

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. CV 2013-04225

**BETWEEN**

**JOHNSON ATTIN GROUP (JAG)**

**IMPRESSIONS LIMITED**

**CLAIMANT**

**And**

**FRANK HITLAL**

**And**

**DONNA HITLAL**

**And**

**DONNA HITLAL**

**T/A**

**DONNAPRINT**

**DEFENDANTS**

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

**APPEARANCES:**

**Mr. Elton Prescott S.C, Mr. Russell Huggins instructed by Ms. Crystal Dottin for the Claimant**

**Mr. Russell Martineau S.C., Ms. Amirah Rahaman instructed by Ms. Jewel Ann Trojas for the Defendants**

**JUDGEMENT**

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## BACKGROUND

1. The First Named Defendant was the owner of a business known as Hitlal's Printery ("the Business" or "Hitlal's Printery"), situated on premises at Tenth Street, Barataria ("the property"). The Second Named Defendant, Donna, is his daughter who now operates a printery business which trades as Donnaprint.

2. The Claimant wished to purchase Hitlal's Printery as a going concern. The Claimant and the First Defendant entered into a contract, embodied in a Business Purchase Agreement (BPA) dated 30<sup>th</sup> April 2013. In fact two BPA s were produced for execution, with a total purchase price of \$4.5 million in each, differing only in the figures stated therein for the prices of the property and the prices of the Plant and Equipment.

3. A Deed of Conveyance was executed on 6th September 2013 between the Claimant and the First Defendant in respect of the property, and the final payment of the sale price was made at that time.

4. The Claimant claims that the Defendants have deliberately breached the terms of the Business Purchase Agreement by inter alia:-

- i. seeking to entice clients of the former Hitlal's Printery away from the claimant's business and towards his daughter's printery business – Donnaprint;
- ii. misrepresenting that key items of equipment were properly functioning, and were unencumbered;
- iii. removing several items from the Printery including paper and inks.

5. The Claimant claimed against all the Defendants inter alia, damages:-

- a. for **breach of contract**,
- b. for **conversion** or return of ink and paper removed from the business,
- c. special damages in the sum of \$806,081.91,
- d. **alternatively** damages for fraudulent **misrepresentation**

## ISSUES

6. The issues include the following:
  - i. Whether Donna was held out as a partner and acted in the capacity of a partner of the First Defendant in the business?
  - ii. Whether the Business Purchase Agreement/s are contrary to public policy, void for illegality, and unenforceable;
  - iii. Whether the Claimant was induced by the false and untrue representations of Frank to offer and to complete the purchase;
  - iv. Whether Frank acted in breach of the Business Purchase Agreement/s in soliciting clients for Donnaprint;
  - v. Whether several important items including paper and inks were wrongfully removed from the printery after the transfer date;
  - vi. Whether the claimant is entitled to specific special damages as claimed.

## FINDINGS

### i. Whether Donna was a partner in Hitlal's Printery

7. I find that in fact it was simply an erroneous assumption on the part of the Claimant that Donna was a partner. There is no real evidence that she ever acted as a partner, or held herself out as a partner, or was held out as a partner in Hitlal's Printery.

### ii. Illegality

8. There is insufficient evidence to find on the instant facts that the claimant, even if intending to reduce his exposure to stamp duty,
  - (a) did so fraudulently, or
  - (b) did so with an intent to **evade** tax and to **defraud** the Revenue.
9. I therefore find that the BPAs were not illegal, contrary to public policy, or unenforceable as alleged.

### **iii. Misrepresentation**

10. I find that the representations that the Claimant claimed were made to him were in most cases not made, or, in the case of those which were made, and recorded in the BPA, were matters where he knew of the actual position and was not misled.

11. I find that the claimant was not induced by any misrepresentations to purchase or complete the purchase.

### **iv. Soliciting clients**

12. Frank's "endorsement" of Donnaprint conveniently came after the BPA had been executed. Despite Donnaprint having been registered since January 2013, his endorsement came only after it was clear that he had a sale for Hitlal's Printery. What he was doing for Donnaprint was at the expense of the goodwill that he had built up and which was associated up to that time with Hitlal's Printery. He was selling a complete package – real property, equipment, and goodwill in a business continuing as a going concern, for **\$4.635** million dollars. I find that his actions in writing and issuing letters to key clients were in breach of the BPA and devalued that goodwill. Yet he was still to receive \$4.5 million dollars for the Business as a going concern.

### **v. Conversion**

13. The claimant has failed to establish on the evidence his claim that items were removed from the Printery, save for the used printer plates. However these were not the property of the Printery, but of the customers.

### **vi. Special damages**

14. These must be strictly proved. The evidence is clear that they have not been.

## **COSTS**

15. While the second named defendant did not herself act in breach of any agreements binding upon her, she was the intended beneficiary of the wrongful action of the first defendant. It was intended that her business Donnaprint receive the benefit of the goodwill, (or part thereof), of the business that was sold to the claimant. She herself took steps to solicit business

for Donnaprint, even while she was an employee of Hitlal's Printery. She was not an innocent third party. In those circumstances the second defendant should not be the beneficiary of any costs order against the claimant.

## **CONCLUSIONS**

16.

- i. The sale transaction, inclusive of the sale of the property, is not void or voidable on the basis of illegality. There is no sufficient evidence of illegality, as inter alia, the evidence does not establish that the lower of the two valuations cannot be relied upon, or that the higher of the two valuations must be relied upon. The evidence of intent to defraud the revenue by paying less stamp duty than properly due on the real property component of the sale has therefore not been established.
- ii. Donna was not a partner in Hitlal's Printery.
- iii. The BPA is not binding on Donna.
- iv. There is no evidence that Frank has any proprietary interest or role in Donnaprint.
- v. Frank is in breach of the BPA in relation to his actions in taking steps, (i) with the intention of prejudicing and (ii) with the potential to prejudice, the goodwill of Hitlal's Printery.
- vi. The claimant has completely failed to establish, far less prove, his claim for special damages. His claims in this regard are exaggerated and unproven.
- vii. The claimant has failed to prove that any paper or ink was actually on the premises immediately before the transfer date, or that it had been removed, as opposed to being used or consumed, before the transfer date. The claim for conversion, and in particular, conversion of paper and ink, fails.
- viii. The claims based on misrepresentation have not been proven.
- ix. The claims based on conversion have not been proven
- x. The claim that machinery was defective, and in particular that the 4 colour printer was not printing in 4 colours, has not been proved.

## ORDERS

17.

- i. The first named defendant is to pay nominal damages to the claimant for breach of the warranty not to do anything which might prejudice the Goodwill of the business, in the amount of \$20,000.00
- ii. Costs are payable by the first defendant to the claimant on the basis prescribed by the Civil Proceedings Rules for a claim in the above amount.
- iii. The claimant's claim against the second defendant is dismissed with no order as to costs.

## ANALYSIS AND REASONING

i. **Whether Donna was held out as a partner and acted in the capacity of a partner of the First Defendant in the business?**

18. There is no compelling evidence that Donna was held out as a partner or acted as one. The business was owned by Frank. All claimants' dealings on the substantive matters regarding the sale were with Frank - for example execution of the BPA, execution of the Deed of Conveyance, and negotiations on the setting of the price.

19. The **BPA** was signed by Frank. The **Deed of Conveyance** for the sale of the property at 10<sup>th</sup> Street, Barataria is made between Frank and JAG Impressions Ltd and is signed by Frank.

20. The **Company Profile** refers to Frank alone as owner and his printery operation as that of a sole trader. It states that it was started by Frank and says nothing of Donna having any interest in it. According to the Company Profile:

*"In February 1982, Hitlal's Printery was started by Frank Stephen Hitlal. ...He founded the company as it operates now, as a **sole trader**."*

21. To the extent that he corresponded with Donna, even using her own personal email, those emails were either expressly or impliedly on behalf of Frank. Although Donna did sign emails these are clearly on behalf of Frank and recognize that Frank was the actual owner. I accept that when one examines the emails, on the occasions when Donna issued emails not

expressly stated to be on behalf of Frank, she made it clear in those emails that she was representing Frank's decisions.

22. Donna was a manager of the stationary department. She was also Frank's daughter. She clearly had authority and her role extended beyond that of simply manager of the stationary department. However, in so far as the issue of partnership arises there is no reason to believe on the evidence that Donna was either de facto a partner, or that she was held out as being a partner in Hitlal's Printery.

23. The documentation does not support this. In cross examination the claimant suggested that her card was one of the things which led him to believe that she was a partner. However it clearly set out her designation as **Manager -Stationery department**.

24. There is no evidence that she shared in profits, and she was not named as owner or partner in any of the correspondence or documentation. At their introduction Donna told him that she ran that department. Any belief by the claimant that Donna was a partner in the business could only have been self induced. It is not supported by the documentary evidence, or even the evidence of the Claimant himself.

25. I find that in fact it was simply an erroneous assumption on the part of the Claimant that Donna was a partner. There is no real evidence that she ever acted as a partner, or held herself out as a partner, or was held out as a partner in Hitlal's Printery.

26. The Certificate of Registration of the Business bears no reference to Donna as a Partner or Joint Proprietor.

## ii. **Partnership**

27. The Partnership Act by Section 3(1) defines partnership as "*the relation which subsists between persons **carrying on a business in common** with a view to profit.*" Section 4 prescribes rules for determining existence of partnership. It provides as follows:

*4. In determining whether a partnership does or does not exist, regard shall be had to the following rules:*



*(a) joint tenancy, tenancy in common, joint property, common property or part ownership, does not of itself create a partnership, as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;*

*(b) **the sharing of gross returns does not of itself create a partnership**, whether the persons sharing the returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived;*

*(c) **the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business**, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, **does not of itself make him a partner in the business**; and in particular—*

*.....”*

28. There was nothing to show that Donna was anything other than a Manager of the Stationery Department. There was nothing to show that she had anything other than limited authority in the Business. There was nothing to show that she received a share of profits in the Business.

29. There is no evidence that Donna:-

- i. was a registered owner of the business;
- ii. was shown as a partner in the business' accounts;
- iii. shared in the profits of the business;
- iv. shared in the losses of the business or assumed any liability there for;
- v. was a party to or signed any of the documents relating to the sale of the business.

30. The discussions on the sale of the business were held with Frank. The emails sent by Donna on his behalf to the claimant do not support any assertion that Donna was, or was held out to be, a partner in the business of Hitlal's Printery.

iii. **Illegality**

**Whether the Business Purchase Agreement/s are contrary to public policy, void for illegality, and unenforceable such that the Claimant cannot claim for breach of contract**

31. It was submitted that the BPA was unenforceable on the ground of illegality in undervaluing the real property and overvaluing the chattels in an attempt to reduce and / or evade payment of the full amount of stamp duty on the Deed of Conveyance.

32. The BPA made it clear that Frank was selling a business as a going concern. That included real property, chattels, machinery and equipment, and goodwill.

33. The Claimant obtained a second valuation by Royce, (February 20<sup>th</sup> 2013), in which the real property was actually valued at \$2 million as opposed to the first valuation by Scott, (January 20<sup>th</sup> 2013), where it was valued at \$3.15 million. Two BPAs were produced by the claimant for execution by Frank. The BPAs placed 2 different values on the real property – \$2 million, and \$3.150 million. The values specifically ascribed to the Plant and equipment were the difference between those figures in each BPA, and \$4.5 million. No value was specifically ascribed to the goodwill component of the purchase.

