

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. CV2007-00923

BETWEEN

**MARY PERSAD (Also called Chandravatti Persad)**

**AS LEGAL PERSONAL REPRESENTATIVE OF**

**INDAR PERSAD, DECEASED AND IN HER PERSONAL CAPACITY.**

Claimant

AND

**RAMESH PERSAD-MAHARAJ**

**HELEN TARA PERSAD-MAHARAJ**

Defendants

**BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR**

**APPEARANCES:**

Mr. Malcolm Jonatty for the Claimant.

Mr. Seenath Jairam S.C, Mr. Dharmendra Punwasee instructed by Mr. Rishi P.A. Dass  
for the Defendants.

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## **Judgment**

### **The Factual Background**

#### **The Parties**

1. The claimant is the mother of the first named defendant. Indar Persad, who died on 26th October, 1997, (the deceased), was the husband of the claimant, and the father of the first defendant. The second defendant is the wife of the first defendant.

2. The claimant claims as the legal personal representative of Indar Persad, deceased, and in her personal capacity.

#### **Pop Beverages**

3. The claimant is the sole beneficiary named in the last Will of Indar Persad. At all material times the claimant, in her personal capacity and Indar Persad, during his lifetime, were the owners of the shareholding in a company known as Pop Beverages Limited (“the Company”) a company incorporated under the laws of Trinidad and Tobago. The Company was involved in the manufacture and marketing of carbonated beverages, with real property and plant and equipment at Chaguanas. The first defendant was, at least from the time of the death of Indar Persad, the managing director of the Company.

#### **The Loan from Suresh**

4. Reference was continually made to the fact that Indar Persad’s son, Suresh, agreed to lend his father the sum of US\$300,000.00 which was not repaid.

5. HCA 3001 of 1994 was initiated by Suresh in the name of Pop Beverages against Indar Persad in which Suresh alleged Indar Persad had sold him Pop Beverages for the said US\$300,000.00. Initially Suresh succeeded in obtaining an order excluding Indar Persad from Pop Beverages. This action was dismissed on 21st October, 1994.

6. HCA 3860 of 1994 was initiated by Suresh and his wife, Pearl, claiming the shares in Pop Beverages pursuant to an alleged agreement made orally between them and Indar Persad, the claimant, the first defendant and 2 other siblings, This matter was dismissed on 19th June, 2007.

7. After Indar Persad's death the claimant continued to live in Trinidad, residing for some time with the defendants. On 3rd March 2000 by virtue of a power of attorney the claimant appointed the first defendant her attorney. This appointment was revoked on 22 September 2001. In or about 2001 she left to reside with her son Suresh in the USA.

### **The Claim**

8. The claimant claims that, unknown to her, the defendants fraudulently transferred to themselves the total shareholding in the Company which belonged to the claimant personally and to the estate of Indar Persad which the claimant was solely entitled to under his will. Any such transfer was without her consent and without her signing any transfer forms that she knew of.

9. She claimed the defendants also incorporated a competing company known as Grapette Bottling Company Limited with themselves as sole shareholders and sole

directors and used the materials, employees, plant and equipment of the Company, without paying for them, to manufacture and market carbonated beverages in the name of Grapette Bottling Company Limited, making a secret profit for themselves, and thus acting in breach of their fiduciary duty.

10. The claimant contends that the defendants have not accounted to the claimant for the following:

- (i) The sum of \$1,188,053.85 returned to them by the receiver,
- (ii) The other assets of the Company,
- (iii) Sales made by the defendants in the name of Grapette Bottling Company Limited using the Company's assets, and
- (iv) The shareholding in the company belonging to herself and the Estate of Indar Persad.

11. She claims that as a result of their breach of trust, breach of fiduciary duty, fraud, breach of agreement by the first defendant and breach of duty of care, the claimant has suffered loss.

12. The claimant claims:

1. Damages including aggravated damages including the sum of \$1,188,053.85.
2. An order that the defendants do transfer to the claimant all their interest or purported interest in Pop Beverages Limited

## Chronology

13.

1. Will of Indar Persad – 25th October 1997.
2. Death of Indar Persad – 26th October 1997.
3. Entry by 1st Defendant Ramesh Persad Maharaj into factory - Pop beverages circa October 1997.
4. Incorporation of Grapette – 1<sup>st</sup> April 1998, certificate of incorporation 15<sup>th</sup> April 1998.
5. Helen Persad Maharaj replaced Mary Persad as secretary but Mary Persad still a signatory to company's bank account – 8<sup>th</sup> August 1999.
6. Grant of probate of Will – 27th August 1999 . – No reference to any share in POP Beverages Limited in the inventory.
7. Return of shareholders dated September 8<sup>th</sup> 1999 refers to date of registration of transfer of shares – 25<sup>th</sup> June 1999 Transfer from Indar and Chandravati to Ramesh Persad Maharaj and Helen -1001 shares each.
8. Date of charge to DFC – 1<sup>st</sup> November 1999.
9. Date of appointment of receiver - 1<sup>st</sup> October 2003.
10. Date of cheque from receiver - \$1,188,053.85 - 2<sup>nd</sup> November 2004.
11. Date of exit of receiver from Pop Beverages – 12<sup>th</sup> July 2005.

## Issues

14. Several issues were pleaded but these all became subsumed in what turned out to be the main issue - **Whether the claimant transferred to the defendants or any of them ownership of Pop Beverages Limited.**

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15. Collateral to this main issue is the issue of **whether any transfer of ownership of Pop took place fraudulently and/or in breach of fiduciary duty and/or in breach of duty of care and/or in breach of trust.**

16. A secondary issue is **whether the defendants used their position as directors of Pop Beverages Limited to act to the detriment of the claimant by operating their own company Grapette Bottling Company Limited.**

### **Disposition**

17. 1. The first defendant is to pay to the claimant the sum of \$1,188,053.85 being the proceeds paid by the receiver of Pop and admittedly received and retained by the first defendant and interest thereon at the rate of 6% per annum from November 2 2004.

