the name of PMCSL in the sum of \$1,356,830.00 was issued. These transactions occurred on the 14th September 2005 at a time when GKL had no knowledge of the true state of affairs and before GKL had obtained such knowledge of "the fraudulent transaction". PMCSL disbursed the proceeds of the cheque in the following manner:

- FCB cheque made payable to Laurie Diaz Construction Company Limited in the sum of **\$906, 830.00**;
- FCB cheque made payable to Junior Thomas in the sum of **\$60,000.00**.

Ms Henriques testified that a Restraint Order of this Honourable Court is in place freezing all of the proceeds of the fraudulent cheque in the sum of US\$500,000.00 the subject of the exchange of the GKL cheque in the TTD equivalent. This Order was obtained pursuant to the **PROCEEDS OF CRIME ACT 2000**. Ms Henriques continues, "... from PMCSL's discovery documents, I note that the amount remaining in (PMCSL)'s account at FCB as of 22nd June 2009 is \$389,563.69." Ms Henriques asks the court to note that that the Restraint Order specifically identifies PMCSL as receiving the re-negotiated cheque in the sum of \$1,356,830.00 from BM which is admitted by PMCSL.

[24] Ms Henriques was not cross-examined.

[25] **SARGEANT KESTER MC KAIN**

Sgt. Mc Kain was at the relevant time attached to the Fraud Squad of the Trinidad and Tobago Police Service. He had been so attached for a period of twenty (20) years. On or about the 27th September, 2005, he was selected as the investigating officer into a

complaint lodged by RBTT Bank. The investigation centered on GKL's tendering for payment a forged RBTT US dollar cheque in the sum of \$500,000.00. He commenced the process at GKL's offices. Sgt. Mc Kain confirmed the uncontested facts surrounding the conclusion that BM was a fraudster. In the course of his investigations he discovered that the manager's cheque made in favour of "Ryen Singh" had been destroyed. The funds were being held by Republic Bank in 2005. He learnt that on 19th September, 2005 a cheque in the sum of \$1,356,830.00 was deposited to the account of PMCSL. He found out that on that day, PMCSL issued two cheques to Laurie Diaz Construction Company Limited and to Junior Thomas for **\$906, 830.00** and **60,000.00** respectively. He further learnt that AB, AB was the Managing Director of PMCSL. He interviewed AB at his office and learnt that he was "a consultant in construction" and that "people would come (to his offices) to do photocopies and faxes". Sgt. Mc Kain stated: *"The premises did have some office equipment but there was no evidence to me that I could conclusively determine the extent of the business operations of (PMCSL)."*¹

[26] **THE PORTIA SINGH INTERVIEW**

Sgt. Mc Kain testified that on 29th September 2005, he interviewed Portia Singh (PS) the secretary of PMCSL. He learnt that she received a cheque from Junior Thomas in the sum of \$1,356,830.00 which she deposited to the FCB account held by PMCSL. Ms Singh prepared cheques to be paid out to LDCCL and to Junior Thomas upon instructions from AB. He recorded a written statement from Ms Singh which she signed. The information contained in the statement mirrors that recited earlier in this judgment so I would not repeat them here.

[27] **THE ALLAN BACHAN INTERVIEW**

On 30th September he spoke directly to AB. He recorded a statement of the interview which was admitted into evidence. AB confirmed to him that he left for Switzerland on the 18th September, 2005 and left two pre-signed cheques with PMCSL's secretary, Ms

¹ See para. 17 of Sgt. Mc Kain's Witness Statement filed November 02 2009.

Portia Singh with instructions that on receipt of the cheque from BM that she was to make two cheques payable to LDCCL in the sum of \$906,830.00 and to Junior Thomas in the sum of \$60,000.00. Dr Bachan confirmed that he “knew Junior Thomas over one year”.² He was informed that Junior Thomas had a “client who was interested in purchasing building steel and construction equipment”.³ Dr Bachan confirmed to Sgt. Mc Kain that he met the client who he described as “an East Indian man”, sometime around 14th September 2005. Sgt. Mc Kain drew the conclusion that this was BM. Further discussions between the gentlemen are recorded as follows:

Dr Bachan informed me that he spoke to Laurie Diaz, who I later learnt to be an individual also known as Laurie Andrews, and informed him that Junior Thomas was interested in some steel and construction equipment for his client. Dr Bachan informed me he located some excess steel and some light equipment from Laurie Diaz and this was conveyed to Junior Thomas.

Dr Bachan further expressly informed me that on/or about 14th September 2005, BM sought to issue a personal cheque as payment however, he Dr Bachan requested that he would only accept a bank draft in relation to the above transaction and this was to be made payable to this company and the copies of the identification of the client be submitted to his office which (PMCSL) received on 19th September 2005 from Junior Thomas.

[28] **ROLE OF LAURIE DIAZ CONSTRUCTION COMPANY LIMITED**

Sgt. Mc Kain then went in search of LDCCL. He located Laurie Diaz who he took into custody. Sgt. Mc Kain was taken to what he was informed was office accommodation

² See para. 24 of Sgt. Mc Kain’s Witness Statement.

³ See para. 24 *infra*.

but formed the view that “the room was not for his sole use and he seemed to be passing through and merely using the facilities.”⁴ Sgt Mc Kain continued:

During this search, I observed a man who I recalled seeing at (PMCSL) when I interviewed Ms Portia Singh and I requested his name he informed me his name was Lindhurst Ishmael.

I know Laurie Diaz is a person who goes by the name of Laurie Andrews. I am aware of this as a fact because, in or around 2005 there were various proceedings pending against him relating to dishonoured cheques in the Port of Spain Magistrates’ Court which is common knowledge to members of the Fraud Squad.