34. The Claimant admitted that he wanted to reduce his costs. However he eventually paid stamp duty on the higher valuation in the Scott valuation report. It was contended that although he did so this was only done when the Defence raising the illegality issue was served, and that an intention to use the lower valuation had been demonstrated up to that point, sufficient to establish an intention to defraud the Revenue, and render the entire transaction illegal and unenforceable.

35. The Claimant sought the second valuation when he formed the opinion that a valuation of \$3.1 million for property in Barataria appeared to be high. He was not a real estate valuator. There is no suggestion that the second valuation was fraudulent. Both valuations are by qualified valuers. His explanation was to the effect that he was aware

that real estate valuations could and did vary between valuers, and that valuation was a matter of opinion and had a subjective component.

36. It is clear that the bottom line is that the claimant was prepared to pay \$4.5 million plus the expenses of the real estate agent Mr. Weekes, in return for the business as a going concern. That sum included payment for the real property, the chattels and equipment **as well as the goodwill**. Under the BPA – clause 7.2.1 an assignment of the Goodwill (as defined), on completion, was contemplated. See also clause 5.7 Fifth schedule of the BPA which recognizes a change in Goodwill as one of the matters with the potential to affect the value of the Business. Goodwill would also be included in the definition of *Assets* as a right of the business. See clause 1.1.3.

37. Only the real property was valued and there were two different values arrived at by two different qualified valuers. The claimant eventually paid stamp duty on the higher value.

38. While there is evidence of two valuations, with one significantly lower than the other, and evidence that the Claimant was quite prepared to utilise the value in the lower of the two valuations for the purpose of paying stamp duty, there is no evidence that the lower value was not the one which actually reflected the fair market value of the real property, or the price that it would fetch.

39. He had valuers who provided him with their expert, though non-scientific, opinion. The intention to reduce costs by reducing stamp duty, if possible, on the real property component of the transaction, if supported by an independent valuation, from expert valuers, whose professionalism has not been impugned, as in this case, did not amount to fraud. Although those opinions differed by over 50%, I find that there was no fraud. The evidence on this does not attain the threshold necessary to support a finding of fraud, or an intention to defraud the revenue, or illegality.

40. He had attorneys whom he relied upon to advise him if the valuation that he intended to submit was at so great an undervalue as to be considered fraudulent. In fact,

given that the machinery had been recently valued at \$1.9 million, and that the goodwill had not been valued, it is not possible to conclude that a valuation of \$2 million for the building / property, out of a total purchase price of approximately \$4.6 million, for the package comprising:-

- a) the property,
- b) the machinery, plant and equipment, **and**
- c) the Goodwill

was too low.

41. There is no doubt whatsoever that \$4.635 million was a fair market price for all three classes of assets of the business, arrived at between a willing buyer and a willing seller. It is even arguable, that with the first value of **\$3.15** million for the building, and a recent valuation of the machinery of **\$1.9** million that either:

- a. **no value at all** was being ascribed to the **Goodwill** in the sale price of the entire business of \$ 4.635 million (which is **less than \$5.05 million**), or that,
- b. the **assets** of the business, (the property, the machinery, plant and equipment, together with the Goodwill), were, at a price of \$4.635 million, being purchased **below the valuation of each.**

42. In the latter case the actual price paid for the real property, if apportioned, would as a matter of arithmetic, be less than \$3.15 million.

43. If the Schiebler valuation is accepted, (and it has not been questioned), then as a matter of arithmetic, the first valuation would have been **in excess of the portion of the selling price actually paid for the property component** of the Business. This is so, even ascribing a value of **zero** to the Goodwill. If any non zero value is ascribed to Goodwill, then the first property valuation would be further overstated by that amount also.

44. If the first valuation were indubitably correct, and the second one was demonstrably an undervalue, then the argument of illegality because of an intent to defraud the Revenue might have carried greater weight. However the first valuation does not mesh with the

reality of what was actually paid. Even if the goodwill component of the assets is valued at zero, it produces a valuation of the business in excess of \$5 million, when the actual price paid by a willing buyer to a willing seller was \$4.635 million.

45. It simply cannot be concluded that the first, (Scott), valuation was the correct one, and that an intention to pay stamp duty on the lower (Royce) valuation must therefore be fraudulent, when the Claimant paid, **for the entire Business**, comprising:-

- (i) goodwill,
- (ii) plant, machinery and equipment, and
- (iii) real property (Scott valuation),

a sum less than the total of the **individual** valuations of ii, and iii.

46. The simple arithmetic demonstrates that it would not have been unreasonable to suspect that the real property may have been overvalued, and to seek a second valuation. Just as there is **no basis for concluding that the first valuation is correct** and must be relied upon, similarly there is **no basis for concluding that the second valuation is erroneous** and should not have been relied upon. (While the value of the Goodwill would have assisted, it is not essential for the analysis, and it is not in evidence).

47. I find that the first valuation cannot be assumed to be the correct one, and the second valuation cannot be assumed to be incorrect.

48. In so far as an intention to defraud the Revenue is based on a suggestion that

- a. the correct amount of stamp duty had to be calculated and paid on the amount of the first valuation, and
- b. that any intention, whether carried through or not, to pay stamp duty on the second valuation must be intended to defraud the Revenue of the amount of Stamp duty properly and actually due and payable,

I find that that intent has not been established.

49. The Defendants submit that the execution of the 2 Agreements was obtained by the claimant with the **intent** and for the **purpose** of defrauding the Board of Inland Revenue by deceiving the Board as to the **true value of the property**.

iv. **Stamp Duty Act**

50. Section 16 of the Act provides as follows:

*“ All the **facts and circumstances affecting the liability** of any instrument to duty, or the amount of duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument; and any person who, with intent to defraud the state –*

- i. executes any instrument in which all the said facts and circumstances are not fully and truly set forth; or*
- ii. being employed or concerned in or about the preparation of any instrument, neglects or omits fully and **truly to set forth** therein all the said **facts and circumstances**,*

*is liable to a fine of four hundred dollars.”*

51. The circumstances were that \$4.5 million was being paid for a business whose assets included

- a. Real property
- b. Machinery and equipment
- c. Goodwill

52. As Frank pointed out in cross examination the apportionment of the price among the various assets did not particularly concern him. The issue of whether **the real property** was actually worth \$2 million as set out in the Deed of Conveyance needs to be examined before it can be determined whether the price set out therein truly sets forth the facts.

53. Section 82 of the Act provides as follows:

*“Any person who practises or is concerned in any **fraudulent act**, contrivance or device, not specially provided for by law, with **intent to defraud** the State of any **stamp duty** is liable to a fine of fifteen thousand dollars.”*

54. Stamp duty on a Deed of Conveyance is paid on the **value** of property. (See Section 3 and First Schedule of the Act). Unless the **value** of the real property were deliberately and **falsely** set out in the instrument at an undervalue there could not be an intent to defraud the State of Stamp Duty. The circumstances surrounding the **value** of the property must therefore be examined.

55. There is a presumption of law in favour of the legality of a contract and the onus lies on the party seeking to set aside a contract for illegality to prove it; per Bowen LJ in **Hire Purchase Furnishing Co v Richens (1887) 20 QBD 387**.

56. The contract here shows no illegal intention. Neither has it been shown that the lower property valuation was actually false. Mr. Attin admitted in cross-examination that the consideration on the Deed of Conveyance was set at \$2,000,000.00 to avoid paying stamp duty on \$3,150,000.00. He looked to reduce his expenses. However, it could not be said that stamp duty **had** to be paid on \$3.15 million **unless** it can be concluded that \$2 million was not a realistic valuation, or in fact a fraudulent undervalue.

57. According to Lord Justice Waller in **Colen and another v Cebrian (UK) Ltd [2004] IRLR 210** *where illegality is alleged, the burden of proof is on the party making the allegation to show that the contract would have been entered into **with the object of committing an illegal act**, or had been performed with that objective. An **analysis** needs to be done as to what the parties' intentions were from time to time.....*In that case the illegality defence failed as the Court of Appeal found that the way the commission was allocated among Mr. and Mrs. Colen did not amount to a fraud on the Revenue although tax considerations were taken into account.

58. When one considers the question of apportionment of the price as between the business and the real property, it really is not possible to say that the lower valuation was an undervalue, and definitely not possible to conclude it was fraudulently so, or that an intention to pay stamp duty on the lower valuation, is of itself fraudulent, if in fact it could have been accurate. I have found that the lower valuation could have been accurate.

59. There is insufficient evidence to find on the instant facts that the claimant, simply by expressing an intention to reduce his exposure to stamp duty,

(a) did so fraudulently, or

(b) with an intent to **evade** tax and to **defraud** the revenue.

60. I therefore find that the BPAs were not illegal, contrary to public policy, or unenforceable as alleged.

**v. Breach of Contract - Goodwill**

**Wrongful soliciting and canvassing and/or enticing away existing clients**

**Whether Frank acted in breach of the Business Purchase Agreement/s in soliciting clients for Donnaprint by letter**

61. The BPA made it clear that the business was being sold with its goodwill. It was being sold as a going concern. Yet Frank wrote letters to the key clients, Republic, Jaleel, and PTSC, (all of which were identified in his company profile as key clients), informing them of his daughter's new Printery, and inviting them to consider giving it their business.

The language used in those letters speaks for itself.

62. It is necessary to set them out in their entirety (all emphasis added), as much turns upon their intent and effect.

***June 25, 2013***

*Republic Bank Limited*

*Head Office*

*Park Street, POS*

*Att: The Marketing Manger*

*Group Marketing and Communications*



*Dear Sir/Madam,*

*The purpose of this letter is to **advise I will be retiring** in the next few weeks. Hitlal's Printery has been working for the Republic Bank for the **past 30 years** and it has certainly been a pleasure. I appreciate all the support and loyalty that the staff of Republic Bank has always shown over the years.*

***In my stead**, my daughter **Donna Hitlal** has registered her own printing company, **Donnaprint**. She is already versed in printing operations as she has been my right hand for over 14 years. **Donna is already familiar with all Republic Bank jobs that we produce** and knows what is expected. **All Republic Bank jobs have been handed over to her** and there will be **no break in service to you**. In addition, **the staff and equipment remains the same**.*

*Please feel free to contact me if you have any further questions at my office numbers or my mobile, 678-1014.*

*Yours truly,*

.....

*Frank S. Hitlal*

*Hitlal's Printery – Managing Director*

.....

**Letter dated July 26, 2013 to S.M Jaleel**

*July 26, 2013*

*SM Jaleel & Co. Ltd*

*Otaheite*

Attn: Mr. Terrance Sinanan  
The Purchasing Manger

Dear Mr. Sinanan,

The purpose of this letter is **to advise I will be retiring** in the next few weeks. We are currently working on PO#8967, 9054 & 9105, and these will be completed on or before August 9, 2013. It has truly been a pleasure working for an esteemed company as yours and I would like this transition time to be very smooth for you, my valued customer.