2. (a) The defendants are to supply within 21 days complete profit and loss accounts of Grapette Limited and Pop Beverages Limited from October 26, 1997 (the date of Indar Persad's death) to July 12, 2005 (the date of the termination of the receivership) showing the profits of Grapette and Pop from October 26, 1997 (the date of Indar Persad's death).

(b) The defendants are to pay to the claimant forthwith all net profits of Grapette and Pop together with interest at 6% per annum from the date of accrual of each annual profit shown on such accounts.

(c) In default of the above accounts being supplied the defendants are to pay to the claimant the total of all sums received by Grapette as shown on the bank account of Grapette (a/c number 22483) supplied by Intercommercial Bank that is - the sum of seven hundred and thirty eight thousand three hundred and ninety three dollars and three cents (\$738,393.03) together with interest thereon at the rate of 6% from April 1, 1998 and thereafter interest at the statutory rate for judgment debts until the date of payment.

3. The first named defendant is to pay the sum of \$15,000 as nominal damages in respect of the equipment of Pop retained and unaccounted for in the possession of the first named defendant.

4. The first named defendant is to pay to the claimant the sum of \$25,000.00 as nominal damages in respect of the conversion of the shareholding in Pop.

5. The first named defendant is to pay the claimant's costs on the basis prescribed by the Civil Procedure Rules in respect of the sums ordered at paragraphs 1, 3 and 4 above.

6. The defendants are to pay the claimant's costs on the basis prescribed by the Civil Proceedings Rules in respect of any sums to be paid at paragraph 2 above.

7. Liberty to apply.



## **The Pleaded Case**

**Circumstances under which the first named defendant was appointed to manage the company.** [Headings and emphasis are added in bold for clarity]

18. The claimant pleaded at paragraph 4 as follows:-

*“At the funeral of Indar Persad a few days **after** his death, the Claimant offered the First Defendant to appoint him as Managing Director of the Company [POP Beverages] and to be responsible for the activities and operations of the Company on condition, inter alia that*

- (i) He was to liquidate the assets of the Company by getting a sale of the assets of the Company.*
- (ii) Until a sale of the assets of the Company, (iii) (Sic) he was to refrain from borrowing money in the name of the Company or to pledge the assets of the Company as security,*
- (iii) **The balance upon liquidation of the assets of the Company was to be paid over to her.***

*Upon the First Defendant's promise, agreement and undertaking ("the agreement") to the Claimant to operate the Company on the aforesaid basis, **the Claimant** appointed him Managing Director of the Company.”*

**Incorporation of Grapette and its alleged operation in competition with the company.**

*“On 3rd April 1998 unknown to the Claimant or to the Company, the Defendants caused to be incorporated a company by the name of Grapette Bottling Company Limited using their home address at 27 Parima Road, Valsayn Park, Valsayn as the registered address of that company, and appointed themselves as directors of that company of which they were sole shareholders” . [Paragraph 5]*

*Using the assets of the Company including plant and equipment and employees paid by The Company, and the funds of the Company the defendant carried on business under the name of Grapette Bottling Company Limited while each also holding office as director of the Company. The Defendants' said activities were a breach of the fiduciary duty they owed to the Company, to the detriment of the Claimant. Further in the annual return of the company filed at the Companies Registry First Defendant on the 17<sup>th</sup> October 1999, the Defendants falsely and fraudulently held themselves out to be the only shareholders of the Company. ... The said activities of the Defendants were secretly carried out as they did not disclose it to the Claimant or to the Company. The existence of Grapette Bottling Company Limited and **the fraudulent transfer of the entire shareholding in the Company to the Defendants** and (came) to the attention of the Claimant for the first time in 2006.*

*Particulars of breach of fiduciary duty*

*(a) The Defendants as directors of the Company were under a fiduciary duty to the*

*Company and to the Claimant its shareholder.*

*(i) not to use their position to compete with the Company*

(ii) not to use the assets of the Company save for the benefit of the Company

(iii) to act honestly and in good faith with a view to the best interests of Company

(b) The Company was in the business of manufacturing, bottling and sale of carbonated soft drinks and had for that purpose, leasehold land, building, plant, equipment and offices at 2 Gaston Street, Lange Industrial Estate, Montrose, Chaguanas and employees being paid by the Company. The Company manufactured and marketed the brands "Grapette", and "Mr Cola" under licence from Grapette International Inc, a company incorporated in the State of Arkansas in the United States of America. The Defendants, being directors of the Company which was then solely owned by the Claimant carried on the business of Grapette Bottling Company Limited which was the same business of manufacturing, bottling and sale of the very brands of carbonated soft drink "Grapette" and "Mr Cola" at the said Company's premises, without paying for the use of the Company's offices, plant and equipment at 2 Gaston Street, using raw material paid for by the Company and the services of the employees paid by the Company, selling the Company's products "Grapette" and "Mr Cola" manufactured by the Company to customers of the Company making a secret profit for their own company, to the detriment of the Company and to the Claimant its shareholder.

(c) The Defendants used their said position as directors of the Company to further the interests of Grapette Bottling Company Limited without informing the Claimant or company of the existence of Grapette Bottling Company Limited and hence used their position as directors to further their own personal interest, using the Company's own products, selling to customers which were the Company's

customers and operating Grapette Bottling Company Limited from the offices and address and telephone number of the Company.

(d) *The First Defendant was the holder of a Power of Attorney of the Claimant and was as her lawful attorney under a fiduciary duty to the Claimant not to benefit personally from acts done by him on her behalf.*

(e) *The Defendants were therefore in breach of their fiduciary duty in that*

*(i) they used their position to compete with the Company*

*(ii) they used the assets of the Company other than for the benefit of the Company*

*(iii) they did not act in good faith in the best interests of the Company*

*(iv) they used their position to the detriment of the Claimant for their own benefit.*

#### Particulars of fraud

*The claimant repeats the foregoing particulars of breach of fiduciary duty and says*

*further that the Claimant owned or was entitled to all the shares in the Company and instead effecting a change in Company's records to transfer Indar Persad's shareholding to the Claimant, the Defendants instead transferred to themselves the entire shareholding of the Claimant without her knowledge or consent, and for their own benefit, thus converting to their own use the said shareholding.*

[Paragraph 6]

### **The Evidence of the Claimant**

19. Her evidence is in the form of her witness statement, which was admitted pursuant to a hearsay notice. Her evidence was therefore not subjected to cross

examination. As it is the sole direct evidence on behalf of the claimant it is necessary to set it out at length hereunder.