At the time of investigation Laurie Diaz was arrested on suspicion of fraud and was detained for one day; he assisted us with the criminal investigation. He was released after a determination that at that time there was not sufficient evidence to commit him⁵.

[29] **JUNIOR THOMAS**

Sgt. Mc Kain had this to say in relation to Junior Thomas.

As an investigator at the Fraud Squad for over 20 years, Junior Thomas’ name is also well known to me. I am aware that he has been under investigation and been a suspect in relation to various fraud matters.⁶

In relation to the three persons who he investigated, AB, Mr. Laurie Diaz and Mr. Junior Thomas, Sgt Mc Kain testified as follows:

In the course of investigation and in my experience and time spent on the Fraud Squad, I have concluded that Laurie Diaz, Junior Thomas and

⁴ See para. 27 of Sgt Mc Kain’s Witness Statement.

⁵ See paras. 28 -30 of Sgt Mc Kain’s Witness Statement.

⁶ See para. 32 of Sgt Mc Kain’s Witness Statement

*Allan Bachan are associates. By this I mean that they are connected to each other and involved. I came to the view during the course of the investigation that they were connected in relation to the facts as they presented themselves and from the documents, the entire interplay between the parties and the fact that Laurie Diaz and Junior Thomas both have ties with PMCSL.*⁷

[30] Sgt. Mc Kain confirmed that he sought and obtained a restraint order under Section 18 of the **PROCEEDS OF CRIME ACT** in relation to the forged USD cheque in the sum of 500,000.00. Sgt. Mc Kain confirmed that there was a balance in PMCSL's FCB account outside of the sums under the Order.

[31] **CROSS EXAMINATION**

Of all Grace Kennedy's witness, only Sgt Mc Kain was cross examined by Mr. Garcia. This went to the information which he received to inform him that Dr. Bachan was in Switzerland at the time of the deposit of the funds and his belief of that information. Sgt Mc Kain stated that he had no reason to doubt that AB was out of the country but agreed that it would have been "challenging" for AB to personally deposit the money at First Citizens Bank Limited, Independence Square. He confirmed that the money was actually deposited by Ms. Portia Singh.

[32] Mr. Garcia requested clarification from Sgt Mc Kain of his statement in paragraph 33 of his witness statement in which he "concluded that Laurie Diaz, Junior Thomas and Allan Bachan are associates". Sgt Mc Kain explained that he meant that they were "business associates". He confirmed that by "interplay" as stated in his evidence in chief that he meant "business ties". Mr. Garcia also highlighted that Sgt Mc Kain did not identify PMCSL or any of its representatives as being accessories to the perpetration of the fraud upon Grace Kennedy.

⁷ See para. 33 of Sgt. Mc Kain's Witness Statement.

[33] **RE EXAMINATION**

Upon re-examination, Sgt Mc Kain clearly stated that he did not mean the same thing when he used the term “associate” and “business associate”, and what he meant by the word “associate” is noted in his witness statement at paragraph 33. Additionally he noted that the deposit did not need to be made personally, but could have been made on his behalf by Ms. Singh.

That closed the Claimant’s case.

[34] **DEFENDANT’S WITNESSES**

DR ALLAN BACHAN (AB)

Dr Bachan (AB) identified himself as a Director of PMCSL, which was incorporated in 1997. PMCSL was, at the material time in the business of providing management consultancy services which involved in *inter alia*, the management and oversight of projects primarily within the construction sector and the receipt of monies for and on behalf of PMCSL’s clients for work done and/or for goods and/or services provided by PMCSL’s clients to individuals and/or businesses. Ms Portia Singh was employed as the Office Manager.

[35] In the year 2004, as a result of the upswing in the construction sector, Mr. Wayne Lucky and Mr. Lindhurst Ishmael approached him regarding developing PMCSL’s business. Both gentlemen were involved in the construction sector and he knew them, Mr. Lucky for ten (10) years and Mr. Ishmael since 2002. In 2005 both men became directors of PMCSL.

[36] **LAURIE DIAZ CONSTRUCTION COMPANY LIMITED (LDCCL)**

In about 2004, he was introduced to Mr. Laurie Diaz of the above named company by Mr. Ishmael. Mr. Ishmael routinely held meetings with Mr. Diaz at the Company Offices. On 9th January 2005, LDCCL and PMCSL entered into a Consulting and Retainer Agreement which involved PMCSL providing LDCCL with suitable office space,

accounting services, human resource services and manage and disburse monies received by PMCSL for and on behalf of LDC CL. In or about 2005, Ms. Natasha Shubit was employed by PMCSL to carry out administrative work primarily for its client LDCCL. In pursuance of the said agreement and between the period from in or about 2005 to in or about 2006, PMCSL also provided LDCCL with office space.

[37] **JUNIOR THOMAS**

In 2004 Mr. Ishmael introduced Mr. Thomas to AB. AB testified that:

*From time to time and when Mr. Thomas was at the PMCSL's offices, Mr. Thomas would **provide messenger services and carry out odd jobs and errands for the PMCSL** but was not an employee.*

[38] **BUSINESS DEALINGS RELEVANT TO THIS MATTER**

On 28th August 2005, AB asked Mr. Laurie Diaz whether "they" had steel and equipment. Sometime in September of 2005, he informed Mr. Diaz that he would accept certified bank cheques **only** from him. On or about the 14th or the 15th September, 2005 Mr. Junior Thomas attended at the PMCSL's offices together with BM and Mr. Ryan Singh whom he introduced to him as the buyers of LDCCL's steel and heavy construction equipment. BM gave him two Republic Bank Limited Manager's Cheques in the sums of TT\$785,625.00 and TT\$571,205.00 respectively both of which were made payable to BM. BM asked him whether he could endorse the said cheques to the PMCSL, a request which he denied. He told BM that he would not accept the said cheques as they were not made payable to the PMCSL. He asked Ms. Singh to make photocopies of the said Manager's Cheques as well as the national Identification Cards and Driver's Permits of BM and Ryan Singh which she did.