**My daughter, Donna Hitlal, operates her printing company, Donnaprint, and since your labels are so specific, I feel comfortable with her handling them.** She is already versed in printing operations as she has been my right hand for over 14 years. Donna is already familiar with all the Labels that we produce and knows what is expected. **All SM Jaleel Labels have been handed over to her and there will be no break in service to you.**

Please use the following information **when sending the next PO:**

**Donnaprint**

29 Reyes Road

La Pastora, Santa Cruz

Tel:868-684-3622

Email – **hitprint82@yahoo.com** (same as used before)

In addition, **Donnaprint is still in the process of registering for VAT** so invoices will not be subject to VAT.

Please feel free to contact me if you have any further questions at my office numbers or my mobile, 678-1014

Yours truly,

Frank S. Hitlal

Hitlal's Printery – Managing Director

*Letter dated July 26, 2013 to PTSC*

*July 26, 2013*

*Public Transport Service Corporation*

*Attn: Rondell Gilkes*

*Dear Mr. Gilkes,*

*The purpose of this letter is to advise **I will be retiring in the next few weeks and Hitlal's Printery will no longer be operating**. It has truly been a pleasure working for an esteemed company as yours and I would like this transition time to be very smooth for you, my valued customer.*

*My daughter, **Donna Hitlal**, operates her printing company, **Donnaprint**, and she is already in possession of all the plates, negatives and artwork that we use to produce PTSC items. She is versed in printing operations as she has been my right hand for over 14 years. Donna is already familiar with all PTSC jobs that we produce and knows what is expected. **All Hitlal's Printery prices will be maintained by Donnaprint.***

*Please use the following information **when sending the next PO**:*

***Donnaprint***

*29 Reyes Road*

*La Patora, Santa Cruz*

*Tel:868-684-3622*

*Email – hitprint82@yahoo.com (same as used before)*

*In addition, **Donnaprint**, is still in the process of registering for VAT so invoices will not be subject to VAT.*

*Please feel free to contact me if you have any further questions at my office numbers or my mobile, 678-1014*

*Yours truly,*

*Frank S. Hitlal*

*Hitlal's Printery – Managing Director*

63. Hitlal's Printing had printing work from Republic Bank, S.M. Jaleel & Company Limited and Public Transport Service Corporation, among others, at the date of the Business Purchase Agreement. These companies were included in those mentioned in the company Profile. The first two were major customers of the Printery.

64. By letters dated 25th June and 26th July, 2013 Frank requested that key clients give their printing orders to Donnaprint, a competing entity established by the second Defendant. He clearly had longstanding relationships with those companies and had the opportunity to quote for printing jobs they had. Those relationships formed part of the goodwill of the company. By inviting these customers to pass their work to Donnaprint he was inviting them to do so at the expense of Hitlal's printery.

65. The first Defendant indicated to SM Jaleel & Company Limited, that he was "retiring" and that all of its labels had been "handed over to her and there will be no break in service to you". The letters carried the name and contact information of Hitlal's Printery, as well as Donnaprint.

66. The First Defendant admitted that he had handed over to the Second Defendant "negatives and plates" for jobs done at Hitlal's Printery for Republic Bank Limited, as well as PTSC. He refused to hand those items over to the Claimant and claimed that the permission of the customer was required in order for him to do so, although he clearly had not sought their permission to hand these over to Donna.

67. Frank appeared to know a lot about the operations of Donnaprint – that their registration to charge VAT had not been completed, and that their prices would be maintained at the same level as Hitlal's.

68. To contend, as Frank in effect does,

- i. that those letters were not in breach of both the letter and spirit of the BPA,
- ii. that his letters were written without consultation with Donna, and
- iii. that Donna's emails, to the same effect, were entirely independent,

is disingenuous in the extreme.

69. Frank had entered into the BPA on **May 1<sup>st</sup> 2013**. Clause 13.1.6 of the BPA expressly provides that the Vendor warranted not to directly or indirectly “**do anything which might prejudice the Goodwill of the Business**”.

70. Frank was aware that Donna incorporated Donnaprint in **January 2013** as indicated in the very letters inviting the clients to consider moving their business there. His assertion in effect that he had no ownership of clients takes the matter no further. The goodwill associated with those customers was to be transferred to the new owner. That is what he was purchasing, inter alia, and that is what Frank covenanted to sell to him, inter alia. Frank had represented that these very clients were customers for whom he had done work for a long time. The Company profile which was supplied to the Claimant expressly so stated. They were a part of what he had held out as evidencing a successful business with goodwill and a reputation in the Printing industry. Yet he was writing letters to those clients inviting them to transfer their business to his daughter's printery, rather than the Printery that he was selling to the claimant.

71. Mr. Hitlal was a very competent and intelligent witness. His track record as a businessman also spoke for itself. He claims he simply wanted to give Donnaprint an endorsement.

72. I find that he must have known exactly what he was doing when he wrote those letters. Specifically he must have known that the chances of those customers remaining with the

Printery that he was selling would be diminished, if they acceded to his invitation to consider doing business with Donnaprint which he was endorsing. There could be no other intention behind writing the letters.

73. The fact is his endorsement was intended to make it **less likely** that the Printery that he was selling would continue to have the business of those clients, and **more likely** that Donnaprint would qualify for consideration than the Printery that he was selling, but did not similarly endorse. His “endorsement” of Donnaprint conveniently came after the BPA had been executed. Despite Donnaprint having been registered since January 2013, his endorsement came only after it was clear that he had a sale for Hitlal’s Printery.

74. What he was doing for Donnaprint was at the expense of the goodwill that he had built up and which was associated up to that time with Hitlal’s Printery. He was selling a complete package – real property, equipment, and goodwill in a business continuing as a going concern, for **\$4.635** million dollars. His actions in breach of agreement devalued that goodwill. Yet he was still to receive in his hands \$4.5 million dollars.

75. He pleaded that

- a. Donna, in collusion with Frank, provided clients such as Republic Bank with **quotes for work** to be done by Donnaprint. He relied on emails dated 10<sup>th</sup> September 2013 and quotations dated 3<sup>rd</sup> September 2013.
- b. Frank, in collusion with Donna and in breach of the warranties set out in the Agreement, siphoned the business from Hitlal’s Printery to Donnaprint, both before and after the execution by him of the Agreement.

76. He also pleaded that Frank and Donna enticed away some of the employees of the business and employed them in the business of Donnaprint. Donnaprint was registered by Donna on January 23rd 2013 and was operational by **July 2013**, before the transfer date. Even before she had staff or equipment, she would take work and broker it out to other printeries and bill it to Donnaprint.

77. It was contended that Donna's actions were completely separate from Frank's and that there was no collusion between them. However this is not borne out by the evidence. On Donna's own evidence she was siphoning work from Hitlal's where she was employed. She claims that after Donnaprint was registered she was brokering work to other printeries, and billing this work to Donnaprint. It is inconceivable that Frank would not be aware of this.

78. Donna herself in her email announcement to Hitlal's printery clients gave them both her telephone number and Frank's cell phone number. In quoting to Republic Bank on September 3<sup>rd</sup> 2013 she did so via the email address that had been associated with Hitlal's Printery .She clearly did not intend the operations of Donnaprint to be a secret from Frank.

79. Hitlal's Printery clients could easily and openly have contacted Frank in respect of Donnaprint work if they chose to respond to Donna's emails. The reason for operating Donnaprint while Hitlal's printery was still operating has not been convincingly explained. The effect of the operation of Donnaprint by Donna while she was still in fact the stationary manager of Hitlal's, was that work, clients and goodwill of Hitlal's Printery were being siphoned or at risk of being siphoned from Hitlals to Donnaprint, even while Hitlal's Printery, with its work, clients and goodwill, was in the process of being sold for \$4.5 million.

80. Frank knew about Donnaprint. In fact he himself endorsed Donnaprint and recommended it to existing clients. Frank's own letters reveal knowledge of Donnaprint's operations, and even its proposed pricing. He indicated in his evidence that quoting for a job required consideration and calculations which he did personally for each job. Yet curiously, though perhaps not coincidentally he was able to assure clients that the pricing of Donnaprint would be the same as it had been with Hitlal's printery.

81. To contend that there was in effect a Chinese wall between Frank and Donna is to read far more into the evidence than is permissible.

82. The evidence is that:

- a. Frank is a very competent, articulate, quick thinking and effective businessman with considerable common sense and business acumen, who built up a well respected Printery

business which serviced major corporations and was able to attract repeat business from them over a long period.

- b. Donna is a very competent, articulate, quick thinking and effective businesswoman with considerable common sense and business acumen, who was sufficiently motivated and ambitious to venture into her own Printery operation.
- c. Frank not only knew of the formation of Donnaprint by his daughter, but actively supported it and endorsed Donnaprint to his customers of Hitlal's Printery.
- d. However Frank was also engaged in the process of selling Hitlal's printery as a going concern and signed a business purchase agreement whereby he gave undertakings not to impair the goodwill of that business.
- e. Endorsing Donnaprint, and recommending it for future printing jobs to major existing clients of Hitlals, when Hitlals was being sold, (supposedly with the benefit of the goodwill of clients, including those very clients), was clearly prohibited by the BPA.
- f. Frank's protestations that Donna's enticements to Hitlals' clients were unknown to him and Donna was acting on her own cannot be accepted when his actions, aimed at recommending Donnaprint to Hitlals' clients, so clearly converged with Donna's actions, in seeking printing jobs from those clients.
- g. The incentive to do this would be that Frank received \$4.5 million for his printery business including the goodwill, but Donna would get the benefit of some of that goodwill. The effect of that, in relation to key clients, could be significant.

83. It was contended that Donna was an employee and owed no fiduciary duties to her employer or the Claimant. While that may be so she certainly owed a duty not to poach clients of the business employing her. On her own evidence this is what she was doing with Donnaprint, even before the business had employees or equipment. It is inconceivable that Frank would not know of this as his actions were directed towards the same end- diverting clients' business to Donnaprint.

84. I find that Frank was clearly in breach of express covenants in the BPA that prohibited precisely that type of dishonest action.



85. It is fully accepted that Donna was neither a partner in the business, nor was she held out as one. It is also fully accepted that Donna was not in a fiduciary position as she was merely an employee, though a senior one, who was also, as the daughter of Frank, trusted and given a degree of responsibility.

86. The situation is either that:

- a. Donna breached her duty of honesty and fidelity to her employer, Hitlal's Printery, and her own father, not in setting up her competing business, but by i. canvassing for jobs from the existing clientele of Hitlal's, and then out sourcing these jobs and billing them to Donnaprint, ii. Printing Donnaprint work without Frank's knowledge, effectively poaching his clients and their income, or
- b. That Donna did not breach her duties of fidelity and honesty to Hitlal's Printery, because the owner, her father, knowing that his business was to be sold shortly, had no objection to her canvassing his clients, and having his and other printeries do jobs for them, and billing these out to Donnaprint.

87. In that case however Frank would have been the one acting dishonestly in frittering away the goodwill of Hitlal's Printery. He would otherwise have been free to do so, because he owned it, had he not agreed to sell it, goodwill and all, for \$4.5 million to the claimant.

88. I find that it is highly unlikely that Donna would have acted in diverting clients to Donnaprint while working for Hitlals', or would have diverted income and printing jobs from Hitlal's to Donnaprint, even when Donnaprint had not yet established equipment, staff and a base of operations, without Frank's knowledge. That would imply a level of extreme dishonesty on the part of Donna towards her father. There is nothing in the evidence to justify a finding that Frank's trust in his daughter to manage a department of his business was not justified.