(Although admitted I place no weight whatever on the following-

- i. Notarized statement of Debbie Stein dated 30 October 2004;
- ii. Notarized statement of Lakshmi Ramparass dated 24 November 2008; and
- iii. Notarized statement of Sunita Soonachan dated 20 November 2008).

**Witness statement of Mary Persad dated 3<sup>rd</sup> January 2008.**

*[Emphasis added]*

7. *At my husband's funeral I said to the First Defendant that he could continue to run the company until he could get a sale for it or for its assets. **A few weeks earlier** he had taken over as Managing Director. I instructed the First Defendant that he must not take new loans or make new investments and he must **try** to liquidate the assets of the company **and pay back the money owed to Suresh.***

9. *We had previously owned a company Gold Crown operating the same soft drink bottling business in the same place selling the same brands. That company went into receivership and hence **I decided that I did not want the same thing to happen.** The First Defendant did not have the experience in running a soft drink bottling business. When my husband died, the new company was free of debt and it had all the assets previously owned by Gold Crown because of the US\$300,000 advanced by Suresh. The First Defendant agreed with me that he would manage the business on those conditions.*

11. *Unknown to me the Defendants incorporated their own company Grapette Bottling Company Limited [page 94 to 100] competing with Pop Beverages Limited. When Grapette Bottling Company Limited was incorporated the First Defendant was Managing Director of Pop Beverages Limited, whose main brands were “Grapette” and “Mr Cola”. I discovered the existence of Grapette Bottling Company Limited and its activities in 2006.*

12. *Unknown to me also which I discovered in 2006 was a document [page 113] which the First Defendant filed at the Companies Registry showing that Indar Persad’s shareholding was transferred to himself and my shareholding was transferred to the Second Defendant. **I never would have effected such a transfer and it was done without my knowledge.** In fact all his documents filed at the Companies Registry relating to the company [pages 106 to 124] were not discussed with me.*

23. *It is false to say that my husband gave any oral instructions to me at the time of making that will or at any other time, that any shareholding in the company should be given to either Defendant or that the family home should be given to Radesh. Radesh is another son who now lives in Florida.*

24. *My husband and I did transfer two pieces of land at Lange Park to Veda. That deed is at page 77 of my bundle of documents. It is false to say that that was a transfer done by me after my husband’s death.*

26. *There is nothing in those Court papers prior to 2006 from which I knew that there was any transfer of shareholding in the company to the Defendants. I did not sign any such document to transfer any shareholding in the company to the Defendants and I never agreed to make any such transfer to the Defendants.*

38. *The company went into receivership [pages 176 to 177]. The receiver's abstracts show that he had sold the company's leasehold property for \$4.2 million [page 178] and there remained about \$1.2 million.*

41. *The company had a fleet of about 10 vehicles but I do not know their numbers. The company also **had a new plant and equipment including bottling capping machine, conveyor and labeler** listed at page 169. These were not sold as the leasehold property at Gaston Street was sufficient to pay for the debts of the company. The Defendants have not accounted to me for them.*

46. *Prior to leaving Trinidad for the United States in September 2001, I went with my daughter Renuka and put the US\$5,409 on my name and hers. I foolishly put the First Defendant's address at 27 Parima Road, Valsayn Park, Valsayn as my address for statements in that account. Either account holder could have withdrawn.*

47. *Sometime in 2005 I asked Renuka to check the balance in the FCB account and found that there was no money in that account. Sometime that year I*

*found out from the bank that the First Defendant had used his Power of Attorney to withdraw those funds.*

48. *At the Unit Trust the \$30,000 was in my name only. After my husband died I put the First Defendant's name on it jointly with me. The account was such that both persons had to sign to withdraw.*

49. *In 2005 I also discovered from the Unit trust that my account there also had no funds and that the First Defendant had sometime in 2001 used my Power of Attorney to withdraw those funds unknown to me and without my permission.*

## **The Defence**

20. The pleaded defence to these allegations is found in paragraphs 6, 7, 8, 10, 11 and 12 of the Defence. The Defence is that:

1. *The Defendants say that the first named Defendant was instructed by the said Indar Persad to prepare his said last will and testament and to ensure [i] that his son the said Dr. Suresh Persad would not benefit from his estate and [ii] that his estate is left to the Claimant subject to certain specific instructions given by the said Indar Persad to both the Claimant and the first named Defendant. [Paragraph 6]*

2. On 25<sup>th</sup> October 1997 when he executed his last will, Indar Persad directed the Claimant, the first named defendant and Veeda *inter alia* (a) that two parcels



of land at Lange Park should be given to Veda and (b) that Pop Beverages Limited **should be given to the First Defendant** on condition that he does not sell but operate the business and use the profits to take care of his sisters and Radesh. [See paragraph 7]

3. In accordance with Indar Persad's wishes after his death the Claimant transferred the two parcels of land at Lange Park, Chaguanas to Veeda Bharathsingh and **the company was transferred to the First Defendant** [paragraph 8]

4. **Immediately after Indar Persad's death** the First Defendant assumed control of the day to day management of the Company with the Claimant's consent, knowledge and approval [paragraph 9]

5. Grapette Bottling Company Limited was used to secure the use of the trade name "Grapette" and to conduct business with the company's suppliers of raw materials. [Paragraphs 10 and 11]

6. The Claimant was always aware that the Defendants were the sole shareholders of Pop Beverages because of the matters pleaded at paragraphs 7, 8 and 9 and other matters which were:

(i) Her alleged transfer of the company after the death of Indar Persad in accordance with his wishes,

(ii) Further and/or alternatively because of H.C.A. No 3860 of 1996 in which the Claimant was a defendant represented by an Attorney-at-Law which concerned the Company and she ought reasonably to have been aware of the changes filed in the Companies Register in relation to the shareholders and directors prior to 2006. [Paragraph 12]

### **The Evidence of the Defendant**

#### **Witness statement of 1st defendant -Ramesh Persad-Maharaj**

21. *The claimant is my mother. I am the eldest of nine (9) children. My father Indar Persad died on the 26<sup>th</sup> October, 1997. At the time of his death my mother lived in the family home at 27 De Verteul Street, Montrose, Chaguanas. They lived alone. They were close to my sister Veeda Bharatsingh and I. We have one other sister, Renuka Ramsaran who lives in Trinidad but she was not close to them. Only Veeda and I used to visit them often. All the other siblings lived abroad and my parents were not in touch with them [paragraph 2]*

*My father insisted that I should prepare a will in order to prevent Dr. Persad from benefiting on an intestacy and on the 25<sup>th</sup> October, 1997 the will was executed by him in the presence of the claimant, Veeda Bharatsingh and myself.*

*My father orally gave specific instructions as follows:-*

- (i) Dr. Persad should not attend his funeral and must not come near his body.*
- (ii) The family home should be repaired by me and transferred to my youngest brother Radesh.*
- (iii) Two (2) parcels of land at Lange Park must be given to Veeda Bharatsingh.*

(iv) The soft drink business he gave to me on condition that I should put money into it to improve it, not to sell it and when it started to make a profit to assist my siblings. [Paragraph 9]

From the moment of my father's death I assumed control and management of the factory business. The day after my father's death, T & TEC cut off the electricity because \$16,000.00 was owing and the Water and Sewage Authority also locked off the supply of water because of debt of \$23,000.00. The business was unprofitable and needed capital. I sold two (2) valuable properties for a total of about One Million Dollars to repair vehicles, some machinery, the leaking roof to pay debts owed by the Company and to purchase bottles and raw materials. This money just vanished in the business. My father operated the business as a sole trader and I could not get out of that mould. I was forced to use my own financial resources to obtain funds because no bank wanted to deal with the Company unless I gave personal guarantees. [Paragraph 10]

Grapette Bottling Company Ltd was never registered as a company to compete with Pop Beverages Ltd. It was registered to preserve the use of the trade name "Grapette" because we had lost the franchise and had built up a trade usage with the name which I thought I should protect. Also, during the time of my father's **management he accumulated a debt of more than \$100,000.00 to National Insurance Board and to VAT** and I could not continue using that name because I could not find the money to pay them. So I used the new company Grapette Bottling Company Ltd for purposes of National Insurance and VAT and also to

*deal with the suppliers business. The Company was never a profitable Company. I used my own monies to keep the business going because I believed that one day it will make us a profit and be of assistance to my siblings.* [Paragraph 12]

*During the time I operated the business I neglected my own professional office and my family's life. I placed all my resources into the business. I put money earned from my legal practice into the business.* [Paragraph 15]

22. This evidence was subjected to cross-examination. Material aspects are set out at length hereunder as the issue of whether the Company Pop was lawfully transferred to the Defendants was essentially one of fact with the claimant and the defendant having diametrically opposed.

### **Cross-examination of First named defendant**

**Day 2**  
**Friday 1st December 2009**  
**10.28**

*Q: You accepted Deed done in her lifetime?*

*A: Yes.*

*Q: So no need for your father to give instructions to your mother to give Veda the 2 lots of land?*

*A: My father insisted please ensure land given to Veda. Make sure she gets the land.*

*Putting- No cause to give Veda the lots of land in Lange Park after his death when he had executed the Deed in the presence of Mr. Bola-i there would have been no need for your father to do that.*

*A: He insisted Veda should get those 2 lots.*

*Q: Will was drawn up in accordance with instructions given by father?*

*A: Yes.*

*Q: He also instructed you to put in a clause about providing for children?*

*A: Yes.*

*Q: Did it reflect wishes of your father?*

*A: Yes in every respect.*

*Look at inventory to estate pg 74*

*Q: Your fathers share in Pop beverages was missing?*

*A: Yes.*

*Q: Why was your father's shareholding in Pop beverages missing from this inventory?*

*A: Because my father and mother had transferred holdings in Pop holdings fully to me and on the said 25th had executed documents. Had transferred factory to me even before the 25th. He signed the documents on the 25th.*

*Q: That is not in your Defence.*

*Shown Defence*

*Identifies Defence*

*Q: Could you show me where in Defence pleaded that transfer documents executed by father and mother?*

**A:** *Paragraph 7 (iv). I am saying they executed documents.*

**Q:** *Doesn't it say he orally directed them to give factory to you?*

**A:** *Yes.*

**Q:** *So if he had executed documents why would there be any need to orally direct that company should be given to you?*

**A:** *He was emphasising but he had in fact executed documents and my mother as well. By executing documents legally it was sufficient but he kept emphasising because he did not want interference with his wishes.*

*My father was fully aware there was a pending court action between Suresh (and her wife Polly) and himself and he knew Suresh would not leave me in peace or the factory in peace.*

**Q:** *You made discovery in this matter?*

**A:** *Yes.*

**Q:** *Did you disclose those transfer documents of factory to yourself?*

**A:** *I couldn't disclose them because I could not locate them. Everything was destroyed in a flood at father's residence.*

**Q:** *Father lived in upstairs residence?*

**A:** *It was downstairs.*

*My attorneys advised me of duty of disclosure.*

**Q:** *Isn't one of duties of disclosure to disclose any documents you ever had in relation to issues?*

**A:** *Yes.*

**Q:** *And that would be [??] that piece of information in relation to you in this case?*

A: Yes.

Q: And you have been attorney for 40 years?

A: More than that.

Q: And you have drawn up several lists of documents?