[39] After Mr. Thomas, BM and Mr. Ryan Singh left PMCSL's offices', he telephoned Mr. Diaz and told him what had transpired. He testified that Ms Singh told him that by letter dated the 15th September, 2005 from LDCCL to BM, which letter was prepared by Ms

Singh upon Mr. Diaz's instructions, BM was asked to have a certified cheque made payable to PMCSL.

- [40] On or about the 18th September 2005, AB testified that he left Trinidad to go to Switzerland. Prior to his departure he signed several cheques as was usual and in accordance with normal business practice. He also informed Ms Singh that if Mr. Thomas and/or BM and/or Mr. Singh returned to the offices with a certified cheque made payable to PMCSL she was to deposit same into the Company's First Citizens Bank Limited account.
- [41] On or about the 19th September 2005, he received a call from Ms Singh informing that Mr. Thomas was at the offices and that he gave her a Republic Bank Limited Manager's cheque in the sum of \$1,356,830.00 made payable to PMCSL. He told Ms Singh to deposit the cheque into PMCSL's account as per his earlier instructions. He further told Ms Singh that Mr. Diaz would be requesting cheques and that she was to facilitate him and to ensure that she received his instructions in writing. Ms Singh later telephoned him and informed that she prepared a letter of even date from LDCCL addressed to her in, which LDCCL authorized the payment of \$906,830.00 to LDCCL and \$60,000.00 to Mr. Junior Thomas. AB stated that he spoke to Mr. Diaz and told him that he would instruct Ms Singh to prepare the cheques as per Mr. Diaz's instructions.
- [42] On September 20th 2005, AB stated that he received another telephone call from Ms Singh informing that Mr. Diaz was at PMCSL's offices and that he had requested that the cheques prepared and given to him by Ms Singh be certified. Further Diaz informed her that FCB Limited required a letter of authorization from him as he was the sole signatory with respect to that particular account that the cheques was drawn upon. AB stated that he requested Ms Singh to prepare the said letter of authorization which she did and which she sent to him via facsimile transmission to his hotel room in Switzerland. He signed the said letter and returned same to Ms Singh via facsimile transmission at PMCSL's offices. On September 29th 2005, Dr Bachan returned to Trinidad and the

following day Sgt. Mc Kain interviewed him. By letter dated 11 October 2005, he was informed that PMCSL's bank account had been frozen.

[43] **CROSS EXAMINATION**

Upon cross examination, AB stated that despite the fact that PMCSL provided accounting services to its clients, he was not an accountant. He admitted to Mr. Kangaloo that clients' funds are deposited in PMCSL's account and he did not possess a financial license to deal with funds in this manner, as he was unaware he needed a license for this. AB stated that in managing client funds, he possessed a "*hands on approach*" to the client's business as he would not want to become involved in anything illegal. He confirmed he was "*very careful*" and "*precise*".

[44] In answer to Mr. Kangaloo's enquiry of the type of business that LDCCL was involved in, AB responded that they were not only in the business of welding and fabricating and he did not remember if they were a limited liability company. AB stated that he was also unaware that in 2006 LDCCL was involved in a Roll on Roll off business. He did not respond when Mr. Kangaloo first asked him whether he knew that LDCCL had never been in the business of selling heavy construction equipment. AB later admitted in cross examination, that when the transaction occurred in 2005, he was "*not aware that LDCCL was not in the business of selling heavy construction equipment*" and stated that he "*thought it was part of his business*". When questioned if he had asked Laurie Diaz about his business, AB only stated that, "*he had equipment to sell*" and that he enquired whether he had the equipment for sale. He additionally stated that enquiring whether Mr. Diaz could sell the equipment or if he was in that business was not part of his obligation to the client.

[45] **BUSINESS AGREEMENT**

Mr. Kangaloo directed AB's attention to the "Agency Agreement" and enquired how many transactions occurred during the time of the Agreement. He admitted that only one financial transaction occurred throughout the course of the Agreement – the transaction which is now the subject of this matter. He received no other monies on

behalf of LDCCL. AB stated that he did not find the transaction unique or strange, so he did not question same. Mr. Kangaloo asked about the lack of accounting services for LDCCL in September 2005 and was informed that there were records of bills such as electrical bills or any others that may have needed recording. AB stated that at the time, managing the funds of LDCCL was not a major part of the Agreement. He admitted that both Ms. Shubit and Ms. Singh typed letters for LDCCL and noted that Ms. Singh usually passed letters for LDCCL to him for advice and approval. However, Ms. Singh who handled more technical activities, dealt with most of the activities in this transaction because of the amount of money involved.

[46] **THE INVOICES**

Mr. Kangaloo then discussed with AB the difference in the amount quoted on the invoice and the amount paid to LDCCL. AB stated that he did not have the invoice at the time as he was out of the country and could not correlate the invoice amount with the amount received. Mr. Kangaloo highlighted that the invoice was dated 16 days before he left the country and the contradiction in figures suggests that the transaction was a “sham”. He put to AB that he turned a blind eye to the transaction. AB claimed that he could not recollect any information with respect to a rebate or his having seen any documentation relating to that rebate. Mr. Kangaloo then presented to the letter which referred to this rebate. Still, AB stated that he did not recall the letter which was written by Ms. Singh. AB insisted that he acted upon written instructions from LDCCL and did not turn a blind eye to the letter. AB admitted under cross-examination that in addition to collecting money on behalf of LDCCL, PMCSL also “*provided advice and ensured documents in place to ensure a proper business transaction*”.