89. The duty of fidelity permits an employee to explore his future prospects and even take **preparatory** steps in setting up a competing business. (See **Helmet Integrated Systems Ltd v. Tunnard [2007] IRLR 126**.)

90. Donna was free to take preparatory steps to set up a competing business. However on her own admission she did more than that. She was operating her business Donnaprint, although it had no staff and equipment at that point, she claims, by taking in orders, and outsourcing it to other printerries, and billing as Donnaprint.

91. She was obviously competing with Hitlal's by operating Donnaprint on the very premises as Hitlal's, while being employed by Hitlals' to do work for Hitlal's – not Donnaprint. It was the exact business that Hitlal's was engaged in, yet Donnaprint was billing for it, and depriving Hitlal's of those profits. While Donna may not have been a partner or in a fiduciary position, she could have been in breach of her implied contractual obligations of **honesty** and **fidelity** to her employer Hitlal's, if she were so acting without the knowledge or approval of Frank.

92. However it is clear that she was not acting without his knowledge or approval. He, as demonstrated by his letters to key clients, intended Donnaprint to get jobs. Those printing jobs would have been at the expense of Hitlals', the printery that he was receiving \$4.5 million for selling to the claimant as a going concern.

93. His evidence that Donna was doing her own thing by September 2013 and that he did not know of her actions was simply not believable in the face of those letters, which sought to endorse her business to bring about that very end.

vi. **Enticing away clients, employees and prejudicing the goodwill of the business**

94. It was pleaded that the letters are not in contravention of the BPA as clause 13.1.2. restricts the Vendor for a period of 3 years from **the transfer date** from soliciting, canvassing or enticing away clients or customers of the Business. The transfer date is defined in Clause 1.1.18 as **close of business on the ninetieth day from the date of the agreement. This would be 29<sup>th</sup> July 2013.** This was originally contemplated as being the date when the sale would have been completed. The actual Transfer date had been impliedly extended beyond 90 days, to September 6, 2013 when the Conveyance was executed and final payment made.

95. It is also pleaded that at the date of the emails dated 2<sup>nd</sup> and 3<sup>rd</sup> September 2013 sent by Donna **the sale of the business had not yet been completed**. However clause 13.1.6 contains no such limitation. Under cross-examination on the contents of the letter dated 26<sup>th</sup> July 2013 Frank explained **he knew which jobs were for Donnaprint and which were for Hitlal's Printery**. Donna confirmed **that she used the hitprint82 email account for Donnaprint**.

96. She denied that she was suggesting to Minocia Dickenson **that Hitlal's Printery had changed its name to Donnaprint**. She explained in re-examination that when she said the 'company name had changed' she was reminding Minocia that the quote would be coming from Donnaprint as she had already spoken to her earlier. Donna also tried to explain the email dated 10<sup>th</sup> September 2013 sent to [tessaw2@hotmail.com](mailto:tessaw2@hotmail.com) from the hitprint82 email address with the subject "new contact information".

97. A great deal of explanation has to go into rationalizing what would be the obvious effect of the emails and letters that both she and Frank wrote, namely:-

- a. that Donna was opening a new printery with the blessing and endorsement of Frank,
- b. that Donna had a track record of working successfully with the clients of Hitlals over a period of many years,
- c. that Frank was supporting this venture and that the clients would continue to get good service, but from Donnaprint in future .
- d. while no mention is made of the fact that Hitlal's would continue in operation, it was made very clear that the Hitlal track record was to be attached to the new printery Donnaprint, even to the point that Donnaprint had the negatives/ plates from those clients in respect of their completed jobs.

98. The suggestions that:-

- a. Donna was canvassing for clients for Donnaprint unknown to Frank, and
- b. In any event she did so before the transfer date, and
- c. Frank was endorsing Donnaprint before the transfer date, but not at the expense of Hitlal's,

simply do not ring true.

99. It was submitted that despite Frank sending the letters of recommendation to two clients of Hitlal Printery's top 10 clients and one – PTSC- not in the top 10 and Donna notifying of new contact information, the evidence is that Donnaprint did not receive work from any clients of Hitlal's Printery. She quoted for jobs but received none. In the context of this case these self serving assertions are difficult to accept and by themselves are of little weight. The reasons for writing to those particular clients, or inquiry as to which, if any, other clients he similarly wrote to, both within and outside the top 10, were not explored.

100. Donna said that even though the Republic Bank Limited negatives and plates were handed over to her that would not have facilitated her getting jobs faster than anybody else or facilitated her doing their work. That simply is not true. If the printing job was to print material whose design had not changed then the negatives and plates would have provided a head start and a competitive advantage, as Frank finally candidly admitted to the court.

101. It was submitted that the evidence is that all Frank did was write letters of recommendation on Donna's behalf before the Transfer date. However I find that he did more than that.

- a. He permitted Donna to begin poaching Hitlal's printery clients while she was based at Hitlal's Printery as an employee.
- b. He handed over to her "for safe keeping" the used negatives and plates for major clients when he could have obtained their permission within days, as he eventually did, to hand them to the claimant.
- c. He led important clients to believe that Donnaprint was his preferred recommendation for their printing work, at the expense of Hitlal's, and
- d. He made it clear that he was retiring, and so diminished the goodwill associated with his name. He clearly appreciated that clients recognized his name and the effect of that recognition on the goodwill of the business.

102. I find that Frank's actions in writing the letters above had the effect of prejudicing the goodwill of the business contrary to Article 13.1.6 of the Business Purchase Agreement. The definition of 'Goodwill' under Article 1.1.9 of the Business Purchase Agreement is:-

*“the goodwill of the Vendor in connection with the Business and the exclusive right for the Purchaser or its assignee to use the name **Hittal Printery** and to represent itself as carrying on the Business in succession to the Vendor including the benefit of all pending contracts orders and engagements and the right to all lists of customers and suppliers of the Business”.*

103. Lord Macnaghten in **Trego v Hunt [1896] AC 7**, at 24 stated;

*“Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole **advantage**, whatever it may be, of the **reputation and connection** of the firm, which may have been built up by years of honest work, or gained by lavish expenditure of money”.*

*“When the goodwill of a business is sold the vendor does not, by reason only of that sale come under a restriction not to carry on a competing business at page 20 Lord Herschell.*

Lord Macnaghten [1896] A.C. 7 Pages 24- 25

*And so it has resulted that a person who sells the goodwill of his business is under no obligation to retire from the field. Trade he undoubtedly may, and in the very same line of business. **If he has not bound himself by special stipulation**, and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. But, then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbour as a stranger and an outsider might do; but **he must not**, I think, **avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value**. He must not make his approaches from the vantage-ground of his former position, **moving under cover of a connection which is no longer his**. He may not sell the custom and steal away the customers in that fashion. That, at all events, is **opposed** to the common understanding of mankind and **the rudiments of commercial morality**, and is not I think to be excused by any maxim of public policy.*

Lord Macnaghten further stated at page 25

*“It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price, and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own”.*

104. By writing letters dated 25<sup>th</sup> June 2013 and 26<sup>th</sup> July 2013 the First Defendant prejudiced *the connection formed between* Hitlal’s Printery *and its customers* - the goodwill.

105. **Halsbury’s Laws of England Vol 80 Personal Property paragraph 807. Meaning of 'goodwill'.**

*“The goodwill of a business is the whole advantage of the reputation and connection formed with customers together with the circumstances, whether of habit or otherwise, which tend to make that connection permanent. It represents in connection with any business or business product the value of the attraction to customers which the name and reputation possesses”*

106. In **IRC v Muller & Co's Margarine Ltd [1901] AC 217 at 223**, HL, per Lord Macnaghten (‘What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start’); at 227 per Lord Davey (‘The term goodwill is nothing more than a summary of the rights accruing to the [purchasers] from their purchase of the business and property employed in it’); and at 235 per Lord Lindley (‘I understand the word to include whatever adds value to a business by reason of situation, **name**, and reputation, **connection**, introduction to **old customers**, and agreed absence from competition, or any of these things’);

107. Finally, it was submitted that the fact that the Defendants were rushing to complete the existing jobs of Hitlals before the handover on 9<sup>th</sup> September 2013, was a malicious act on the part of the Defendants to prejudice the goodwill of the Business. This is not accepted. It is difficult to understand how this could negatively impact the *goodwill* of the business, properly

understood. Though goodwill includes the benefit of **pending** contracts and orders, nothing in the BPA **requires** that orders be left unfulfilled or incomplete or pending.

108. Even if no work was left undone for the new owner to continue, there is nothing about this that would by itself prejudice the goodwill of the business. Completion of existing jobs simpliciter could not prejudice the goodwill of the business.

vii. **Other Alleged Breaches of Warranty - Fifth Schedule to Business Purchase Agreement**

109. The Vendor's warranty contained in Clause 1.4 of the Fifth Schedule to the Business Purchase Agreement expressly states that;

*“Neither the **Vendor** nor any of its members **has any interest** directly or indirectly in any company or business other than the Business which is or is likely to be or become competitive with the Business”*

110. I have no doubt that it was not disclosed that the second defendant was involved in Donna print, either by her or by Frank. She claims that as she was not a partner in Hitlal's she would have had no reason or obligation to do so. I accept that Donna was an employee, not a partner or member of Hitlal's.

111. I have no doubt that the first defendant did not disclose this as he claims that he was not involved in Donnaprint. There is little evidence that he was. I accept that he wanted to retire. I accept his testimony that he wanted to endorse Donna and her business, and though he clearly wanted to assist Donna, and was quite aware of the status of its VAT registration, and likely pricing, there is insufficient evidence on a balance of probabilities to conclude he was actually directly or indirectly involved with Donnaprint, or had an interest or financial interest in it.

viii. **Alleged breach of other warranties**

112. For completeness these are addressed although they each contain limitations on their applicability, and clause 13.1.6 covers the situation. He did not breach clause 13.1.1, clause

13.1.2, clause 13.1.3 or clause 13.1.5 of the Agreement which deal with prohibited conduct after the Transfer Date.

ix. **Misrepresentation**

**Was the Claimant induced by the false and untrue representations of Frank to offer and to complete the purchase?**

113. I find that the claimant was not induced by any misrepresentations to purchase or complete the purchase. He made his own inquiries and requested of his own accord, the **Company Profile, financial statements**, (which formed the basis for further inquiries and request for production of **bank statements**), **valuations** of the **equipment**, (which he again questioned when produced by Frank, requiring instead one by Schiebler – the manufacturer), and **valuations** of the **property**.

114. He was a sophisticated investor in that he was a professional, an experienced businessman, and had the benefit of legal and accounting/ financial advice. He also had some previous contact with the printing business. He negotiated the sale of the Printery business with Frank down from \$ 7 million to \$4.635 million.

115. I find that the representations that he claimed were made to him were in most cases not made, or, in the case of those which were made, and recorded in the BPA, were matters where he knew of the actual position and was not misled.

x. **Alleged representation that the machinery was free from encumbrances**

116. The Claimant alleged that that the First Defendant acted in breach of the warranty at Article 8.1 of the Fifth Schedule to the Business Purchase Agreement , in that all the Assets were not “*free from and not subject to any agreement or commitment to give or create any mortgage charge, lien, option bill of sale **leasing agreement** hire purchase.....*” and **Article 8.3 of the Fifth Schedule** was similarly breached as the GTO-46 and Sormz machines were not owned by the Defendant but were leased by Caribbean Leasing Company Limited.



117. I find that there was no reliance on any misrepresentation. The actual facts were sufficiently known. In any event the outstanding balances were paid and there was no damage or loss sustained.

118. The claimant knew that some items of machinery were leased. They bore stickers which he saw on his inspection of the printery. The amounts payable under the finance arrangements were relatively insignificant in the context of the entire sale price, and in any event, have been paid, and no damage was sustained as a result.

xi. **Whether representation that Frank had good and marketable title to all the assets and owned them absolutely**

119. Frank's evidence is that he never represented that the machines used in the business were free from all encumbrances. Two machines, the SORMZ and the GTO-46 were leased from Caribbean Leasing Company Ltd. Both balances were paid in full by 31<sup>st</sup> October 2013. There were labels containing the words "Property of Caribbean Leasing Company Ltd"

120. Claimant saw the Caribbean Leasing Company Ltd sticker on the machines and did ask about it. He claims that he was told by Frank that it was paid off already but they forgot to take off the sticker. This is not accepted. It would have been a gratuitous untruth. I find that Frank did intend to pay off the lease, and he did in fact do so. I find that the Claimant was not misled by any representation that the machines were unencumbered, that the amounts involved were paid off, that they were relatively insignificant in the context of the entire price being paid, that there was no default in making lease payments, and that he suffered absolutely no damage as a result.

xiv. **Alleged representation as to state of equipment – that the equipment was properly maintained fully serviceable and in good condition.**

121. As to the **state of the equipment** – the age of the equipment was disclosed to him. Its condition was ascertainable by inspection either by the Claimant directly or his agents. He made no request to have the machines independently examined. I do not accept that he was hindered in inspecting or having the opportunity to inspect the machines.

122. With respect to the machines,

- a. He saw them in operation on his visits- at least three.
- b. He knew that the machines were more than 10 years old – and that some were much older such as the SORMZ-1980 and the KORD-1980.

123. There is no evidence from a technician or any competent and qualified person as to the state of the equipment, the cost of repair, or even whether any repairs are actually necessary.

124. With respect to the GTO 52 printer I find on, a balance of probabilities, that it was able to print 4 colour jobs at a time as at the time of handover.

125. The claimant knew the age of the machines as provided by Frank in DH 4. He also knew the values that the authorized dealer, Schiebeler & Co (Trinidad) Ltd put on them at that time. He was fully aware that the machines were at least ten years old and that some were made as early as 1975 –die cutter. The equipment was in use and capable of producing printing jobs for clients, as evidenced by the invoices for the numerous jobs done up to 6<sup>th</sup> September 2013. He made at least three visits to the Business looking at, inter alia, the machines. No further valuation of the machines was requested by the claimant. Nothing prevented him from doing so with respect to the machines if he observed anything that put him on suspicion as to their functionality. They were being used for printing jobs up to the handover date. It is highly unlikely that an experienced businessman like the claimant would have relied on any oral assurances by Frank or anyone in this very important regard.

126. Ian Belgrave confirmed the Machines were not defective but were left in good working condition at the date of the sale. Having seen his sober and straightforward delivery of his evidence and responses in court I accept his evidence, and in fact prefer it to the contradictory and inconsistent evidence of the claimant's witnesses.

127. The claimant's evidence that he was only allowed a 5 minute walkabout of the Printery during one of his few visits is simply not credible nor is it corroborated by his witnesses. He denied that all of the machines which were left on 6<sup>th</sup> September 2013 were fully functional and

used to print 4 colours. He claimed that **from** his short (5 minute) walkabout it was clear the equipment was not in best condition based on his experience. If that were so one wonders why he would even have proceeded with the purchase.

128. The claimant's evidence on this is rejected. Having observed his testimony, it is inherently incredible, that he would even consider paying \$4.5 million for a printery business with the machines in the condition he says he observed.

129. Further,

- i. Raphael Machado's evidence is that he saw Mr. Attin visit the printery on **more than 1 occasion**.
- ii. Michael Joseph, Printing Press Operator, gave evidence that he saw Mr. Attin at the Printery **3 times** before the sale on 6<sup>th</sup> September 2013. The first time he saw him he was looking around at the 4 – colour machine which was working at the time.

130. Michael Joseph admitted that while he was operating the machine some days he did perfect 4 colour jobs and then some days he complained that he couldn't get 4 colours at a time because the machine gave trouble.

131. According to Ian Belgrave, at times Joseph reported that the machine was malfunctioning when the problem was often his error. Ian Belgrave's evidence is that he often assisted him in identifying the problems and resolving them. In answer to the Court, he explained that he formed the view that it was the operator's error and not the machine **because he solved the problem**. He explained several problems he identified and the solutions.

132. The Claimant contends that at all material times, the First Defendant represented that the machines **were in good working condition** and fully **operational**. Had the Claimant known of the true condition of the machines, it would not have entered into the transaction.

133. The claimant obtained quotations for the repair of some of the equipment. He did not produce the makers of those quotations. The allegation that the defects in the machinery were so severe and significant as to impair the ability of the Printery to operate was a serious one. It went directly to his contention that the representation that the machinery was in good operating order was one that was made fraudulently, and was one that induced him to complete the purchase of the Printery.

134. It also went directly towards 2 of the major reliefs sought: a. significant damages for repair of the machinery – in excess of \$250,000.00, and b. potentially significant consequential damages for fraudulent misrepresentation. Yet there was no evidence from qualified technicians as to the actual state of repair of those machines, and the actual cost of repair, or even the necessity for any such repair. Even the receipts actually produced for the amounts expended amounted to a fraction of the amount claimed.

xv. **Alleged Defects in the machinery and equipment**

135. Frank provided the claimant with a list of the machines and the ages of the machines on **21<sup>st</sup> January 2013**. Further, the claimant was provided with a **valuation** of the machines which showed their market values \$1, 906, 125.00 in **November 28th 2012**, done by the authorised dealer for the machines, Schiebeler & Co (Trinidad) Limited.

136. He knew that the newest machine, the GTO-52-4 Printer, was 11 years old. This had been valued by Schiebeler at **\$780,000.00 plus VAT** despite its being 11 years old. No mention was made by Schiebeler at that time of any defect in this printer which would have affected its value.

137. The evidence of the workers who testified to the contrary was contradictory and unreliable. Michael Joseph testified that that machine had not been working for at least two years but eventually conceded that he was able to do perfect 4 colour jobs on occasion.

138. I find that he is far less reliable than the objective evidence of the valuation by Schiebeler - the agent, or the defendant's witness who testified to the contrary.

139. First, in his witness statement he said that the GTO-52 machine was not functioning on 4 colours for 5-6 years before the sale. Under cross-examination he then claimed that the period was 2 years and eventually admitted that the machine had in fact worked with 4 colours on a job just before the sale.

140. The evidence of the claimant to this effect is also unreliable. He could not say that the machine was not printing in all 4 colours at once before the transfer date. His evidence that it was not was based on speculation and inadmissible hearsay.

141. There is also evidence from Belgrave who testified far more convincingly that the machine was always capable of printing in four colours.

142. The evidence of the claimant's witnesses is that the machines worked up to September 7<sup>th</sup>, 2013, "rushing work". The claimant's witnesses were not reliable, and certainly cannot be relied upon for a matter as important as this. The claimant unfortunately evinced a propensity to exaggerate the claims that he was making and to argue from his perceptions of events to the conclusions that he himself drew, which far too often upon examination were not supported by the evidence. Examples of this included:-

- i. exaggeration of the cost of repairing the printer,
- ii. claim that paper and ink were removed,
- iii. inexplicable failure to avail himself of the first defendant's offer to meet with him once his medical condition allowed this,
- iv. complaint and exaggeration about disconnected telephone lines.
- v. attempting to cancel/ stop payment on the cheque for the real estate agent who had procured the sale for the business and which he had agreed to pay,
- vi. reporting Frank to the Fraud squad shortly after the sale.

143. Answers in cross examination were often arguments – apparently carefully thought out before hand, as to the significance of every event. This approach, often bolstered with helpings of hearsay, clearly lengthened the time taken for cross examination and prolonged the trial. The propensity to exaggerate made it more difficult to sift the real causes for complaint in this

transaction from the imagined ones. The bottom line is there is no evidence that the GTO printer was not working and printing in all 4 colours at a time on the transfer date.

144. I accept in this regard the evidence of Frank's witness who gave clear evidence of common sense methods and suggestions that he utilized in assisting the operator to operate the printer, when he, as apparently was often the case, had difficulty in doing so.

145. The claimant did not take the opportunity to inspect the machines at the handover with Donna on 9<sup>th</sup> September 2013. His claim that he knew the machines had not been working for many years because technicians inspected them after he acquired the printer on 9<sup>th</sup> September is mere speculation, especially when they were clearly in use printing numerous jobs.

146. I accept the defendant's submission that:-

- a. None of the quotations and invoices which the claimant claimed as expenses for fixing the machines showed that work was done to replace parts or fix the machines.
- b. The quotation from Schiebeler (RJA 36) was merely a quotation and was dated 3<sup>rd</sup> September 2013 before the sale and handover. It was merely an enquiry.
- c. He claimed that the quotation from Schiebeler dated 8<sup>th</sup> January 2014 was a quotation and a purchase order in one, (although it expressly states that "all quotations are without engagement") and he paid down \$50,000.00 (although no documented evidence of payment was filed).
- d. He accepted that the quotations only referred to 2 machines and that none of the documents he produced showed that parts were purchased.
- e. The other invoices (RJA 37 and 38) showed purchases of consumables such as sponges, blades, rollers and rubber suckers, and normal servicing. The invoice for restoring the network connection for the equipment in the Graphics Department is dated 12<sup>th</sup> December 2013, long after the sale.

147. I find that the Claimant was not denied any or reasonable opportunity to inspect the machinery and equipment before the Transfer Date.

- a. The defendant's witness, Belgrave, whose evidence was far more balanced and credible, contradicts this.
- b. No expert was produced to corroborate the testimony of the claimant on such an important matter.
- c. The claimant's case is that jobs, including a 4 colour job, were rushed in the month before the transfer. The claimant's witness accepts that such a rushed 4 colour job was done despite his claim that the 4 colour printer could only print 2 colours each time.
- d. Schiebler provided a valuation in November 2012 which made no reference to any defect.

148. It is therefore more likely than not that as at November 28<sup>th</sup> 2012 that the GTO52-2 printer was fully functional and able to print in all 4 colours at once.

149. I do not accept the evidence that the 4 colour printer was defective at the time of the transfer, or that it had been defective for at least 2 years before. I do find it more likely that the operator had difficulties in operating the 4 colour printer and that the fault did not lie with the machine. I accept his co-worker's convincing and detailed evidence that he was able to fix the problems reported to him when he was asked for assistance.

xvi. **Alleged representation that work in progress at a normal level**

150. The assertion that work was not at a normal level has not been established on a balance of probabilities. While there is evidence that suggests that the defendant did not place any effort in quoting for jobs that were to be completed after the handover date, and that he rushed to complete jobs before the handover date, the phrase "normal level" is simply too subjective or alternatively, too vague and devoid of objective measurement, to justify a finding that this representation was untrue.

151. While there was debate as to whether September was or was not a slow month in the printing industry, the wording of the Clause in the BPA does not attain the level of specificity to justify a finding that work in progress at the Transfer date, reduced as it appears to have been, was not at a level "normal", "having regard to current orders and reasonably anticipated orders".

xvii. **Alleged representation that existing clients would be assigned**

152. I accept the evidence of Frank that there were no clients to be assigned and that the claimant was told this. There were no written contracts that could be assigned. In fact the claimant accepts this. The printery had long standing relationships with customers that permitted it to be considered when printing jobs were required. The Printery had the opportunity to quote for each job but with no guarantee that it would be offered

xviii. **Whether assurance that Frank would be very involved in the business**

153. Frank's evidence is that he wished to retire but he was prepared to assist for three months after the sale. This is far more credible. After September 9, when Frank came out of the nursing home and tried to contact the claimant, he did not allow him to do so. In fact he had even reported him to the police. An open ended commitment to be on hand indefinitely, if given and if sufficiently important to have induced reliance on it as alleged, would have been in the very detailed BPA.

154. The claimant eventually conceded under cross examination that Frank's version of 3 months was in fact accurate.

xix. **Whether inducement**

155. The evidence is clear that the claimant did his own due diligence. By email to Donna dated Thursday 1<sup>st</sup> November, 2012, he states that "*I had wanted to put in my offer this week but have not been able to complete my due diligence because I have been otherwise preoccupied...*"

156. In order to **ascertain the Business' viability** and for the purpose of **negotiating the selling price**, he requested the **Business' profile, financial statements and/or bank statements, customer listing, sales by customer, equipment listing with serial number and age.** (See para RJA)



157. In **October 2012** he received the **company Profile and the Business' Financial Statements for 2010 and 2011**.

158. Frank had presented him with a valuation report on all the machines that appeared to be prepared by him. **He was not satisfied** with this valuation of the equipment and **requested a valuation done by the manufacturers of the equipment**, namely Schiebeler & Co (T'dad) Ltd. Clearly he was not relying on Frank.

159. In **November 2012** he received **the valuation report** from the authorized dealer of the machines, Schiebeler & Co (Trinidad) Ltd, dated **28<sup>th</sup> November 2012**.

160. In **January 2013** he received the Business' **Bank Statements** from Republic Bank Ltd. He received **a list of the age of the machines** on 21<sup>st</sup> January 2013.

161. He was also provided with the **Monthly Sales of the Business** for the period March 2010 –December 2012.

162. He therefore did not simply accept the information that was provided to him. In January 2013 Mr. Attin himself commissioned a **professional valuation** of the property by Lindon Scott and Associates Ltd dated 24<sup>th</sup> January 2013. Mr. Attin visited the Printery on at least two, and probably more, occasions. Only thereafter in or around the beginning of February, did he offer \$4 million for the purchase of the business. He revised the offer on 14<sup>th</sup> February 2013.

163. The evidence therefore is that:-

Mr. Attin made his offer to purchase the business for \$4,500,000.00, after investigating and ascertaining the value of the Business and after requesting and receiving over a considerable period of time, inter alia, the business profile, **the bank statements and the financial statements**, a **valuation of the equipment** provided by Frank and Schiebeler, and **valuations of the property**.

164. Any statement or representations made by the defendants could not have displaced his own careful and systematic investigations and analysis.

165. I find not credible any assertion by him that, despite being a potential purchaser of a multimillion dollar business, he would have been denied opportunities to inspect the equipment or the business operations. His evidence to this effect was deliberately vague and is rejected.

166. I find it far more likely than not that it was his own evaluation of the specific material that he requested that informed his decision to purchase and the price he was willing to pay.

167. Matters not expressly recorded in the BPA were not likely to have been a factor in that decision. The Claimant was a prudent and experienced businessman unlikely to have been swayed by any representations uncorroborated by documentation. Hence his prudent requests for valuations, for bank statements, the company profile, financial statements and the preparation of a detailed legally binding B.P.A.

168. I find:-

- (a) the machines were not new machines
- (b) Schiebler had placed a value on those machines which implied, certainly in the case of the four colour printer, that it was working in November 2012.
- (c) Claimant did not request an up to date inspection report.
- (d) Claimant himself examined them, although possibly briefly.
- (e) Claimant was not likely to have been denied the opportunity for further inspection if requested.
- (f) Frank had a duty to disclose if any of the machines had become defective since the date of the Schiebler valuation if he knew of this. However the fact that the machines were being used up to September, including on 4 colour rush jobs, days before the handover date, suggests that they, (including the GTO52-2 printer), were in working order.

xx. **Knowledge**

169. Further, the evidence is clear that the claimant had actual knowledge of the truth of some of the matters in respect of which he alleged misrepresentation.

He knew:-

- a. **By the stickers that he observed**, that the GTO – 46 and SORMZ machines were leased from Caribbean Leasing Co. Ltd,
- b. **By the age listing that he requested**, that the machine were second hand machines
- c. **By personal inspection and the opportunity for further inspection if he observed anything that put him on inquiry**, that the machines were in working condition and working, and
- d. **By being expressly so told by Frank**, that the business had no written or continuing contracts with clients.
- e. **By being expressly so told by Frank**, that Frank would be prepared to assist him for a defined period of 3 months and not indefinitely.
- f. **By being expressly so told by Frank**, that the business had no written contracts or ongoing retainers with clients.

xxi. **Conversion**

**Allegedly stripping the Business of plant and equipment such as paper and ink**

170. The evidence is that paper and ink are consumables in a printery business. It would be normal to expect that, in an operational Printery, as this was, and was being sold as, that paper and inks would have been used in the normal course of operations. This would include use of these items before the transfer date.

171. It would be reasonable to expect a new owner to purchase his own consumables such as paper and ink, and to take the cost of these items into account when invoicing for jobs printed by him after handover. The allegation that, by using these items, the business was “stripped” of these items:-

- a. which are naturally consumable in the course of business operations,
  - b. which are an input into printing jobs that the new owner would print, and for which the new owner would charge,
- is unsubstantiated.

173. Frank’s evidence is that no significant stocks of these items were kept as they were easily purchased as needed. This is logical and it is accepted.

174. As to the absence of paper and inks causing the business to be operated in a limited fashion, it is clear that any purchaser of a Printery must reasonably expect that he would have to purchase the inputs of that Printery for print jobs at some point in time after handover. He could not expect an indefinite supply of paper and inks to have been left for him on the premises.

175. I find that the claim for return of ink and paper removed from the business must fail as it has not been established that there was any paper or ink to be removed at the transfer date, or that any were in fact removed.

### **Removal of documentation**

#### **a. Contracts**

176. The First Defendant's assertion that each purchase order constituted a separate contract, and so, to the extent that all extant printing work was completed before the Transfer Date there were no existing contracts capable of assignment, is accepted. I am satisfied that what the Printery had by reason of its long standing relationships with its customers was the opportunity to quote for each job, rather than written contracts.

#### **b. Purchase orders**

177. I accept the evidence of the first defendant that purchase orders were only issued by certain clients and that these were eventually handed over on November 8<sup>th</sup> 2013. I take into account the evidence of Frank that the purchase orders would not have provided much assistance to the Claimant in allowing him to quote for printing jobs as there were many factors to be balanced and taken into consideration.

178. I take into account that Frank was unavailable at the initial handover date due to hospitalisation, and that the relationship deteriorated rapidly with the Claimant reporting the first named defendant to the police.

179. I find that there were extenuating circumstances which affected the handover, and that with a bit of flexibility the situation may not have deteriorated as rapidly as it did.

**c. Invoices**

180. The claimant admitted in cross-examination that Donna told him that she would send information that was stored on her computer, though he claimed that she had been promising to do so for some time.

**Negatives, plates and film**

181. It is not disputed that the **used** plates and negatives were removed from the Business premises. Frank asserted that the used negatives and plates do not belong to Hitlal's. It was admitted that the used plates were removed and given to Donna for safekeeping. The explanation was that these belonged to the clients and their permission was required before handing them over to the claimant. They were eventually handed over to the claimant on November 8<sup>th</sup> 2013, after the handover date.

182. He admitted that he had not told the Claimant that he was removing them. They were returned by the Defendant to the Claimant on 8th November 2013. This is unsatisfactory. Clearly these items were removed, and if done simply for safe keeping, even accepting that these belonged to the clients, nothing prevented him or his agent from so informing the purchaser, who had paid \$4.5 million for the printery business as a going concern.

183. There is no evidence to rebut Frank's assertion that the used plates belonged to the clients. If that were the case then one would expect that they would be returned to the clients themselves, or that the permission of the clients would have been sought to hand these to the claimant before the transfer date.

184. Their permission does not appear to have been sought to hand these over to Donna, who was by that time a competitor of Hitlal's Printery. That fact, together with the letters written by Frank, demonstrates clearly that it was of no concern to Frank that Hitlal's, under the Claimant's ownership, should actually benefit from the past association with these clients. The manner in which this was handled, coupled with the approaches made to clients by letter, are highly suspicious.

185. With respect to **unused negatives** the evidence is that removing these from the machines would be futile as exposure would render them useless, and removal of these is denied. This is accepted as I find the evidence of the claimant's witnesses who worked at the Printery contradictory and less reliable than that of the defendant's witnesses.

**Tools, Computer programmes, Tapes, and Chemicals for tapes.**

185. The evidence that these items were removed is tenuous and insufficient to make any finding that they were in fact removed. In fact in relation to the item "chemicals for tapes" no one seemed to even know what these were. Personal items of Frank may have been removed. It is possible that this may have accounted for part of this perception.

186. The evidence of the workers who testified on behalf of the claimant was contradictory, and in the case of at least two, it appeared coloured by animosity towards Donna.

187. I have found that the allegation that any such items were removed has not been proven. The allegation that the removal of such items caused the business to be operated in a limited fashion has not been established.

188. **Chevon Stephen-Haynes** alleged removal of items from her Department but under cross-examination she admitted that she did not even go into her department to check for them on the Monday of the handover. She was also unsure as to whether some were personal items of Frank, for example, the bench.

189. She claimed that the telephone lines were disconnected until December causing the Business to be at a standstill **but admitted under cross-examination that the lines were actually restored in September.**

190. Chevon Stephen-Hayes alleged in her witness statement that on the evening of Monday 9<sup>th</sup> September she accompanied Mr. Attin through the Graphics Department and in so doing observed that several items were missing including,

**i. boxes of CD's** with client artwork, (in cross examination she confirmed that she did not go into her department and therefore could not deny or confirm if these were left at handover on September 9<sup>th</sup> .

**ii. the main external hard drive,**

**iii. film for the machine,** (in cross examination she confirmed that this would spoil if taken out of the machine. Also she last saw film in the box in August and therefore she could not deny that it had been used since then).

**iv. flash drives** which she used daily for artwork, (in cross examination she could not confirm that she had in fact left 3 by her computer, as she had claimed)

**v. park bench,** ( she was unsure in cross examination if this was Frank's personal property)

**vi. book** that outlines Republic Bank criteria for printing jobs.

191. She also said on the morning of 9<sup>th</sup> September she observed-

i. stacks of paper missing, (she saw it on Friday 6<sup>th</sup> September, she did not look for it on Monday 9<sup>th</sup>. She could not say whether it had been used on Saturday or Sunday 10<sup>th</sup>), and

ii. pouches with client's artwork missing. She said the only external hard drive that remained was in the Department was the Malfunctioning External hard drive.

This witness demonstrated a propensity to jump to conclusions without sufficient basis, and departed from her witness statement.

## xxii. **Handover**

192. **This was to be on September 9<sup>th</sup> 2013.** It was at this point that things took a turn for the worse.

193. By Deed of Conveyance dated **6th September 2013**, (eventually registered on 13<sup>th</sup> December 2013), Frank conveyed the property and was paid the balance of the purchase price in the sum of \$3,050,000.00. The Parties agreed to a joint announcement to the employees of the sale of the Business on **9<sup>th</sup> September, 2013 at 1:30 pm.**

194. On **Monday 9<sup>th</sup> September, 2013** Frank was not available to meet with Mr. Attin due to a medical emergency. He asked Donna to meet with the claimant to hand over the keys to the property and to advise the employees of the sale of the Business and that claimant would be taking over the business the next day.

195. The keys to the premises were handed over to Mr. Attin in the presence of Mr. Weekes, the real estate agent. The joint announcement did not take place because of Frank's medical emergency, Frank contacted claimant on his discharge from hospital on September 11<sup>th</sup> and offered to meet him. Claimant never accepted his offer, reported him to the Fraud Squad, tried to stop payment of the cheque to the agent for his commission, and put the matter in the hands of his attorneys.

196. Raphael Machado also alleged in paragraph 13 of his witness statement that on the evening of 9<sup>th</sup> September 2013 he accompanied Mr. Attin through the Dark Room and Printing Department and in so doing he observed that **several items were missing**, including:

- i. sealer,
- ii. box of selo tape,
- iii. all GTO-52 plates,
- iv. punch machine,
- v. eight (8) numbering boxes worth approximately \$2000 - \$3000, (in cross examination he confirmed that he did not observe this himself but instead had been told this), and that
- vi. the phone lines were not working. (He suggested that these were not reinstated until December. Chevon Hayes confirmed, more probably, that they were reinstalled in September).

197. He also agreed that he was not in a position to doubt that Donna left the sealer, the box of selo tape or the punch machine. He claimed that the phone lines were reconnected in December and it was only when the phone lines were reconnected that work started to trickle in for small jobs such as calendars and bill books. Chevon's evidence that the phone lines were reconnected in September. His evidence was inconsistent with hers and unreliable on the whole. He was a low level employee whose evidence too often did not survive cross examination intact.



198. Frank stated that whatever inks were opened at the date of the sale were left on the premises and it would have been inconvenient to carry them away. This is logical and it is accepted. In any event there is no evidence linking Frank or Donna with the removal of any inks, save for that of the Claimant.

199. The Claimant claims he saw before 6<sup>th</sup> September on a 5 minute walkabout various items. He claimed he saw **bottles of ink** being removed on trucks on 9<sup>th</sup> September. This evidence was not given in his witness statement and was clearly an afterthought.

200. In cross-examination he accepted that at the handover on 9<sup>th</sup> September Donna told him that she had information on her personal computer and would email them to him. She directed him to 2 filing cabinets which contained NIS, PAYE, Health Surcharge and Financial Statements of the business. He admitted that he found those documents in the cabinets but they were very old- relating to 2002 -2007.

201. He also claimed that there were 3 computers in the Graphics Department which he saw on his '5 minute walkabout' which were not there on 9<sup>th</sup> September. Chevon made no complaint about 3 missing computers in her evidence.

202. He also claimed that he had actually seen 2 **Pallet Jacks** on his 5 minute walkabout and said he referred to Pallet Jack in his witness statement as being taken, in error. He admits that one Pallet Jack was in fact left at the premises. It strains credibility that on such a short walkabout or on the few brief visits that he was prepared to admit to, that he would have observed all the items that he claimed, especially in the absence of an inventory.

203. The minute examination and dissection of evidence as to what items, (extending even to flash drives and selo tape), would not have been necessary if normal business practice had been followed of taking an inventory. It is accepted that Frank's medical emergency rendered that impractical on September 9<sup>th</sup> 2014. It is less clear what precluded an inventory on the 6<sup>th</sup> of September, when the sale was concluded and final payment was made.

204. Michael Joseph stated under cross-examination that the last day he worked was Friday 6<sup>th</sup> September 2013 and that he was not at the Printery after Friday. The next day that he went to the Business was Monday. His claim of “stripping and removal” on Saturday 7<sup>th</sup> and Sunday 8<sup>th</sup> September 2013 was completely discredited.

205. In the absence of an inventory the evidence resolves into the testimony of witnesses as to their recollection of what was on the premises before and after the transfer. The evidence of the claimant and his witnesses of ‘stripping’ and ‘removal’ did not survive cross examination.

206. The claimant did not take an inventory, and the claimant did not avail himself of the opportunity, when offered, to subsequently meet with Frank and possibly take a joint inventory with Frank.

207. On the transfer date Frank had been hospitalized and was simply not available. Frank even offered to meet with him at the hospital.

**xxiii. Advising the employees that the Business was sold**

208. Michael Joseph’s evidence in chief is that at the meeting on 9<sup>th</sup> September 2013 Donna made several unusual declarations, including that “This is it. Hitlal’s Printery is no longer in operation” and “if y’all want u’all can take me to court”. Such statements appear senseless as under the BPA Hitlal’s Printery was to continue in operation as a going concern, and there was no obvious need to take anyone to court, far less Donna, who was simply a managerial employee of the Printery.

209. He alleged that before the meeting was over she turned to him and blamed him for “mashing up” the GTO-52 machine. When cross examined about the meeting his evidence contradicted what he said in his witness statement in several particulars. He simply was not a witness whose evidence could be relied upon. Chevons, Joseph’s and Machado’s evidence were all clearly contradictory and unreliable.

210. Under cross-examination the claimant confirmed that he did receive a telephone call from Frank a few days after the handover of 9<sup>th</sup> September. He asked Frank to come to the

Printery but he said he could not. He asked the claimant to meet him at Westshore Medical, which the claimant declined to do. Mr. Attin says he told Frank that made no sense and that he wanted to get the advice of his lawyers. He never got back to Frank. The failure to hold that meeting cannot be attributed to Frank.

**xxiv. Wrongfully disconnecting the telephone service to the business**

211. The evidence does not support the claim that the telephone service was disconnected by Frank. Frank claims that he was responsible for that service up to a specific date September 9<sup>th</sup> 2013. Thereafter the purchaser would be responsible. There is nothing unusual about this. It was up to the purchaser to ensure that he had himself entered into a contract with the service provider after the transfer date. If the telephone service was disconnected it has not been explained why it should take until December to be reconnected if there were an existing line and number.

212. In any event at least one of the claimant's witnesses confirmed that the lines were reconnected long before December, and I find that this is far more probable than that the claimant would have left the business without working telephone lines for so long and without attempting to resolve this issue with the service provider, if it even were an issue. Chevon Stephen **said under cross-examination that the phone lines were reconnected in September.**

213. In any event a reasonable business owner who wanted to ensure that his investment was up and running would have taken steps to mitigate any non functioning telephone lines, such as making contact with the service provider immediately, placing advertisements in the daily newspapers as to alternative contact information, including telephone and email addresses, directly contacting the major clients of the Printery, which were listed in the Business Profile, rather than waiting for them to be frustrated by the inability to make contact through non functioning telephone lines. This allegation is yet another example of exaggeration.

214. Frank's evidence is that the password to the Business email address was changed because the personal information such as credit and bank information of Frank and Donna and that of Donna's husband were accessible from that account. This is but one issue that could

have been addressed at the aborted meeting, and much expense and time was caused by the hasty rejection of the offer to meet.

215. Analysis of the evidence reveals that in fact there is no proof of conversion of assets after 6<sup>th</sup> September 2013.

**xxv. Special Damages**

**216. Special damages claim not proved**

- a) The Claimant claimed \$250,000.00 as the estimated cost to repair and restore the GTO-52 machine. There is no evidence that it was left in a defective or non-functional state at the date of the sale or on the handover and no credible independent evidence that the claimant needed to spend or has spent any sums in its repair.
- b) The Claimant also claimed \$50,000.00 as the estimated cost to re-stock the Business with ink, paper and chemicals which were allegedly wrongfully removed. This is rejected as:-
  - i. the evidence did not support the claim of removal, and
  - ii. the evidence is that these items were not stocked in the normal course of the Business, but were purchased per job , and consumed per job.
- c) The Claimant also claimed \$20,000.00 as the replacement cost of tools used on a daily basis to operate the Printery. However, no tools were specified and there was no evidence of removal. For example, contrary to the claimant's evidence in chief, there was at least one pallet jack left on the premises.
- d) The claim for \$400,000.00 as the replacement cost of plates and negatives is rejected as:
  - i. the negatives and plates have since been returned
  - ii. they did not belong to the Printery, but rather belonged to the clients,
  - iii. the value of those used plates, or even the unused ones, has not been proved in any form.
- e) The \$86,081.91 claim of outstanding monies due and owing to Caribbean Leasing Company Ltd is no longer relevant as that sum has since been repaid by Frank. It is another example of much here being made out of very little.

217. The evidence of the Claimant is that the business did not receive contracts from the major clients after the handover. The suggestion was made repeatedly by Frank that the Printery was operated as JAG Printery after the transfer. This was confirmed by the evidence of Chevon Hayes. She testified that she responded to a query by a client identifying herself as an employee of JAG Impressions, rather than Hitlal's Printery. They never called back with an order.

218. In cross examination it was suggested by Frank that the effect of such a change on ensuring the continued recognition of the Printery as a continuation of Hitlal's Printery, though under new ownership, would be a significant factor in retaining or attracting business.

#### **xxvi. Remedies**

219. The court invited supplemental submissions on the remedies that would be available to the Claimant if it were to be found that Donna was not a partner in the Printery, but that Frank had acted in breach of the covenant not to impair the goodwill of Printery. The claimant contended that injunctive relief could apply to Donna and the operation of Donnaprint in the exercise of the court's equitable jurisdiction.

220. The defendants contended that no special damage arising from the breach of covenant had been pleaded, far less proved, and cited examples of cases where the court, faced with allegations of breach of similar covenants, had been provided with particularised pleadings and calculations, and even evidence from former clients of the business, as to what if any, value of business had been diverted by breach of similar covenants.

221. Analysis of the evidence in fact fails to demonstrate that Donna was a partner in Hitlal's Printery, or that the claimant had any reasonable basis for concluding that she was, or was held out as such. There can therefore be no basis in law or equity, for granting relief in respect of Donna or Donnaprint.

222. As to the relief available in respect of Frank's breach of covenant, it is difficult to discern any basis for an award of anything other than nominal damages. Damages must be pleaded and strictly proved.

## Law - Proof of special damages

223. Pretrial loss is an item of special damage. It has to be pleaded, particularized and strictly proved. See **Charmaine Bernard (Legal Representative of the Estate of Regan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15 at paragraph 16 Sir John Dyson SCJ (citing *Perestrello*) *infra*:

**In Bonham Carter v Hyde Park Hotel [1948] 64 TLR Lord Goddard CJ** stated that parties “*must understand that if they bring actions for damages, it is for them to **prove their damage**; It is not enough to write down the particulars, so to speak, throw them at the head of the court saying ‘this is what I have lost; I ask you to give me these damages’. They have to prove it.*”

**The degree of strictness of proof that is required depends on the particular circumstances of each case.**

224.

(a) As Bowen L.J. stated in **Ratcliffe v Evans** (1892) 2 Q B 524, 532 - 533: (all emphasis added)

*“In all actions accordingly on the case where the damage actually done is the gist of the action, **the character of the acts themselves** which produce the damage and **the circumstances** under which these acts are done, **must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles to insist upon more would be the vainest pedantry.**”*

(b) In Civil Appeal 41 of 1980 **Gunness and Another v Lalbeharry**, the appellant was injured in a vehicular collision. In an action for damages for negligence the Judge allowed certain claims and disallowed others. Among the claims disallowed was a claim for special damages relating to the loss of various items of jewelry, handbag, cosmetics and \$75.00 in cash. On Appeal the Court held that the Judge erred in disallowing the claim. Braithwaite J.A with whom the other members of the Court of Appeal agreed stated at page 2:

*“In disallowing the appellant’s claim for these items, the judge merely stated:*

*‘From the evidence which she gave and which was unsupported, I find that you failed to prove such loss.’*

*There is no evidence to contradict the evidence of the appellant nor had she been shown not to be a credible witness. There is therefore no justification for the judge’s finding in this respect. The fact that her evidence is unsupported is clearly not sufficient to deny her claim for a loss which must be taken, in the absence of evidence to the contrary, **in the circumstances of her loss of consciousness** to be at least strong **prima facie evidence** of the fact which she alleged.”* (all emphasis added)

(c) That a measure of flexibility exists in the degree of proof required for special damages was confirmed by the Court of Appeal in Civil Appeal 162 of 1985 **Uris Grant v Motilal Moonan Ltd.** and **Frank Rampersad**, where **Ratcliffe v Evans** was applied.

The appellant’s furniture and other articles were destroyed when a vehicle ran off the road and crashed into a house in which she lived. She claimed damages in respect of the destroyed chattels. According to the evidence the appellant had made a detailed list of the things destroyed the day following the accident. In the statement of claim the Appellant’s special damage claim had been particularized. A default judgment was taken up, and in the assessment before the Master, the appellant produced in evidence the **list** she had prepared which itemized each item and the **price** thereof. She however produced **no receipt** verifying the price she had paid for the items. She admitted that she did not have such receipts, nor did the appellant retain the services of a valuator to value the damage.

The Master held that the appellant had failed to prove the value of the items and awarded an “ex gratia” payment. The Court of Appeal held that the Master erred. The Court at page 16 noted that the appellant’s evidence as to her loss represented strong prima facie evidence and was unchallenged. With respect to the lack of receipts to support her claim, it stated: -

*By the production in evidence of the list of chattels destroyed together with the costs of their replacement, the appellant had established **a prima facie** case both of the **fact of loss** of those articles and of the **costs of their replacement** at the time. Her special damage had to be established on a balance of probabilities. The respondent called no*

evidence in rebuttal. In the event, the Master, in my view, either had to accept the appellant's claim in full or, **if for whatever reason she had reservations** she should have approached the matter along the lines in Ratcliffe's Case by **applying her mind judiciously to each item and the cost thereof** in the list. This she did not do. Instead she merely, as stated earlier, made an *ex gratia* award. She did so on the premise, wrongly in my view, that the appellant had called no evidence of any kind in support of her claim.

In my view, the Master erred. The appellant did call **prima facie evidence** of her replacement costs the fact of which, as I said was **unchallenged**. At this stage I must pose the question whether in this country it is **unreasonable**, in a case of this kind, for a person to be unable to produce bills for **clothing, groceries, watches, kitchen utensils, furniture and/or other electrical appliances** and/or for that matter to remember the time of the purchase. To my mind, this is clearly in the negative and to expect or insist upon this is to resort to the "vainest pedantry."

With regard to proof of special damage the authors of McGregor on Damages citing the dictum of Bowen, L.J. in Radcliffe's Case supra and quoted earlier in this judgment state that in proof as with pleading, "the courts are realistic and accept that the particularity must be tailored to the facts." (all emphasis added)

(d). In a more recent decision of the Court of Appeal, **David Sookoo, Auchin Sookoo v Ramnarace Ramdath Cv. App No. 43 of 1998** per M.A de la Bastide, C.J, delivered 12<sup>th</sup> January 2001, it was confirmed that that degree of flexibility had limits, depending on inter alia:-

- (i) The circumstances,
- (ii) The nature of the claim,
- (iii) The difficulty or ease with which proper evidence of value might be obtained, and
- (iv) The value of the item involved.

*"It is common experience that items of special damage are sometimes not proved to the hilt and yet the Court may make an award in respect of them. **It is a matter which depends on the circumstances and evidence in each case.** The Court has to decide*



*whether on the material before it, it can arrive at some acceptable conclusion as to the amount which it should award.” (At page 4)*

*“.....These are the cases on which counsel for the Respondent relies. **The sort of evidence** which a Court should insist on having before venturing to quantify damages **will vary** according to the **nature of the item in respect of which the claim is made and the difficulty or ease with which proper evidence of value might be obtained**. It would also, **depend in part on the value of the individual item**. It may not be reasonable to require expert evidence of the value of used household items but where one is dealing with a motor-vehicle which usually has considerable value, and **in respect of which there should be no difficulty in securing proper evidence of value**, then the **Court is entitled to adopt a more stringent approach**.*

*I, accept the correctness of the decision in **Grant’s** case but that case is clearly distinguishable on the facts from ours”. (At page 5)*

(e). See also the discussion on proof of special damages by the Honourable Justice of Appeal Archie as he then was at pages 8 to 11 of the case of *Civ. App. No. 20 of 2002 Anand Rampersad v. Willie’s Ice Cream Limited* – applying all of the above cases – as follows:-

*At page 8 – “I wish to emphasise that the fact that a defendant may not challenge the values of destroyed items given by the plaintiff does not automatically entitle the plaintiff to recover whatever is claimed. The rule is that **the plaintiff must prove his loss**”.*

*At page 10 – “None of the latter three cases should be understood as derogating in any way from the principle that the plaintiff must prove any special damages claimed. In particular, *Uris grant*, which may appear to bear some similarity to the present case, is merely an example of a case where the degree of particularity accepted by the Court of Appeal was considered to be appropriate in those special circumstances. In this case the Plaintiff/Respondent is a **commercial enterprise**. It would have been reasonable to expect that some evidence of the value of the larger items could be found in its books and records.”*

At page 10 – “*a lesser degree of strictness would apply to proof of the value of smaller items such as kettles, mops (etc .In accordance with Uris Grant the Master, in the absence of any evidence to the contrary, would have been entitled to accept a reasonable figure*”.

At page 10-11 “*the plaintiff cannot simply present a list of prices, it must show the basis on which the figures are established*” (all emphasis added)

### **The principles summarized**

225.

- a) The principles revealed by the cases are that special damages must be particularized and pleaded. (See *Seebalack*)
- b) Special damages must be proved by evidence.
- c) The degree of proof varies depending on
  - (i) The circumstances,
  - (ii) The nature of the claim,
  - (iii) The difficulty or ease with which proper evidence of value might be obtained, and
  - (iv) The value of the item involved. (See *Sookoo*)
- d) Even prima facie evidence may, in some instances suffice if not rebutted or challenged, and common sense must be applied in deciding whether such evidence can reasonably be expected to be available to the claimant. – (*Uris Grant, Guinness v Lallbeharry*)

226. Frank’s behaviour was unacceptable. It was not an excuse to contend, as he attempted to do, that he paid attention to what he considered the main parts of the agreement and did not focus on the others. This is simply not credible, given that Frank was an experienced and worldly businessman, who would have been astute and alert to the possibility of clauses in the agreement being unfavourable to him. I do not consider it credible that he would not have read and understood this agreement.

227. In addition the clauses relating to goodwill were prominent, and the topic was covered by several sub clauses. Certainly by the time that the trial was underway, Donna and Frank were sufficiently aware of the fact that many of those sub clauses came into effect with effect from the Transfer date, and arguably may not have applied to the date when he wrote the letters. This is not consistent with his attempt to portray himself as insufficiently sophisticated to appreciate the fine details in the BPA.

228. In any event the sub clauses prohibiting impairing goodwill are not all so restrictive and in at least one case, make no reference to the Transfer date. Frank's actions were deliberate. He was sufficiently aware of the importance of goodwill as to refrain from disclosing to the claimant that Donna had started up Donnaprint. Any reasonable person, moreso an experienced businessman, must have appreciated that that fact, in addition to Frank's letters, would have impacted on the ability of Hitlal's under new ownership, to attract or retain existing clientele.

229. The law frowns upon such conduct – see Lord McNaughten in **Trego v Hunt** supra. That conduct is “*opposed to the common understanding of mankind and the rudiments of commercial morality.*”

230. Actions such as those of the first defendant cannot be condoned, nor can they escape severe criticism. The fact that there was an express covenant prohibiting such conduct simply makes the conduct itself far worse. Proof of the extent to which the claimant's business suffered loss, if any, would have permitted an award of the substantial damages which, if pleaded and proved, to which the claimant would have been entitled.

231. In **Civil Appeal No. 84 of 2005 Aaron Torres v PLIPDECO** at page 20 paragraph 44, the Honourable Justice of Appeal Mendonca even observed that “*In contract law an award of exemplary damages may signal that it is worth keeping one's promise.*” However there was no plea for exemplary damages and the instant case was not argued on this basis.

232. The exaggerations in the Claimant's case, especially with regard to the allegations of conversion, become more understandable in the context where the sense of being cheated and getting less than bargained would automatically follow upon:-

- a. the discovery that clients were being enticed away from the going concern that was purchased, and
- b. where the handover was handled so badly, and the Claimant was left to sink or swim once he had handed over final payment.

234. The haste of the claimant:-

- i. to break off contact with the first defendant,
  - ii. to ignore first defendant's willingness to meet, despite the fact that he was wearing a catheter,
  - iii. to bring in lawyers, and
  - iv. to report him to the police,
- aggravated a hasty handover without an inventory and contributed to the rapid degeneration of the situation.

235. The concealment of the existence of Donnaprint, and the apparent disinclination to consider handing over or arranging for the permission of the clients to whom they belonged, the used photographic plates, and the very belated offer to arrange introductions of the claimant to the existing clients, ensured the rapid loss of trust and the need for expensive and time consuming litigation rather than mediation, focusing on what were the commercial interests of the parties. In the absence of a successful mediation the introduction of senior lawyers into the picture clearly assisted in ameliorating the situation.

## **ORDERS**

236.

- a. The first named defendant is to pay nominal damages to the claimant for breach of the warranty not to do anything which might prejudice the Goodwill of the business, in the amount of \$20,000.00.
- b. Costs are payable by the first defendant to the claimant on the basis prescribed by the Civil Proceedings Rules for a claim in the above amount.

- c. The claimant's claim against the second defendant is dismissed with no order as to costs.

**Dated the 23<sup>rd</sup> day of September, 2014**

**Judge**

**Peter A. Rajkumar**

*The Court is indebted to counsel and their teams, in particular for the diligence of their research and the thoroughness and extreme detail of their written submissions, from which great assistance was derived, as well as the assistance of Judicial Research Assistant E. Ali*