A: Yes sir.

Q: And there is schedule when you can report document lost [**confirm**]

A: Yes.

Q: And being aware of that failed to disclose?

A: Yes.

Q: Put - Because documents never existed?

A: No.

Q: Did you even plead transfer of factory to you by your father and mother?

A: I pleaded ownership of the factory.

Q: Did you plead in Defence that it was after father's death factory was transferred to you?

A: Can't remember.

*Shown Defence - paragraph 8 - After his death?*

A: **Yes - but because transfer didn't become effective until after his death**

Q: While alive he remained owner?

A: There was a document. I drew up that document. It was signed by father and mother.

Q: You are lying?

A: No true.

*Document never existed?*

A: *Not true*

Q: *You never said it in witness statement?*

A: *I mentioned ownership.*

Q: *You didn't say it in your list of documents?*

A: *No.*

*I never got into the serious details of this court action until recently. That is why I omitted to mention it.*

Q: *But that would have been most important thing for your claim?*

A: *I don't agree.*

Q: ***If both she and father had transferred factory to you before he died wouldn't that have been a complete answer to your claim?***

A: ***That is true.***

**2.31**

Q: *You mentioned case pending against Suresh/*

A: *Yes. My mother was one of the defendants.*

Q: *You pleaded "because of that case your mother ought to have known that factory had been transferred to you?"*

A: *Hesitates - can't remember.*

Q: *Reads paragraph 12.*

A: *Yes.*

Q: *If mother had transferred ownership to you why would you have to say that she became aware of it? [Changes in company ownership] if she had transferred ownership to you?*

A: *It says she was represented by attorney at law.*



*Q: Why not say directly that your mother gave company to you rather than say she ought to have become aware through (filing of company registry)*

*Q: But it was in response to paragraph 6 of the Statement of Case?*

*A: In further answer to paragraph 6?*

*Look at paragraph 6 of Statement of Case*

*Shown Statement of Case*

*Q: Wasn't she referring to Defence falsely and fraudulently held themselves out to be the only shareholders of the company*

*A: She is saying that now.*

*Q: Why saying that she should have known because of court case?*

*A: One of factors.*

*Q: You didn't say any of factors is that she executed documents?*

*A: It doesn't say there.*

*Look at paragraph 9 of your Defence "Consequent upon the Claimant transferring the company to you in accordance with the wishes of Indar Persad*

*Q: Are you saying the claimant or [father and mother]?*

*A: That is not correct.*

*Q: That was the information given at the time?*

*A: Perhaps.*

*Q: And you know it makes no sense for a man to give instructions for a will and then give contrary oral instructions?*

*A: Can I object to the question?*

*Q: No.*

*Q: Can he give contrary oral instructions at same time gives instructions for will?*

*Testator can do anything he can change his own?*

*A: It is unusual.*

*Q: But your case in Defence is father gave oral instructions to mother to give factory to you?*

*A: That was the position all the time that is nothing new.*

*Q: Your case now is documents were executed in his lifetime?*

*A: That was always my case - instructions to my mother. Make sure Ramesh get the factory and ensure son in America doesn't interfere.*

*Q: Reason why you stole these assets from your mother was you didn't want it to get to Suresh?*

*A: My mother used to say not a black sent for that so and so.*

*I know Suresh controls my mother she cries she wants to get out of house.*

*I know my brother calls my brother in Savannah.*

*I am on good terms with Radesh*

*I did not want to involve any other member of my family.*

*I did not ask Radesh.*

*I did not ask anybody.*

*Truth will bear me out and God will protect me.*

*Q: Your case is mother and father gave them ?? shareholding?*

*A: Everything, everything they trust me absolutely with everything.*

*Q: When Veda was being cross-examined did you hear your counsel tell Veda that your father told Veda to give [ ] company to run?*

*A: Yes.*

*Q: Counsel did not put to Veda that father told mother to give ownership of company?*

*A: So be it. Veda was present - ownership issue was between parents and myself.*

*Q: Put to her that father told mother to give you the company to run. Mother gave you the keys upon father's death?*

*A: Yes. I had keys before that. Somebody had to pay workers.*

*Q: In 1999 you filed return at companies registry transferring Indar shareholding to yourself?*

*A: Yes*

*Look at page 113*

*Q: Is this the Resolution by which you informed companies registry of transfer from Indar Persad to yourself?*

*A: Yes.*

#### **2.59.25 stood down**

*Q: And you told companies' register mothers shareholding was transferred to your wife?*

*A: This was done for purpose of getting loan from Development Finance Limited. Wife had to guarantee the loan. I don't think I said this in witness statement.*

#### **Analysis of the Evidence - Transfer of the company**

23. 1. The First Defendant's case on the pleadings was that his father gave oral instructions at the time of his will that the Company was to be given to him.

2. In fact the assertion is made for the first time at trial that the First Defendant's parents had on 25<sup>th</sup> October 1997 also signed a document transferring the

Company to him, a transfer to take effect upon the death of Indar Persad. It was submitted that if this was a transfer that took effect upon Indar Persad's death, it was arguably a will and was void for want of formalities, in particular the signing before two witnesses. If the pleading was intended to suggest some arrangement akin to a secret trust this was not pursued in submissions.

3. (a) The existence of such a document was not pleaded although the issue was a live one. It is not one of the reasons pleaded in paragraph 12 of the Defence as to why the Claimant is alleged to have known that the Defendants were the shareholders of the company. If she and Indar Persad had on 25<sup>th</sup> October 1997 signed a transfer of the company to the First Defendant, she herself having joined with Indar Persad to sign the transfer document would have direct personal knowledge of that fact.

(b) Apart from not being pleaded or referred to in any witness statement the alleged transfer document was not disclosed in discovery. The explanation was that it was destroyed in a flood. However, the existence of documents a party no longer possesses must still be disclosed.

(c) Further, according to the First named Defendant, three documents were executed that day by Indar Persad, namely the will, the Deed to Veda and this transfer of the company. Curiously the will survived, the Deed survived but the transfer document did not survive the flood.

4. The First Defendant also suggested that the Claimant was present at Lex Caribbean when he gave instructions to prepare the return. The name Lex Caribbean does not appear on the return.

Even at the time of the witness statement, the First Defendant did not disclose the transfer on 25<sup>th</sup> October 1997 or that Mary Persad was there at Lex Caribbean when he went to give the instructions. He asserted for the first time in the witness box the transfer which allegedly took place on 25<sup>th</sup> October 1997.

5. It was submitted that if there was a written transfer which had been destroyed in the flood, the sensible course where two persons are receiving gratis a valuable shareholding was to have Mary Persad re-execute a new transfer to the Defendants. She had received the grant and would have been able to transfer both her shares and Indar Persad's shares. I accept this submission. [In fact for such a transfer she ought to have obtained independent legal advice if it occurred at all.]

24. The suggestion that this transfer document was done during Indar Persad's lifetime is inconsistent with the plea in paragraph 8 of the Defence that after Indar Persad's death, the Claimant transferred the company to him, but immediately after the death of Indar Persad, but before the transfer he assumed control of the management with the Claimant's consent, knowledge and approval.

25. The first defendant's evidence was that the transfer was before Indar Persad's death. In fact both the claimant and defendants pleaded that upon Indar Persad's death she allowed him to run the company.

26. The evidence is set out at length to provide a flavour of the many inconsistencies that surround this single issue. These inconsistencies cumulatively are highly suspicious and cry out for explanation. It should be noted that the claimant's case also raises issues and these are set out hereunder:

#### **Issues arising on the Claimant's pleaded case**

27. If there was an agreement as pleaded for the first named defendant to seek to liquidate the assets of the company why did the defendant not recognise that the assets were not in fact being sold? She claims to have been expecting to be paid the proceeds of sale, so she would have had an interest in the expeditious sale of those assets. Further, in her witness statement, unlike in her statement of case, she says the proceeds of liquidation were to be used to pay back Suresh. In either event years passed and the company was not being sold. That this was not a problem for her up to almost 3 years later is demonstrated by her action in executing a general power of attorney in favour of the First named Defendant. It would be logical to have expected her to inquire whether her company was making a profit and to request her share of profit, or an account of it. If it were making a loss she might reasonably be expected to have requested that a sale be expedited. Her inactivity is unexplained.

28. Further she claimed she wanted to avoid a receivership because of her prior experience of receivership of Gold Crown, another company she had an interest in. Yet the receivership in October 2003, a matter which should have concerned her if she knew about it because of her prior experience with Gold Crown, did not alert her to the fact that she did not own the company any longer.

29. It becomes a question of fact therefore as to whether the claimant transferred her shareholding and the shareholding of Indar Persad to the defendants. She says she did not. The First named defendant says she did.

#### **Issues arising on The Defendants' pleaded case**

30. From the defendant's pleaded case certain issues also arise:

(a) If Indar Persad gave directions for the transfer of the company to the First named Defendant why it was not stated in his will?

(b) If the purpose of not stating this in the will was to deflect a claim by Suresh why was the written document by which that transfer was indicated or effected not pleaded or produced. If that document was in fact destroyed by flood why was its existence never disclosed or even pleaded, or addressed in the witness statements?

(c) Indar Persad owned only half the shareholding in the Company. Yet the first named defendant suggests that Indar Persad was proposing to direct how the entire company should be disposed of and dealt with.

(d) What document was used to indicate to the Companies Registrar that the shareholding of Indar Persad was to be transferred to the first defendant, if the document executed by Indar Persad and the claimant had been destroyed.

(e) Even if the document utilised to effect the transfer of Indar Persad's shareholding was based on the grant of probate to the Claimant, how was it that the claimant was unaware of such a transfer of her own shareholding to the defendants. Her claim to be so unaware could have been readily rebutted if she had executed any transfer document and it had been produced.

(f) If as the first defendant says, the claimant should have been aware of the transfer as she went with him to Lex Caribbean where the return of shareholders was prepared why was this not pleaded ,though other reasons why she should have purportedly been aware of the transfer were pleaded.

(g) Why did the first defendant provide no details whatsoever in support of his assertion that he utilized personal funds in an attempt to keep the company afloat? Even evidence of the alleged sale of the "two valuable properties" was not documented, substantiated, or particularised. The lack of disclosure in this regard means that there is no material to substantiate that allegation and it is therefore not accepted.



(h) the professed reason for keeping this allegedly loss making company in operation and the alleged reason for it being given to the defendant was for the benefit of his siblings - many of whom lived abroad and who he claimed were not in touch with their parents and one of whom lived in Trinidad but was not close to her parents.

31. I am not convinced the company was transferred to the 1st defendant to benefit his siblings or that it in fact made such continuous losses prior to its loan from Development Finance Corporation, that it required the substantial investment of personal funds that the First named defendant claims he provided.

32. If she had gone to Lex Caribbean this would have been in his witness statement.

33. If the transfer document had been lost in a flood a new one could have been executed by Mary. No transfer document was produced from the records of the Companies Registry. This is all the more reason for the first defendant to fully particularise the circumstances under which a valuable asset, a shareholding in Pop, found its way into the defendants' hands, to rebut the claimant's assertion that she did not know how this happened.

### **Findings**

34. It is possible that the arrangement between the claimant and the first named defendant was more nuanced, and informal than pleaded by either. However the court is constrained by the pleadings of each. The difference between the parties on the issue of

the ownership of Pop could not be more stark. The first defendant maintains that he is the owner, ownership having been transferred to him by the claimant and his father Indar Persad. The claimant maintains that this never happened. There is no middle ground.

### **Law -Burden of Proof**

35. This approach is appropriate in respect of all serious allegations: the more serious the allegation against the defendant, the more cogent must be the evidence to substantiate same.

36. This is clear from the decision of Ungood-Thomas J. expressed in **In re Dellow's Will Trusts** [1964] 1 W.L.R. 451, 455:

*"The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."*

37. This accords with the approach adopted in authorities such as the well-known judgment of Denning L.J. in **Hornal v. Neuberger Products Ltd.** [1957] 1 Q.B. 247 at 258.

38. These are serious allegations. A higher degree of proof commensurate with their severity is required. The evidence of the first named defendant on the critical issue of the transfer of ownership of Pop- when, where and how this was effected, given that the claimant alleged she was unaware of it, was unconvincing, lacking in credibility, and unbelievable. Coupled with the failure on discovery to disclose the alleged transfer document, and the adverse inferences to be drawn as a result , the departure from the

pleadings and the witness statements on this issue I am satisfied that that degree of proof has been attained.

39. I find that the Defendants' pleading that the Company was transferred to the first named Defendant by the Claimant after his father's death was diametrically opposed to his evidence in court, unsupported by pleading or disclosure, that his parents signed over a transfer of the company to him the day before his father died.

40. I find that there is no evidence that there was ever any such document executed by Indar Persad or the Claimant on October 25<sup>th</sup> 1997 save for the contradictory statements of the first named defendant that this took place. Those statements, coupled with the evasive demeanour and conduct of the first named defendant, are simply not credible. That being so I find that Indar Persad did not transfer his own shareholding to the first named defendant prior to his death, nor did he direct the claimant to so transfer the shareholding. I do not accept the evidence of the first named defendant that this ever occurred. Further I accept the evidence of the claimant, notwithstanding the absence of cross examination thereon, that she never transferred the Company to the first named defendant either subsequent to the death of Indar Persad, or at all..

41. Upon payment of the Company's debts the Receiver paid over the balance of his receipts being the sum of \$1,188,053.85 to the Defendants, which they have kept. This is admitted on the pleadings. The Defendants have not accounted to the Claimant for this sum or for the value of her shareholding in the Company .The Claimant got nothing from the proceeds of sale of the Company's assets.

**The power of attorney.**

42. The allegation with respect to further duties being owed by the first defendant by virtue of the fact that he held a power of attorney takes the matter no further. If the shareholding in the company was transferred fraudulently the existence of a power of attorney would not make this act any more or any less fraudulent.

**Issue No. 2 - whether the Defendants used their position as directors of Pop Beverages Limited to act to the detriment of the Claimant by operating their own company Grapette Bottling Company Limited.**

43. I consider it more likely than not that Grapette was not formed to compete with Pop and I accept the first named defendant's evidence in this regard. The purported share transfer took place on June 25th 1999 according to the return of shareholding. Alternatively it took place by September 1999 and in any event no later than October 25th 1999. Grapette was formed in April 1998. A year later the shareholding in both Grapette and Pop was in the name of the defendants. On the defendants' version of events ownership in Pop predated the formation of Grapette. Even on the Claimant's case, at latest a year and a half later the defendants owned both companies and had no need to compete with Pop or siphon funds from it. I accept that both companies were run as one, as contended by the defendants. There is no evidence to the contrary, and no useful purpose would have been served by Grapette being run separately from Pop when the defendants claimed, rightly or wrongly, to own Pop also. There would have been no detriment to Pop, both companies being treated as under common ownership.

44. Accordingly profits of Grapette and Pop must be treated similarly. If Pop had been legally transferred to the defendants on their own case Grapette and Pop were not operated as separate companies. By the same token if Pop had not been legally transferred to the defendants then the assets of Grapette would be in the same ownership as Pop and Grapette and Pop were admittedly not operated as separate companies.

45. If the claimant retained ownership of Pop then she would also be entitled to the profits of Grapette as there is no doubt that:

- (a) it was not formed to operate independently of Pop,
- (b) it utilised the assets of Pop,
- (c) it serviced the customers of Pop,
- (d) it received the receivables of Pop.

46. The issue is not so much whether the defendants were competing with the claimant's company for a short period, but whether they effected the unlawful wholesale transfer to themselves of the claimant's company. Any competition with that company fades into insignificance if a finding is made of an unlawful transfer. However if the shareholding in Pop was not validly transferred to the defendants as I have found, I have no hesitation in finding in the alternative, based on the fact of the first named defendant's testimony as to how Grapette and Pop were operated interchangeably, that the defendants were in breach of their fiduciary duty to Pop, and would have a duty to Pop, and its sole shareholder, the Claimant, to account for all receipts and profits of Grapette.

## **Disclosure of Documents**

47. A party must disclose such documents in his possession or control or custody that are relevant to the issues in the case and even documents which have left their custody or control.

## **Disclosure**

48. While 65 documents were disclosed under schedule 1 and 9 in schedule 2 in a list of documents filed on December 18 2007, apparently signed by first named defendant, the Defendants failed to disclose their accounts of the companies Grapette and Pop and their bank records. These are documents which should exist, given that Pop was able to secure funding from a financial institution – Development Finance Limited DFL.

49. In the case of **Carlton Greer v Alstons Engineering, Civil Appeal 2 of 1996** the Court of Appeal made it clear that adverse inferences could be drawn against persons withholding relevant documents - See pg 14 per the Honourable Justice of Appeal Jones

## **Quantum of damages**

50. Claimant claims damages including aggravated damages in respect of the matters pleaded in the statement of case. These include the following

### **(a) Loss of the company**

51. Indar Persad put the value of the company at \$5 million, as at July 10 1995 (see page 168 Vol.2 agreed bundle of documents) a value agreed by the First Defendant. In 2004 the receiver sold the real estate for \$4.2 million [page 178 of Agreed Bundle

Volume 1]. He claimed the company was never making money. However the company (Pop) was able to take a loan for \$1.6 million from DFL.

52. It was submitted that in the absence of the company's records, the value of the company should be taken as the value according to Indar Persad which value the First

Defendant admitted. But 2 years had elapsed from 1995 to the time of Indar Persad's death. Indar Persad himself deposed in previous proceedings to indebtedness of Pop to its creditors in the sum of more than \$500,000.00 and deterioration of its assets in 1995.

53. I am unable to use this value, especially as it would include the company's real estate which was sold by the receiver and which the claimant gets the benefit of in the form of the surplus of sale after payment of the debts of the company.

(b) **Equipment of the company**

54. Apart from the real estate, the company had bottling equipment and vehicles which the claimant alleged, at paragraph 13 of the statement of case, were in a location unknown to her.

55. In cross-examination the first defendant said that the trucks were all rented except one, and that one had been sold in Indar Persad's lifetime. He accepted that he had the bottling equipment stored at his temple.

### **Grapette Bottling Company Limited**

56. No accounts were provided for Grapette Bottling Company Limited.

57. The bank records from Intercommercial Bank show that the account was opened on 5<sup>th</sup> February 1999 with a negative balance of -\$26,509.63. The account remained in existence for five years until 5<sup>th</sup> January 2004. On that day the account was closed. Page 23 of the Statement of Account shows a total receipt of \$738,393.03 over the five years. It is possible that it was used for expenses of Pop. In the absence of accounts it is not possible to determine whether this is so or whether it even reflected any profit. This was income derived from the assets of Pop. That income should have been by received by Pop, and by the claimant as sole shareholder. The defendants would have had no right to receive, far less retain any such sums, as I have found they had no interest in the ownership of Pop, unless they can establish that those sums were expended on the operational or other legitimate expenses of Pop. Accounts must exist and therefore must be provided. The defendants are required to return to the Claimant, as sole shareholder in Pop, all sums received by that company – totalling \$738,393.03 with interest at 6% from 5<sup>th</sup> January 2004 to the date of judgment and thereafter at the statutory rate to the date of payment, in default of accounts being provided, establishing that the sums received were in fact used for the operational or other expenses of Pop as there would be no basis otherwise on which the sums, admittedly received on behalf of Grapette, could be retained.

58. I have found and it is in fact undisputed, that Grapette and Pop were operated as one company. The First defendant made it clear that de facto there was one



company. The profits of Grapette would equally be the result of the use of the assets of Pop. Having found that the claimant relinquished ownership of Pop I find that it is indisputable on the evidence that she was entitled to the net profits of Grapette, which were derived from the use of Pop, which she wholly owned.

59. The directors' primary fiduciary duty is to the company but if a special factual relationship exists between directors and the shareholders of a company capable of generating a fiduciary obligation, such an obligation may arise: Per Neuberger J in **Peskin v Anderson [2000] B.C.C. 1110** at 1111 to 1120, (delivered December 7, 1999). In this case such a relationship does exist. The claimant is the sole shareholder in a family company, and the mother of the first named defendant who is an Attorney at Law.

### **Quantum Surplus after Sale of Real Property**

60. There is no dispute that the first defendant received the sum of \$1188053.85 from the receiver of Pop beverages. There is equally no dispute that the first defendant retained the proceeds of this cheque.

61. Having found that there was no transfer of Pop beverages from the Claimant to the defendants there is no basis on which the first defendant can retain that sum. He is liable to repay that sum with interest to the claimant.

### **Value of Pop**

62. There is evidence of the value of Pop as at July 10 1995 in the sum of \$5 million as deposited to by Indar Persad and accepted by the first defendant. However that sum

probably included the value of real estate sold by the receiver subsequently and there is no evidence of the value of the company subsequent to the termination of the receivership and particularly at the date of the trial or judgment - See **Carlton Greer [Ibid]** per De La Bastide at pg.2

63. The dearth of evidence as to the value of Pop is contributed to significantly by the failure of the defendants to comply with their obligations on discovery. In the circumstances I award the sum of \$ 25,000 as nominal damages in respect of the conversion of the shareholding in Pop, a company which was July 10 1995 said to be valued at \$5,000, 000.00

### **Equipment**

64. The first defendant admitted that he stored the equipment of the company at his temple. In his evidence he attempted to downplay its value. In the absence of evidence of the value of this equipment. I am constrained to award nominal damages for its retention and effective conversion as in **Carlton Greer v Alstons Engineering, Civil Appeal 2 of 1996** at pg.13 per Jones J.A. I award the sum of \$15,000.00

### **Disposition**

65. (1). The first defendant is to pay to the claimant the sum of \$1,188,053.85 being the proceeds paid by the receiver of Pop and admittedly received and retained by the first defendant and interest thereon at the rate of 6% per annum from November 2 2004.

2. (a) The defendants are to supply within 21 days complete profit and loss accounts of Grapette Limited and Pop Beverages Limited from October 26, 1997 (the date of Indar Persad's death) to July 12, 2005 (the date of the termination of the receivership) showing the profits of Grapette and Pop from October 26, 1997 (the date of Indar Persad's death).

(b) The defendants are to pay to the claimant forthwith all net profits of Grapette and Pop together with interest at 6% per annum from the date of accrual of each annual profit shown on such accounts.

(c) In default of the above accounts being supplied the defendants are to pay to the claimant the total of all sums received by Grapette as shown on the bank account of Grapette (a/c number 22483) supplied by Intercommercial Bank that is - the sum of seven hundred and thirty eight thousand three hundred and ninety three dollars and three cents (\$738,393.03) together with interest thereon at the rate of 6% from April 1, 1998 and thereafter interest at the statutory rate for judgment debts until the date of payment.

3. The first named defendant is to pay the sum of \$15,000 as nominal damages in respect of the equipment of Pop retained and unaccounted for in the possession of the first named defendant.

4. The first defendant is to pay to the claimant the sum of \$25,000.00 as nominal damages in respect of the conversion of the shareholding in Pop.

5. The first named defendant is to pay the claimant's costs on the basis prescribed by the Civil Procedure Rules in respect of the sums ordered at paragraphs 1, 3 and 4 above.

6. The defendants are to pay the claimant's costs on the basis prescribed by the Civil Proceedings Rules in respect of any sums to be paid at paragraph 2 above.

7. Liberty to apply.

Dated this 16<sup>th</sup> day of July 2010

Peter a. Rajkumar  
Judge.