[47] **JUNIOR THOMAS**

AB maintained that JT was not a messenger with PMCSL. He explained the nature of the relationship as he *would offer to do odd jobs. If we had to deliver a package and we ask, he would do that...*”. AB agreed that the task would be regarded as an odd job or errand. AB further admitted, when pressed that JB performed messenger services as

well and admitted again, after some persuasion that JB was a messenger with PMCSL. He declined at first to identify JT's role in this transaction and also that JT introduced him to BM, and Mr. Ryan Singh. The exchange between him and Mr. Kangaloo is interesting:

Mr. Kangaloo : Didn't JT introduce BM and RS to you?

AB : In the beginning sir? I was not introduced to either party at the beginning of this transaction. I met these parties ... JT brought them to the office.

Mr. Kangaloo : Therefore in your eyes it was a messenger who brought these two people to meet you for this deal?

AB : No.

Mr. Kangaloo : But he introduced BM and Ryan Singh as buyers of heavy construction equipment?

AB : At the time when they came to bring the cheques, yes.

Mr. Kangaloo : So you did not think it strange that JT would be introducing you to these people in September 2005?

AB : No Sir, it did not cross my mind at the time.

[48] **THE SEPTEMBER 2005 TRANSACTION**

Towards the end of the cross examination, Mr. Kangaloo returned to this transaction and to the Agency Agreement. AB confirmed that the Agreement was the document

that governed the relationship that PMCSL had with LDCCL. AB confirmed that PMCSL would have been acting normally or ordinarily if a payment was made under this Agreement, while following his client's instructions. AB confirmed to Mr. Kangaloo that the 2005 payments made were so made "*in the course of business between PMCSL and LDCCL*". AB confirmed that he would have been entitled to a 1% commission on the transaction, the sum of \$13,000.00 but up to 19th September 2005 he had not taken the money from LDCCL.

[49] Mr. Kangaloo then put his client's (GKL) case to AB that the Agreement was a sham; that AB as the heart and mind of PMCSL turned a blind eye to the nefarious activities of LDCCL thereby negating his defence of change of position in good faith; that AB was unusually naive and that GKL was entitled to restitution. These were stoutly denied. AB concluded that "*I concluded a proper business transaction ensuring that all proper documents and instructions were followed*". In answer to the Court question, AB stated that LDCCL was PMCSL's only client and that the September 2005 transaction was the only transaction handled for that company for the time that he had signed the Retainer Agreement.

[50] **PORTIA SINGH**

Ms Singh testified that in 2003, she was employed as the Office Manager for PMCSL. She left that employment in 2006. In 2004, Mr. Lindhurst Ishmael introduced her to Mr. Laurie Diaz. Mr. Ishmael's company Co-Petrol Limited held meetings regularly at PMCSL's offices. She had seen Junior Thomas at the offices on several occasions.

LDCCL

In 2005, PMCSL hired Ms. Natasha Shubit to perform administrative duties primarily for LDCCL. In August, 2005, either AB or Mr. Laurie Diaz asked her to prepare a quotation. She cannot recall exactly who asked her to perform this task. In or around September 2005, AB told her that Mr. Laurie Diaz was selling material and equipment to BM and

Mr. Ryan Singh. She was instructed to prepare an invoice dated September 02 2005 in the sum of \$1,368,431.00.

[51] **JUNIOR THOMAS (JT)**

Ms Singh's next bit of testimony is interesting. She says that:

On or about the 14th or 15th September, 2005, Mr. Thomas attended at (PMCSL)'s offices with the two individuals who were unknown to me. Dr Bachan asked me to make photocopies of two Republic Bank Limited Manager's cheques ... in the sums of TT\$785,625.00 and TT\$571,205.00 respectively both of which were made payable to Bhola Maraj and I told him and he agreed that we could not accept the said cheques because they were not made payable to (PMCSL). Dr Bachan also asked me to make photocopies of the National Identification Cards and Driver's Permits of Bhola Maraj and Ryan Singh which I did.

These documents were produced in evidence.

Ms Singh further stated that:

On or about the 19th September 2005, Mr. Thomas came to PMCSL and gave me a Republic Bank Limited Manager's cheque in the sum of TT\$1,356,830.00 made payable to (PMCSL). Upon receipt of the said cheque, I telephoned Dr Bachan in Switzerland and he told me to deposit same into (PMCSL)'s account. Dr Bachan also told me that Mr. Diaz would provide me with instructions to prepare two cheques, one for LDCCL and the other for Mr. Thomas.

These documents were produced in evidence.

[52] Ms. Singh then detailed the disposition of the two cheques that she was instructed to prepare. On that same day, JT escorted her to FCB to deposit the cheques into PMCSL's account as instructed. He then took her to PMCSL's offices where she met Mr. Laurie

Diaz. Mr. Diaz made a request of her. She telephoned AB in Switzerland and told him of the request. After, AB and Mr. Diaz held a conversation over the telephone. Following that conversation, AB instructed her to prepare cheques as per Mr. Diaz's instructions. She did so and gave the cheques to Mr. Laurie Diaz. She asked him to confirm receipt of them by signing the payment vouchers, which he did. On examination of the cheques entered as "PS9", it was observed that one is payable to "LDCCL" in the sum of \$906,830.00 drawn on the account of PMCSL and the other to "Junior Thomas" in the sum of \$60,000.00 drawn on the account of PMCSL. Ms Singh further testified that she prepared a letter to be signed by AB detailing further instructions to their bankers about the cheque that was made payable to LDCCL. That letter is admitted as "PS10" in the following terms *inter alia*:

I am sending a fax of the authorization for the payment of funds as per the Cheque issued by my company and signed by myself in favour of LDCCL ...

Please certify Cheque in the name of LDCCL for the amount of \$906,830.00...

Ms Singh stated that she was interviewed by Sgt. Mc Kain and gave him an account of these events.

[53] **CROSS EXAMINATION**

Under cross-examination, Ms Singh confirmed that she was responsible for administrative services, which included the typing of letters for PMCSL. She confirmed Ms Shubit's role in PMCSL as it related to LDCCL. She confirmed that she was not involved in the accounting or creating of balance sheets for the LDCCL. Mr. Kangaloo questioned Ms. Singh on the details of the transaction in 2005, but she admitted that she was unable to recall most of the details. Ms. Singh referred to her witness statement and stated, "... whatever I stated in here is true and correct. I cannot remember exactly now. It is over 6-7 years ago." Ms. Singh did recall her interview with

Sergeant Mc Kain and noted that her statement to him was the one closest in time to the incident.

[54] **WAYNE LUCKY**

Mr. Lucky testified that at the time, he was the Project Manager of PMCSL. On January 9, 2005, he was present at PMCSL where he witnessed the execution of the “Consulting and Retainer Agreement” between PMCSL through Dr. Bachan and Laurie Diaz Construction Company through Mr. Diaz. That Agreement was produced in evidence as “WL1”.

CROSS EXAMINATION

On cross examination, Mr. Lucky could not recall whether PMCSL had other retainer agreements with other clients. When asked the question in a different form, he answered that PMCSL had other clients in January 2005, but he could not recall the exact number. He put it at (2) or three (3) clients. Mr. Lucky stated that he personally provided Project Management Services in 2005 and that he was liaising with his other clients. He did not agree that the Agreement with LDCCL was a sham.

[55] **LAW**

Both Counsel cited copious authority on the subject. I do not propose to examine all of the authorities cited by them. The law is clear. As Lord Templeman states in **LIPKIN AND GORMAN**: “*the law imposes an obligation on the recipient of stolen money to pay an equivalent sum to the victim if the recipient has been ‘unjustly enriched’ at the expense of the true owner*”.⁸ An innocent recipient of stolen money will be enriched if he has not given valuable consideration for the money⁹. These are the unassailable legal positions.

⁸ See **LIPKIN GORMAN v KARPNALE LTD [1991] 2 AC 548; (HL); 559 Letter E**

⁹ See *infra* p. 560 Letter B per Lord Templeman.

[56] In equity, the position is expanded, as it were to ease the harshness of the law. Suffice it to say that the starting point in analyzing this area of equity is and remains whether it would be unjust or inequitable for a party to have restitution whether in whole, or in part, if a defendant contends it would be unjust or inequitable or unconscionable “*and thus unjust*”¹⁰ in all of the circumstances to ask him to make restitution since the monies which he has received are no longer in his possession or control as he has parted with them to another.¹¹ He must go further to prove that such parting constituted a **change of position in good faith**. It is now accepted that this defence is available to a defendant.¹²

[57] In this case, GKL has to demonstrate to the court that he must have the remedy. The burden of proof is on it. It must come to the court making full and frank disclosure of all the relevant circumstances. Above all it must come with clean hands. Once PMCSL is relying on the defence, the burden falls on it to prove to the court that the change of position was in good faith and that it is inequitable to ask it to make restitution whether in full or in part.

[58] A change of position is fairly easy to prove from the facts. In this case, it constituted receiving money and parting with it to third parties. The issue to be examined is whether this parting or change in position was **in good faith**. There is no one general rule in deciding cases of this nature. Both the Privy Council and the House of Lords¹³

¹⁰ See **NIRU BATTERY MANUFACTURING CO AND ANOTHER v MILESTONE TRADING LTD AND OTHERS [2004] QB 985**;

¹¹ See *infra* p. 580 Letter F per Lord Goff of Chieveley

¹² See **LIPKIN v GORMAN** *op. cit.* 558 Letter G; per Lord Goff of Chieveley at p. 578 Letter F; and p 579 at Letters F – G: “*where an innocent defendant’s position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay so outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays the money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position... In other words bona fide change of position should of itself be a good defence in such cases as these...*”.

See further **DEXTRA BANK AND TRUST CO. LTD v BANK OF JAMAICA PC APPEAL No. 26 OF 2000**.

¹³ See **LIPKIN GORMAN v KARPNALE LTD [1991] 2 AC 548; (HL)** where Lord Bridge of Harwick opined that “*it would be unwise to attempt to define its scope in abstract terms but better to allow the law*

have endorsed a generous approach to determine the issue in such matters. In fact the Privy Council has opined that the court in **LIPKIN GORMAN** “*appears to have adopted a broad approach based on practical justice, and to have avoided technicality*”.¹⁴ I propose to do the same in this case. Suffice it to say that each case would turn on its own facts but the principles derived from the cases would be useful to my deliberations.

[59] Let me begin by stating clearly that in keeping with myself imposed mandate of not being bogged down by technicalities, in examining the actions of a Claimant in the balancing exercise, there is no condition that a Claimant must have acted wisely or in accordance with sound business practice. Its knowledge and awareness must be only such that it is not tainted by the very transaction that it seeks to avoid and to have the court renounce in its favour. It is the Defendant which must prove that his defence can hold water in the first instance.

[60] I hasten to add as well that the defence is not available to a defendant who has plainly changed his position in bad faith, as when a defendant changes his position with knowledge that the monies correctly belong to the true owner and as stated by Lord Goff, it is plainly accepted that the defence is “*not open to a wrong doer*”.¹⁵ Lord Goff makes an interesting point in his speech when he says: *I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things...*¹⁶

[61] I think that the position is neatly summarized by the English Court of Appeal in **NIRU BATTERY MANUFACTURING** by Clarke LJ.¹⁷ Clarke LJ pointed out that their Lordships in

on the subject to develop on a case by case basis” p. 558 Letter H endorsed by Lord Goff at p 580 Letter C – D.

¹⁴ **DEXTRA BANK AND TRUST CO. LTD v BANK OF JAMAICA PC APPEAL No. 26 OF 2000** para. 36 citing in particular. **LIPKIN AND GORMAN [1991] 2 AC pp 581-583** per Lord Goff of Chieveley who gave the speech in this case with Lord Bingham of Cornwall.

¹⁵ See **LIPKIN AND GORMAN** *infra* p. 580 Letter C.

¹⁶ See **LIPKIN AND GORMAN** *infra* p. 580 Letter F – G

¹⁷ See **NIRU BATTERY MANUFACTURING CASE** per Clarke LJ at para. 147.

LIPKIN AND GORMAN did not have to deal with the issue of whether the defendant was dishonest. The speeches were predicated upon the salient issue of whether it was unjust or inequitable for the defendant in that case, who paid money under a mistake of fact to make restitution. The Privy Council in **DEXTRA** rejected the correctness of introducing the notion of relative fault as a factor to be taken into account when examining the issue¹⁸. I have read that decision closely and have not seen an embrace of the concept of risk allocation which Mr. Garcia advanced to me. I reject that as well. Clarke LJ stated as well that *“No one suggested to us that it was sufficient to show ... (negligence) in order to defeat a defence of change of position”*. This seems to suggest that he did not take this into consideration but would not have ruled it out, if the facts suggested that it ought to be taken into account. In this case, I do not think that it would make a difference to the deliberations as the facts do not admit its consideration. Clarke LJ does make the point, and I agree that in the context of these cases, that, in cases of this nature, it is not necessary to show that the receiver of the money was dishonest¹⁹ in order to defeat a defence of change of position in good faith. Having said that, I do not think that the concepts of “honest receipt” or knowing receipt” are of much assistance in this case. The primary issue in this case is whether on the facts it would be in all of the circumstances inequitable or unconscionable and therefore unjust

¹⁸See **DEXTRA v BANK OF JAMAICA** *op. cit. f.n.* 8 paras. 40 – 45, in particular *“Their Lordships are however most reluctant to recognize the propriety of introducing the concept of relative fault into this branch of the common law and indeed decline to do so. In forming this view, they are very much influenced by the fact that, in actions for the recovery of money paid under a mistake of fact, which provide the usual context in which the defence of change of position is invoked, it had been well settled for over 150 years that the plaintiff may recover ‘however careless [he] may have been, in omitting to use due diligence’. It seems strange that, in such circumstances, the defendant should find his conduct examined to ascertain whether he had been negligent, and still more so that the plaintiff’s conduct should be examined for the purposes of assessing the relative fault of the parties”*. In commenting on a passage from Professor Bicks, their Lordships continue *“in particular he stated ... that the New Zealand courts have shown how hopelessly unstable the defence [of change of position] becomes when it is used to reflect relative fault. Certainly ... the reader has the impression of judges struggling manfully to control and to contain an alien concept.”*. See further **NIRU BATTERY MANUFACTURING CASE** *op. cit.* per Clarke LJ at para. 160.

¹⁹ See **NIRU BATTERY MANUFACTURING CASE** per Clarke LJ at para. 171 *“it is not necessary to show that a recipient of money was dishonest in order to defeat a defence of change of position in response to (a) claim for restitution of money paid under a mistake of fact ...”*. (Emphasis mine)

to allow a receiver of money paid under a mistake of fact to deny restitution to the payer whether in full or in part. Good faith on the part of the recipient of the money is according to their Lordships in **DEXTRA** is a “*sufficient requirement in this context*”.²⁰

[62] Both Counsel as I said referred me to a plethora of authorities to assist the cause. Counsel delved into the area of the kind of knowledge that I needed to consider. Mr. Garcia made much of how I should construe Mr. Kangaloo’s assertion that AB turned a blind eye to the questionable transaction by comparing and contrasting it with “blind eye knowledge”. The authority cited was one of merit, but in the context of Marine Insurance and the principle of *uberrima fides* or utmost good faith, a stringent legal requirement in insurance contracts.²¹ I propose to leave it there and not let it trouble me in this case.

[63] What therefore are the circumstances which will determine whether AB and by extension PMCSL acted in good faith? As I said before, the concept of good faith should not be confined but should be determined on a case by case basis and on the particular facts and circumstances. I shall therefore undertake an analysis of the facts and present my findings.

[64] **ANALYSIS AND CONCLUSIONS ON THE EVIDENCE AND LAW**

Let me begin by stating that a court is entitled to draw adverse inferences if a party does not call as a witness a person “**who is not known to be unavailable and/or who has no good reason for not attending**”. The law provides further that “... **if the other side has adduced some evidence on a relevant matter, then in the absence of that witness, the trial judge is entitled to draw an inference adverse to that party and to find that matter proved.**”²²

²⁰ See para. 45 *op. cit.*

²¹ See **MANIFEST SHIPPING CO LTD v UNI-POLARIS INSURANCE CO LTD AND OTHERS**[2003] 1 AC 469.

²² See **WISNIEWSKI v CENTRAL MANCHESTER HEALTH AUTHORITY** referred to in **SIEUNARINE v DOC’S ENGINEERING WORKS (1992) LIMITED** HCA No. 2387 of 2000 per RAJNAUTH-LEE J at p. 7.

[65] I think as well that I must comment on the demeanour of the witnesses as I think that this must be taken into account in assessing whether PMCSL has made out its defence of change of position **in good faith**. **Sgt. Mc Kain's** testimony struck me as clear and concise. His aspect was confident and objective. He gave his view of the evidence without any colouration and was not shaken on cross examination. I accept his evidence as a true picture of the character of the protagonists and the nature of the relationship that existed between and among them.

[66] **Dr Allan Bachan** I should describe as a tentative and evasive witness who under cross examination, had to be reminded of the exact nature of his case. That did not impress me to say the least. **Ms Portia Singh** struck me as a forthright witness who is to be believed. Her witness statement was clear. She had no qualms about saying what she knew, did not know or did not remember. She affirmed quite clearly that her statement to Sgt Mc Kain was given whilst events were fresh in her mind and that it was the truth. I was impressed by her lucidity. **Mr. Wayne Lucky** appeared nervous about his role in this entire matter. That translated in his being evasive as to his real position and remit of his activities in PMCSL. He did not go far to establish that there was any good faith in PMCSL's change of position.

[67] After due consideration of the undisputed facts, my findings based on the evidence and the law, I have arrived at the following conclusions of fact:

1. That Bhola Maraj was a fraudster and he, Laurie Diaz, Laurie Diaz Construction Company Limited, Lindhurst Ishmael and Junior Thomas were known to each other.
2. Lindhurst Ishmael, Dr Bachan's business associate at PMCSL, was known to Bhola Maraj, Laurie Diaz, Laurie Diaz Construction Company Limited, Junior Thomas. He was the common link between them **and** Dr Allan Bachan and PMCSL.
3. That Bhola Maraj, Laurie Diaz, Laurie Diaz Construction Company Limited and Junior Thomas engineered the plot to convert funds belonging to GKL.
4. That PMCSL was the conduit through which the funds were to be sanitized.

5. That the Consulting and Retainer Agreement entered into by PMCSL and Laurie Diaz Construction Company in January, 2005 was not actively operational since PMCSL produced no evidence of income, expenses or profits to prove a course of dealings between the parties.
6. That from the undisputed facts, GKL had parted with the monies on the faith that the cheque presented by BM for negotiation was valid.
7. That the cheque presented for negotiation by BM was a forgery so that GKL's funds were converted by him.

Based on the above therefore, I find that GLK was entitled to seek restitution of the funds paid to BM on the basis of the fraudulent cheque. I find as well that as a matter of law, PMCSL could avail itself of the defence of **change of position in good faith**. The burden of proof rests on PMCSL to prove all aspects of the defence.

[68] I find as well that GKL's carelessness or negligence in parting with its monies, the TTD equivalent of US\$500,000.00 is not to be taken into account in assessing whether it was equitable to allow the claim for restitution in the face of the defence of change of position in good faith when balancing its rights to restitution as against PMCSL's defence of change of position in good faith. The requirement of good faith on the part of PMCSL is sufficient and I need go no further.

[69] My findings continue as follows:

8. That the funds found their way into PMCSL's account for onward transmission and were transmitted to Laurie Diaz Construction Company Limited and Junior Thomas, ostensibly pursuant to the Consulting and Retainer Contract.

Because of this, it is crucial to examine the circumstances surrounding PMCSL's receipt of these funds from BM to determine whether PMCSL when it transmitted those funds to Laurie Diaz Construction Company and Junior Thomas changed its position **in good faith**.

9. That PMCSL's status at the time of the transaction whether experienced or fledgling is immaterial to the question of good faith. By Dr Bachan's evidence, it was a company incorporated since 2002 and conducting business.
10. That there was a change in position is clear. PMCSL parted with \$60,000.00 to Junior Thomas and \$906,830.00 to Laurie Diaz Construction Company Limited.

[70] In determining **good faith**, the linchpin of this case, all of the circumstances of the change in position must be examined. There were many circumstances alluded to by the parties, which are important in assessing whether PMCSL acted in good faith. I have chosen the ones that I consider relevant for my deliberations. They are as follows:

- a. The transaction, the subject matter of this action was the first of its kind for what appears to be the Company's only client LDCCL. That business with that company commenced with this transaction, some nine months after the Retainer and Consultancy Contract.
- b. Interestingly, Dr. Bachan stated in cross-examination that he possessed a "hands on approach" and was "very careful" and "precise". This is contradicted by his nonchalant conduct throughout the transaction. Dr. Bachan claimed that PMCSL provided advice and ensured documents in place for proper business transactions. If this were so, then why was he unaware of Laurie Diaz Construction Company's dealings and business history? His lack of knowledge regarding the area of business in which Laurie Diaz Construction Company was involved coupled with his lack of enquiry into the only transaction conducted by Laurie Diaz Construction Company does not carry his defence far.
- c. The amount of money paid to Junior Thomas, \$60,000.00 for messenger and handy man services seem to be incompatible with his stated duties. There was no evidence as to the period over which these duties were performed or the rate of payment for the services rendered, the usual information

associated with payments of this kind. It is remembered that he introduced the parties at some point in time. Even if he served as the “business scout” in this transaction, there is no evidence and quite sensibly so that the payment had anything to do with this activity. For Dr Bachan not to have asked a question or seek some kind of documentation for this transaction belies his assertion that the change of position in this instance was in good faith.

- d. The quotation admitted into evidence as being prepared by Ms Portia Singh on behalf of Laurie Diaz Construction Company Limited, “**PS1**” was in the sum of \$1,218,431.00 and was unsigned and addressed to no one in particular. That is not helpful in speaking to a course of business dealings in furtherance of establishing the defence of change of position in good faith.
- e. There is nothing tying the cheque which was prepared for Laurie Diaz Construction Company Limited to the above quotation.
- f. That the payment out to Laurie Diaz Construction Company Limited for the heavy machinery and equipment in the absence of accompanying invoices or other supporting documents, raises suspicions and detracts from a finding of change of position in **good faith**.
- g. What is significant is Dr Bachan’s business sense and astuteness as seen in his actions as principal of the company PMCSL. When BM asked if he could have endorsed cheques in the Company’s favour, Dr Bachan refused and insisted that the cheques which were to be made payable to the Company were to be in the form of Manager’s cheques.

How then did Dr Bachan not question the bona fides of the transactions that he was asked to participate in given his apparent knowledge of the dangers of receiving funds of that magnitude from a cheque endorsed in his favour? In these modern times when

commercial transactions are subject of heavy scrutiny I think it would have been incumbent upon Dr Bachan to question the source of these funds from BM who he met just prior to the transaction and with whom he claimed not to have a long relationship. I conclude that Dr Bachan sought to protect his business while at the same time, turning a blind eye to the transactions that PMCSL was asked to effect.

- h. That Sgt. Mc Kain's cross examination did nothing to alter his stated conclusion of the nefarious relationship existing among the parties, Bhola Maraj, Laurie Diaz, Junior Thomas, Lindhurst Ishmael and AB.

I am fortified in my wholehearted acceptance of Sgt. Mc Kain's evidence of the relationship between all of these parties to the fraudulent transaction and I accept his conclusion as correct.

- i. That neither Laurie Diaz nor Junior Thomas was called as witnesses for PMCSL to verify their roles in the transaction or their relationships with PMCSL.

[71] I am of the view that GKL has made the case for the return of their moneys by PMCSL to them. I am entitled to and in keeping with the dicta in **MC QUEEN v GREAT WESTERN RAILWAY COMPANY**²³ as cited by Rajnauth-Lee J in **SIEUNARINE v DOC'S ENGINEERING WORKS (1992) LIMITED**, I draw adverse inferences from their non appearance as witnesses and conclude that they would not have assisted PMCSL's defence in this matter by their recitation of the true circumstances of this case.

- j. That there is no evidence of any *bona fide*, good or valuable consideration passing between Laurie Diaz Construction Company Limited and PMCSL for the service rendered of collection and disbursement of funds under the

²³ (1875) L.R.10 Q.B. 569 and see p 10 of the **SIEUNARINE CASE**

tainted transaction. There is no evidence that the sums retained represent that consideration.

I can safely find that no good and valuable consideration exists and that the Consulting and Retainer Agreement is a sham. Thus in all of the circumstances of this case PMCSL cannot avail itself of the defence of **change of position in good faith**.

[72] Even if I am incorrect on my interpretation of the facts and evidence that the Consultancy and Retainer Contract is valid and not a sham, and the payments were made in furtherance of their obligations under that contract,²⁴ I find comfort in Lord Goff's dicta that if the correct position is that the parting with the funds to Laurie Diaz Construction Company Limited and Junior Thomas was incurred by PMCSL in the "ordinary course of things", it is not inequitable in these circumstances to call upon PMCSL to make restitution to GKL.

[73] Mr. Kangaloo referred me to the **FINANCIAL INSTITUTIONS ACT**²⁵ to make the point that the Consultancy and Retainer Agreement violated its provisions in that under that Agreement, PMCSL was contracted to "manage and disburse funds on behalf of" its client. Mr. Kangaloo opined that this operation flies in the face of Section 5(1), in that PMCSL had no licence to operate a "business of a financial nature" which included "collection of funds in the form of deposits ... and ... the performance for reward of the functions and duties of trustee". He opines that:

In those circumstances by the second named Defendant collecting, managing and disbursing monies on behalf of the Laurie Diaz Construction Company, it is contended by the Claimant that such management and disbursement of funds amounts to a collection of funds in the form of a deposit and/or performance by the second Named

²⁴ This is PMCSL's pleaded case even though Dr Bachan first denied that the payments were made in accordance with the Agreement on cross examination but later admitted that this was the case.

²⁵ **Chap. 79:09** repealed and replaced by the 2008 Act. The offences section is Sections 17(1) and (2) of the 2008 Act.

*Defendant of acts of a trustee in relation to these funds of Laurie Diaz
Construction Company.*

Should there be a violation of these sections, then PMCSL would face criminal sanction. I take judicial notice that PMCSL did not have a licence to operate as a financial institution but make no comment as to the effect of any apparent violation of this Act on these proceedings.

[74] On balancing the equities, GKL's carelessness or negligence in parting with its monies, the TTD equivalent of US\$500,000.00 did not tilt the balance away from it. It is clear that I can order PMCSL to repay the entire sum of \$1,356,830.00 by way of restitution to GKL in the terms to follow. The sums of \$906,830.00 and \$60,000.00 are to be treated differently from the sum of \$390,000.00 (which the parties have agreed is due and owing and did not form part of this deliberation) in terms of the interest and costs.

ORDER:

- 1. That there be judgment for the Claimant against the Second Defendant in the sum of \$1,356,830.00.**
- 2. That interest be paid on the said sum at the rate of 5.5% per annum from the 19th September 2005 until the date of trial.**
- 3. Thereafter, interest be paid on the sum of \$966,830.00 at the rate of 5.5% from the date of trial until the date of judgment and thereafter at the rate of 12% per annum from the date of judgment to the date of payment.**
- 4. That interest be paid on the sum of \$389,563.00 at the rate of 8% per annum from the date of trial to the date of payment.**
- 5. That the costs be paid in the sum of \$45,375.00 on the sum of \$390,000.00 up to the stage of the Pre-Trial Review as prescribed and in the sum of \$94,341.00 on the sum of \$966,830.00 to trial as prescribed.**

- 6. That the payment of the said sum of \$389,563.00 standing in the name of PMCSL at First Citizens Bank standing in the Account No. 1084228 be paid to GKL after the outcome of the proceedings CV 2005-06001.**

I wish to place on record my gratitude to Counsel in this matter.

Dated this 28th day of July 2011.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE