THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2017-00668

BETWEEN

SUPERPHARM LIMITED

Claimant

AND

DARREN DOOKIE

Defendant

Before the Honourable Mr Justice Frank Seepersad

Date of Delivery: March 19, 2019

Appearances

1. Mr. Merry instructed by Ms. Laurissa Mollenthiel for the Claimant.
2. Ms. Watkins-Montserin for the Defendant.

Decision

1. Before the Court for its determination is the Claimant's claim against the Defendant for breach of the Defendant's contract of employment. The contention is that the Defendant inter-alia misrepresented, deceived and/or defrauded the Claimant of $3,982,637.70. The allegation is that this sum was misappropriated by the implementation of two fraudulent schemes.

2. The first scheme involved the use of valid invoices from which cheques were produced and subsequently collected from the Claimant's accounts payable department and delivered to the Claimant's stores. Fraudulent representations were made to the Claimant's staff at the stores by the Defendant that there was authorisation to cash the cheques at the stores. The cash was then collected from the stores but never delivered to the vendors. The Claimant postulates that this scheme resulted in a loss of $1,372,288.28.

3. The second scheme involved the use of fraudulent invoices, whereby the Defendant would have created a fraudulent invoice from his work computer and then follow the same process as the first scheme. The Claimant states that this resulted in a loss of $2,610,349.20.

4. The Defendant denied the claim and pleaded that he had no role in the authorisation or encashment of cheques nor did he collect cheques on behalf of vendors. The Defendant further denied that he authorised anyone to cash cheques on his behalf and stated that he only verified bona fide works which were effected on behalf of the Claimant.

5. The Claimant called seven witnesses. Sindy Surijlal in her evidence referred to an invoice table prepared by her dated February 1, 2017. The table

referenced alleged fraudulent invoices from vendors, none of whom testified before this Court. She stated that an investigation was conducted and during the course of same, she spoke to several vendors. A summary of her findings with respect to the alleged misappropriated sums was annexed to her witness statement as exhibits SS3 and SS8. The preparation of the table was a retroactive exercise.

6. The bona fides of the method employed by Sindy Surijlal to determine the amount of money misappropriated was not challenged by the Defendant. It was not suggested under cross-examination that there were other steps which could or should have been implemented to determine the sum of money that was unaccounted for.

7. For most invoices on the tables, Ms. Surijlal was able to demonstrate with all relevant supporting documentary evidence (copies of invoices, cheques, deposit slips, bank statements) the following:

    a) Some cheques were issued by the Claimant in respect of the invoices.
    b) Some of those cheques were cashed at the stores.
    c) Some cheques cleared on the Claimant's account.

8. Ms. Surijlal determined that the monies in respect of invoices had not been received by the vendors by contacting each individual vendor and getting confirmation of same. In terms of the invalid and/or fraudulent invoices, Ms. Surijlal testified that she had confirmation from each vendor that the invoices listed as fraudulent were in fact fraudulent as they were not issued by the vendors.

9. For some of the invoices, the witness was unable to locate the deposit slip or bank statement entry which corresponded with the cheque which was issued by the Claimant. As a result, she was unable to verify with the bank statements that those cheques were cleared on the Claimant's account. However, for each of these invoices she was able to confirm with supporting documents that cheques were issued by the Claimant in respect of those invoices.

10. Ms. Surijlal explained in her witness statement at paragraph 10 that she drew a reasonable inference that those monies had been misappropriated based on the following:

    (a) In each case the cheque was never received by the vendor.
    (b) In many instances she was able to definitively confirm (with deposit slips and bank statements) that other cheques issued to the same vendor had been cashed at the stores and never received by the vendor.
    (c) The cheques that she was unable to definitively confirm (due to lack of deposit slips and bank statements) were issued in the same time period as those which she was able to so confirm.

11. The Court found that this witness instilled in it a feeling that she was forthright and did not question the veracity of her testimony. The Court also accepted her position that it is not uncommon to have missing documentation when audits are conducted and did not form the view that her testimony was designed to deceive. Ultimately, the Court accepted her evidence and did not form the view that same was either tenuous or unpropitious.

12. The Court however considered that on the table of invoices, there was no evidence that some cheques were encashed or deposited. Given the nature of the exercise engaged, the retroactive nature of the inquiry and the possibility that transactions could have been incorrectly recorded, it seemed plausible that pieces of the puzzle would be missing. Cognizant that the burden of proof rests upon the Claimant, the Court viewed with a degree of disquiet, those invoices for which no evidence was adduced so as to establish that the sums referred to therein were actually cashed. With respect to exhibit SS3, there was no evidence of clearing in relation to items 1-6. 8. 13.17.19, 21-26,29-33,35,38,42,45,47,48,53,54,57-60,62 and 76. These invoices amounted to $549,633.88.

13. With respect to exhibit SS8, there was no evidence of clearing in relation to the invoices referred to at items, 2,5,9,12,14-17,20,25,31-34,39,40,43-45,48,53-55,67,74-76,79-82,86,90,92,101-103,105-110,116,118,120-123,125,133,137 and 248. These invoices amounted to the sum of $1,138,199.99.

14. In relation to the aforesaid invoices, the Court felt that it was incumbent upon the Claimant to establish on a balance of probabilities that the Defendant encashed same. This burden could have been discharged by the production of bank records and the failure to establish by way of bank statements that the said cheques were in fact encashed, negatively impacted the Claimant's case. The unavailability of such evidence led the Court to hold that the Claimant failed to establish that the Defendant, even if the Court ultimately found that he engaged in a fraudulent scheme to misappropriate funds, had to account for the sums as aforesaid quantified.

15. The Claimant also relied on the evidence of Peter Gomez who was, at the material time, the Claimant's COO. This witness accepted that he and/or David

Sobrian and/or Sharlene Paraig were authorized to approve and endorse invoices and cheques. Mr. Gomez accepted under cross-examination that the audited accounts from Ernst & Young were not produced. During his cross-examination he stated that he relied upon the Defendant's representations prior to his authorisation of invoices.

16. The Court felt that this witness's evidence, though plausible, was also self-serving insofar as he failed to exercise due diligence. It was also noted that although the witness asserted that the Claimant had to reissue payments to the various vendors, no documentation was provided in support of the said assertion. Having considered the fact that the witness subsequently resigned from the Claimant's company, the Court formed the view that it was unlikely that he would, at this stage, fabricate evidence so as to support the claim.

17. David Sobrian, the Claimant's CEO at the material time, also testified on the Claimant's behalf. This witness established that the Defendant had no managerial function, nor did he have the authority to authorise capital expenditure. Mr Sobrian testified of his close relationship with the Defendant and that he attended the Defendant's wedding. The orders, invoices and areas of capital expenditure approved by the CEO at the Defendant's behest demonstrated a failure to properly discharge his function presumably because of his trust in the Defendant. The situation which unfolded, and which led to the authorisation of approximately 25 invoices underscores the need to always keep professional and personal relationships separate.

18. This witness gave evidence in relation to a second meeting with the Defendant which was partially recorded. A transcript of same was put before the Court.

This recorded meeting occurred in the presence of the Defendant, Peter Gomez, relatives of the Defendant including his Pastor and this witness. Having listened to the recording, the Court noted that the Defendant appeared to be upset but at no time did he or his relatives request an adjournment, nor did they adopt the position that the Defendant was no longer prepared to engage a discussion or that same was being conducted in circumstances which were unfair or oppressive. Ultimately, the Court found that during the course of the said meeting, the Defendant made admissions in relation to the allegations which were levied against him.

19. On Page 1 of the transcript he admitted to giving cell phones to employees of the Claimant in exchange for them cashing cheques on his behalf.

> *"DD: Natasha, Holder, Nicola all of them bought phones from me at. Lynelle, Nevon, Avinash.*
>
> *DS: So what are you saying they did this in exchange for cashing the cheques that they knew they shouldn't cash.*
>
> *DD: <u>Basically I gave them the cheques to cash and they cash it on my authority</u> then at the time cuz they say that was within their scope of twenty thousand to cash out during the day and I asked them to change the cheques so so those…..*
>
> *DS: but they knew that they were that it was irregular business they must know that Amalgamated not gonna change a cheque or John Dickinson not gonna change a cheque at the store*

DD: I think I betrayed their trust but yes I did give I did give reduced prices on those things

DS: When you say you betrayed their trust in what in what sense

DD: Well they trusted me as a manager that I would give them a cheque and that it would be concrete that they would be able to change it then so I used to send like someone like Kiran and they to the stores to collect the money but yes it was cashed under Amalgamated it would have been cashed under something else"

20. When confronted with the allegation that he fabricated invoices he did not deny same, but simply disputed the quantum stolen:

"DS: Alright whatever but we reach four million we reach four million we've had internal audit in here and we reach four million in cheques that have been cashed yeah four million yeah this is organised crime yeah because you have quotations for two and three hundred thousand dollars that he break it into smaller things and cashing out the cheques

Background voice mail: non-legitimate quotations

DS: Yeah yeah he's brilliant eh he fabricate he can make a Memory Bank invoice look just like Memory Bank send it

DD: I shouldn't look (inaudible) four million

PG: four million

DS: We checking it next door it's four million

PG: the returned cheques we have four million in returned cheques Darren we have called people and that have confirmed that their cheques that the whole of Watersource is fake the whole of ummm Doors and controls are fake you got a colour printer to mix and match and make invoices

DS: who has a colour printer? We bought a colour printer?

Background voice: he has one on his desk for the longest while

DS: OK anyway so basically you want your sorry about this

DD: I didn't know I swear to God it's not four million"

21. Reflected on the transcript and in answer to a question about the reason for the theft, the Defendant stated that he fabricated everything in his life:

DS: Well we've been checking four million internal the auditors are next door four million. So but let me ask you a question why? Why would a good young soul do this? Why what's the reason

DD: No reason cuz I have nothing I fabricated everything in my life from….

22. On page 5 of the transcript, the Defendant explained the contents of the spreadsheet found on his computer by Julian Ragbir by stating:

> *"DS: so but what are those thing in that spreadsheet for? What is twenty thousand for aunty for? What is that?*
>
> *DD: twenty thousand…I did give aunty Neeta twenty thousand but she thought she was borrowing it from me*
>
> *Background voice female: she thought it was a loan from him*
>
> *Background voice mail: she thought it was his personal money*
>
> *DS: so how Darren could just lend twenty thousand dollars?"*

23. On page 6 of the transcript he gave the names of persons, including store managers, who cashed cheques for him at the stores.

> "*DS: Ok but just to be clear all the people that were cashing the cheques you've called those names already there's no one else.*
>
> *DD: Kiran, Kester what in the stores?*
>
> *DS: No the store managers.*
>
> *DD: Furillo, Natasha, every. Trincity stores yes. Golda they cash the cheques from the drawers Lynelle, Shinelle. Nevon, Natalie and Dhristee too*."

24. On page 9 the Defendant admitted to forging signatures:

> *"Christian: do you admit to forging signatures on cheques?*
>
> *DD: Yes*
>
> *Christian: you know that's wrong right?*
>
> *DD: Everything that I did here….."*

25. The authenticity of the audio recording or transcript was not successfully challenged and the Court found that the Defendant disingenuously skirted around the issue during his cross-examination when he stated that he did not challenge the transcript because he could not understand 90% of it. The Court also found Sobrian to be a compelling witness and given that he is no longer employed with the Claimant the Court felt that he had no reason to fabricate evidence so as to support the Claimant.

The law on admissions

26. In the Court of Appeal decision of **Aguillera and Others v. The State, Crim App Nos 5,6,7,8 of 2015** the Court stated at page 30: "*In law, an admission which is properly proved or which is accepted by the maker without any relevant qualification, has the potential to be the highest in the scale of evidence, since it is a declaration against self-interest: see Cross and Tapper on Evidence 10th Ed at pages 659-663*".

27. In **Phipson on Evidence, 19th Ed at para 4-01** the learned authors stated that: "*The general rule both in civil and criminal cases is that any relevant statement*

made by a party is evidence against himself." The authors go on to state that the weight to be given to the admission will depend on "*the circumstances under which it was made*" and that "*the weight of the admission increases with the knowledge and deliberation of the speaker, or the solemnity of the occasion on which it was made*."

28. In the instant case the Court viewed the Defendant's response to the admissions and they were made in circumstances where the Defendant was present at a pre-arranged meeting with management. He was aware of what the meeting was about and had time to prepare for it.

29. In addition, the admissions were made in the presence of the Defendant's close family members and Pastor. These circumstances increased the weight that should be attached to the admissions.

Evidence in relation to the Defendant's laptop.

30. Julian Ragbir, the Group Information Lead at Agostini Company Limited testified that he examined the Defendant's laptop: a Lenovo-X1 Carbon, 3444-25U Serial Number: R9-TBPTC 12/09 (hereafter "the Defendant's laptop"). In his examination he testified that he came across a number of emails with attachments containing the words "MAKE UP" as well as other files saved on the Defendant's laptop. The Makeup files were invoices that were submitted to the Claimant company's accounts clerk, Sushmita Hayban.

31. The Defendant in his defence and witness statement did not deny that the Lenovo-X1 Carbon, 3444-25U Serial Number: R9-TBPTC 12/09 was his computer, nor did he give any explanation as to how the files with the words

"Make up" and other files which were found to be fraudulent came to be present on his computer.

32. In cross-examination, the Defendant responded as follows to questions from the Claimant's attorney:

LM *You had a Lenovo laptop. In October 2013 you were asked to return this computer?*

DD *Yes*

LM *You aware that they found that there were files with makeup*

DD *Yes five years later*

LM *You were informed about it since our pre-action letter*

DD *Yes*

LM *Our statement of case we mention make up docs. To this day you provided no explanation whether in defence or witness statement as to how files with words make up were found on computer*

DD *No I can't explain*

LM *All you give in your witness statement is a bare denial*

DD *No a denial not a bare*

LM *You don't say someone had access to pc*

DD *No*

LM You don't say that you never created file

DD No

LM You don't say that

DD Because, I didn't see laptop

LM You were made aware that you were given a chance to look at laptop

DD Yes not aware that it would have made a difference five years later

LM You not aware, you an IT specialist

DD No are you"

33. It was never put to Julien Ragubir that the emails and fraudulent invoices could have been planted on the laptop by someone else. Counsel for the Defendant asked about the bank statement and whether the time and date stamp could be changed, and he responded that it would be very difficult as such an exercise would need a lot of expertise and would take a long time.

34. Mr. Ragubir first came into possession of the Defendant's work laptop in December 2016. He was unable to offer any assistance with respect to where the laptop was prior to that time nor was he able to assist in relation to what may or may not have been done with that laptop since it was out of the Defendant's possession from 7th October 2013 to December 2016 when he received it.

35. This witness carried out an examination of the Defendant's work computer based on the request of his employer and he agreed that his witness statement

surmised everything he would have done during the course of that undertaking. He was told before the investigation commenced that files may have been deleted.

36. The witness stated that he checked the system for personal documents to which he admitted that it was possible that somebody else may have placed documentation on the system and he did not produce information as to when the information appeared on the system. The witness accepted that it was possible for date and time on the system to change.

37. He further admitted under cross-examination that no document produced originated from the system and most were pdfs. He further admitted that no recovery software was used on the system notwithstanding the fact that he was told that files may have been deleted.

38. Counsel for the Defendant submitted that it was evident from the partial recording of the meeting in October 2013, that Mr. Sobrian told the Defendant that the laptop was examined and that recovery software was used on the laptop and he also went on to state that various documents were found including various spreadsheets.

39. This witness however unequivocally stated in cross-examination that there were no documents resident on the computer at the time of his examination. There were no word documents, there were no excel documents and there were no documents in the office suite. There was only one picture which was a scanned document that showed the Defendant's bank statement, ID card and skybox info neatly and conveniently packaged as one image.

40. It was further submitted that the evidence demonstrated that the laptop in question was manipulated by the Claimant during the period October 2013 to December 2016, a fact which was not disclosed to this witness.

41. The Court found that it was highly improbable that the Claimant planted documentation and/or manipulated same on the laptop. There seemed to be no justification for the adoption of such extreme measures by the Claimant simply to establish a case against the Defendant.

42. Sushmita Hayban also testified for the Claimant. This witness was an accounts clerk for the Claimant at the material time. She confirmed that the Defendant's role was that of verifying the invoices and once approved she would then prepare the cheques all of which required two signatures.

43. This witness stated that part of the procedure was that the cheques were prepared and taken along with all supporting documentation, such as notes, pro forma invoices, quotations, delivery notes, etc and the invoice, to the CFO, Peter Gomez, if he was available for review and eventual signing and thereafter to a second signatory for further review and signing. Thereafter, the cheques would be made available for collection with some being left at reception, some being sent out for delivery and some being otherwise collected.

44. The witness testified that there were times when the Defendant would collect vendor cheques but was unable to give any evidence of what would transpire thereafter. The Court did not find that this witness's evidence was particularly helpful.

45. Lisa Armoogam was also called on the Claimant's behalf. The most critical aspect of her evidence related to her assertion that the Defendant organized a phone for her but she gave no evidence that he ever asked her to disregard proper policy or procedure.

The evidence of Valmiki Balbirsingh

46. The Claimant's case was that after the Defendant resigned from Superpharm, he went on to work at Label House Group Ltd. Whilst employed there, he concocted a document under a purported Label House letterhead, signed the letter under a fictitious name, and uttered same to another company. Most importantly, it was alleged that he emailed the letter from his Label House email address, making it easy for Label House to determine that the fraudulent letter had in fact been sent. In other words, he engaged in fraudulent conduct without taking basic steps to ensure that he would not be caught.

47. The evidence of this witness was not adduced to directly prove the facts in issue in the instant matter. The court noted that there was no substantive claim made by Label House relative to the Defendant. This witness gave evidence of his limited and/or passing interaction with the Defendant whilst he was employed there.

48. The witness proceeded in cross-examination to add to his evidence and significantly changed numerous facets of his evidence. His demeanour was combative, and the Court viewed his aggression with suspicion.

49. The witness expressly admitted that his witness statement did not paint a complete picture. He stated that someone from Cell Mates contacted him to explain that Label House was not paying their bills and became combative

when confronted with the fact that this was absent from the witness statement. The witness provided no documentation to substantiate the allegations against the Defendant.

50. With reference to the exhibit at VB1, the witness also admitted that what was presented to the Court was only a small portion of a string of emails. No one from Cell Mates testified before the Court and the Court ultimately placed little to no weight on this witness's evidence.

51. The Claimant invited the Court to consider that this evidence was demonstrative of a propensity to engage in fraudulent conduct. For the purposes of a civil trial, such evidence can be termed as Similar Fact Evidence. This type of evidence must meet numerous criteria before same can be considered by the Court.

The law on similar fact evidence and its use in civil trials

52. In the case *of* ***R v Handy [2002] 2 SCR 908*** the Court stated at paragraph 82 a number of factors which should be taken into consideration with reference to similar fact evidence and outlined the issue as whether or not the information is "connected" to the material event. The Court stated as follows:

> *"The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. Factors connecting the similar facts to the circumstances set out in the charge include:*
>
> *1) proximity in time of the similar acts*

2) *extent to which the other acts are similar in detail to the charged conduct*
3) *number of occurrences of the similar acts*
4) *circumstances surrounding or relating to the similar acts*
5) *any distinctive feature(s) unifying the incidents*
6) *intervening events*
7) *any other factor which would tend to support or rebut the underlying unity of the similar act" [citations omitted]*

53. The correct test to determine the admissibility of similar fact evidence/evidence of propensity in civil proceedings was outlined in **Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] 1 All ER 763 (CA)** at 766 where the Court said as follows:

"The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side had fair notice of it and is able to deal with it."

54. The House of Lords in **O'Brien (Respondent) v. Chief Constable of South Wales Police (Appellant) [2005] UKHL 26** at paragraphs 4 and 5 stated that:

"4. […]Thus in a civil case such as this the question of admissibility turns, and turns only, on whether the evidence which it is sought to adduce,

assuming it (provisionally) to be true, is in Lord Simon's sense probative. If so, the evidence is legally admissible. That is the first stage of the enquiry.

5. The second stage of the enquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole."

55. At the time that the decisions in **Mood Music** and **O'Brien** *supra* were issued, the test for admissibility in criminal proceedings was that the evidence must have a striking similarity or enhanced relevance. The Court in **O'Brien** stressed that the rules for admissibility in civil proceedings should be a lot more relaxed and stated at paragraph 53, that once the evidence is relevant and potentially probative of an issue in the action it is admissible. It is important to note that the test in criminal proceedings is now much more relaxed, and that evidence of bad character, including evidence tending to show a propensity to commit the offence for which the accused is charged, is now routinely admitted in

criminal proceedings in accordance with the amendments to the **Evidence Act, Chap 7:02** which came into effect with the passage of **Act No. 16 of 2009**. The effect of these amendments in respect of propensity evidence is that in criminal proceedings (where there is significant risk of prejudice to a person accused of a criminal offence) previous misconduct is now routinely admitted despite those said risks.

56. In civil cases, a Claimant can adduce similar fact evidence consisting of evidence of the Defendant's misconduct on other occasions in order to help establish that what he is claiming is more likely than not to have occurred. As was held in **O'Brien**, such an approach is based on rational common sense and the trial judge in determining issues ought not to depart from the process of thought that a rational fair minded person ought to take. Lord Bingham of Cornhill stated at paragraph 4 as follows:

> "4. That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probable can scarcely be denied. If an accident investigator, an insurance assessor, a doctor or a consulting engineer were called in to ascertain the cause of a disputed recent event, any of them would, as a matter of course, enquire into the background history so far as it appeared to be relevant. And if those engaged in the recent event had in the past been involved in events of an apparently similar character, attention would be paid to those earlier events as perhaps throwing light on and helping to explain the event which is the subject of the current enquiry. To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow. If such a person would, or might, attach importance to evidence such as this, it would require good reasons to deny a judicial decision-maker the opportunity to consider it. For while there is a need for

some special rules to protect the integrity of judicial decision-making on matters of fact, such as the burden and standard of proof, it is on the whole undesirable that the process of judicial decision-making on issues of fact should diverge more than it need from the process followed by rational, objective and fair-minded people called upon to decide questions of fact in other contexts where reaching the right answer matters. [...]"

57. Evidence of similar conduct on prior or subsequent occasions, may be of assistance in determining the plausibility of the facts in issue. In **Hales v Kerr [1908] 2 KB 601** the Court was asked to make a finding of negligence against the Defendant barber. The case was that the barber's dirty razors had caused the Claimant to develop 'barber's itch'. The trial judge allowed evidence from two other clients who had developed the same disease after being shaved by the Defendant in the month prior to the Plaintiff. Channell J was of the view that where the evidence was of a practice to do, or omit to do, a particular act, and the material issue was the continuation (or not) of that practice, then evidence as to the continuation (or not) of that practice was 'always' admissible. It is admissible to establish that it's occurring (or not) on a particular occasion was not mere accident or an isolated event. Channel J clearly regarded the evidence as relevant and probative, such evidence, it was said, gave rise to a 'legitimate inference' that the barber's instruments were not kept clean. This circumstance, in turn, was strongly suggestive of negligence.

58. Similarly, in the case of **Mood Music**, a case of copyright infringement, the Court admitted similar fact evidence which amounted to evidence of other copyright infringements by the Defendant. The Court considering the evidence held that it may be mere coincidence in one case but given the fact that it had occurred more than once, it is very unlikely to be coincidence. The evidence

of similar fact was the tipping point in the case as it rebutted the Defendant's claim that the infringement was mere coincidence.

59. Similar fact evidence can be especially probative in cases where a party's state of mind is relevant such as cases involving malice or fraud. In **O'Brien**, at paragraph 7, Lord Bingham of Cornhill stated as follows:

> "His Honour Judge Graham Jones and the Court of Appeal were in my opinion right to regard the evidence which Mr O'Brien seeks to adduce as potentially probative, and so admissible. Mr O'Brien contends that, in the course of investigating the murder of Mr Saunders and prosecuting him and his co-defendants for that murder, named officers for whom the Chief Constable is responsible resorted to specific methods which were oppressive, dishonest and unprofessional. Accusations of such gravity must be clearly proved, and proof could never be easy. The primary evidence must relate to how Mr O'Brien and his co-defendants were treated. But if he were able to show that these same officers had, in the earlier cases of Griffiths and Ali, resorted to the same or similar methods in order to try and obtain admissions and convictions, his hand would be significantly strengthened: put technically, the matter which requires proof would be more probable." (emphasis mine)

60. In **Mitchell v. News Group Newspapers [2014] EWHC 3590** the Court had to determine an application by the Claimant, a British MP, to exclude details of some seventeen (17) previous allegations of improper and highhanded behaviour on his part which had been pleaded by the Defendant in an action for defamation. At paragraph 65, Mr. Justice Warby explained:

> "65. […]Mr Millar submitted that the incidents are evidence of a propensity or tendency on Mr Mitchell's part to push at the enforcement of security rules by junior police officers and to react adversely – testily or angrily –

and to threaten consequences. Although the degree of anger and the degree of offensiveness were greater on 19 September 2012 than on previous occasions, his reactions bore similarities to his behaviour on previous occasions. To that extent these were incidents of an "apparently similar character" to the incident in issue. He submitted that, looked at as a body of evidence, the evidence of those incidents goes beyond what Mr Mitchell has been prepared to admit and that if established they are potentially probative of the case for NGN and PC Rowland.

66. I accepted the submissions of Mr Millar, in respect of a majority of the alleged incidents. I asked myself whether the evidence, assuming it provisionally to be true, might lead to the conclusion that events on the evening of 19 September 2012 were more likely to have unfolded in the way alleged by PC Rowland and NGN, rather than as alleged by Mr Mitchell. I concluded that the answer was that it might.

72. My conclusion was that the evidence that I found to be relevant should be admitted. I did not consider it appropriate to rule on issues of credibility at the PTR. The evaluation of the evidence is a matter for trial. However, I did not believe the trial would be distorted or unbalanced by the admission of this evidence. The incidents alleged were all relatively brief, and the evidence in support of them quite narrowly confined. The evidence, if properly managed at trial, should not take up a great deal of time.

73. I did not consider there would be unfair prejudice to Mr Mitchell. He has been able to plead a positive case as to the nature and extent of his adverse reactions to what he perceived as obstruction from police officers. His witness statement addresses specifically the allegations about the November 2005 incident at the Palace of Westminster and about his

conduct on the African visits. Mr Price's submissions showed that he is able on behalf of Mr Mitchell to test much of the evidence by reference to documents. The trial judge can give appropriate weight to the evidence, making due allowance for the passage of time and any restrictions on Mr Mitchell's ability to challenge what is said. Moreover, Mr Mitchell will be able to rely on the substantial number of witness statements he has obtained and served containing evidence to the effect that he is habitually courteous and respectful towards others, including the police. […]"

61. Similar fact evidence was also admitted in **GH Cornish LLP v. Smith [2013] EWHC 3563 (QB)**, a harassment claim, as evidence of the Defendant's propensity to harass the Claimant.

62. In **Gulati and others v. MGN Ltd [2013] EWHC 3392 (Ch)**, a phone hacking case, the Defendant applied to strike out similar fact evidence consisting of numerous allegations of previous misconduct on the part of the Defendant. The Court concluded that the evidence was potentially probative and refused the application. The Court stated:

"**[18]** Applying them to the criticisms that are made of para 5, and viewing the pleadings as relating to evidence that would in due course be sought to be led, it is immediately clear that the criticisms are, on the whole, ill-founded. Many of the criticised paragraphs relate to matters which are plainly capable of being relevant to the particular hacking claims relied on by the individual Claimants. Most of the sub-paragraphs are references to the knowledge in the industry (and some in Mirror Group titles) of the ability and propensity to hack phones, some sub-paragraphs actually referring to listening to messages. Indications by an editor that that has gone on in some cases would seem to me to be relevant to a claim that it

had gone on in different case. Any "rational, objective and fair-minded person" might come to the conclusion that it is relevant to any particular cases that this sort of conduct has gone on in relation to others. It does not prove it in any particular cases, of course, but it would be wrong to exclude evidence of those similar fact matters (which is in substance what Mr Browne invites me to do), at least at this stage in the action.

[19] Weight is, of course, a different matter. So is case management of the issue. One point touched on in argument was how disclosure was to be handled in the face of broad-based allegations of phone hacking in a lot of other cases. That is an important point. For example, at first blush it would seem to be excessive to order disclosure in relation to all stories about private lives of celebrities to see how many involved phone hacking sources. Some controls would have to be put on that exercise. But that is a case management issue, not a relevance or admissibility issue."

63. **The cases demonstrate that similar fact evidence can be relevant in so far as it can assist the Court in a determination as to the propensity of a person to commit certain acts or to omit to do a certain act. In cases where a person's state of mind is relevant and especially where fraud is alleged, evidence of similar conduct may be central to a determination of whether the action complained of was innocent or not. The adoption, for example, of a consistent method can be useful evidence of propensity which can then help a Court to determine the inherent plausibility or probability that the Defendant may have committed the acts alleged. This type of evidence does not however obviate the evidential burden placed upon the Claimant to establish the actual allegations on a balance of probabilities.**

The Defendant's evidence

64. The Defendant denied that he ever created any of the fraudulent invoices or submit same to the Claimant. He was steadfast in his denial, affirmed his innocence and denied ever sending any other person to encash cheques or collect funds save and except where it was authorised by David Sobrian. Moreover, he further denied ever sending couriers to collect funds from cheques which were encashed and he also denied forging any documents or signatures.

65. The Defendant stated that he was bullied during the course of the partially recorded meeting and claimed that he was not given the opportunity to speak. He was also steadfast in his denial of the production of fraudulent invoices and he explained that the differences in the John Dickenson invoices were based on the division from which the order was placed. That division, he said, dealt with various brands of stationery and used different letterheads.

66. The Defendant also denied that the decisions which flowed from the production of his invoices were based on trust. Instead, he asserted that the various persons in the process chain each had their respective roles and would have conducted their own due diligence.

67. The Defendant accounted for the "gifting" of phones to staff at the Claimant company by stating that free phones, otherwise referred to as extras, were given from Bmobile upon renewal of the corporate plan.

68. When questioned about his time at Label House, the Defendant affirmed that he was not there for a long time and denied that he was generally a deceptive person.

69. The Defendant instilled in the Court an unshakable feeling that he was not a witness of truth. The Court formed the view that he used charm, his personality and willingness to be of assistance to systemically develop relationships with his superiors and with co-workers with the calculated objective of gaining their trust and confidence. The Court found as a fact that the Defendant developed the art of manipulation and gained the confidence of Sobrian and others at the Claimant company and he perfected a scheme of presenting fraudulent invoices and encashing cheques.

70. It is settled that the law implies certain duties into an employment contract. One of these duties is the mutual duty of trust and confidence. In **Attorney General v Blake (1998) 2 WLR 805 at 814** Lord Wilkinson stated:

> "There is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation. The most important of these is the relationship of trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another. The relationship between employer and employee is of this character. The core obligation of a fiduciary of this kind is the obligation of loyalty. The employer is entitled to the single-minded loyalty of his employee."

71. In **Roger Carrington v The University of Trinidad and Tobago CV2016-03482** the Court recognized that a general duty of honesty is a fundamental principle of contract law.

72. In **Astor Management AG (formerly known as MRI Holding AG) and another v Atalaya Mining plc (formerly known as Emed Mining Public Ltd) and others [2017] EWHC 425 (Comm)** the Court stated that:

> "A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people. This is a lesser duty than the positive obligation to use all reasonable endeavours to achieve a specified result which the contract in this case imposed."

73. Lord Steyn in **First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] BCLC 1409 at 1410** opined as follows:

> "A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract. It affords no licence to a judge to depart from binding precedent. On the other hand, if the prima facie solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness. Having considered the law it is evident

that there exists an implied obligation ,as a matter of law, that with respect to any employment contracts, the duty of good faith is paramount. This duty applies in relation to both employer and employee."

74. On the evidence the Court found as a fact that the Defendant conceptualised and executed fraudulent schemes. He did not act honestly or in good faith nor did he act with the degree of loyalty, trust and confidence expected, by virtue of his employment contract. Instead he adopted a course of conduct which was calculated and by virtue of which he stole money from the Claimant and he breached his employment contract.

75. In ***Jennifer Josephine Chance, Dirk Waterman and Sean Chance CV2016-03382***, the law on deceit at paragraph 73-77 was surmised as follows:

> "73. In Derry v Peek, Lord Herschell considered the various authorities on the action of deceit and stated the following: "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false,

has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

76. Lord Herschell considered that a want of care would not amount to fraud and he stated that:

> "In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds."

77. In **Singh v Singh and Tai Che** Narine J (as he then was) described the test to be applied in cases of fraud as:

> "The burden of proving fraud lies on the person who alleges it. It must be distinctly alleged and distinctly proved. The standard of proof is on a balance of probabilities. However, the standard is flexible, **and requires a degree of probability commensurate with the seriousness of the occasion. The more serious the allegation the more cogent is the evidence required to overcome the likelihood of what is alleged**. The very gravity of an allegation of fraud is a circumstance which has to be weighed in the scale in deciding as to the balance of probabilities." (emphasis added)"

76. Having considered the evidence, this Court is satisfied that the Claimant established on a balance of probabilities that the Defendant engaged in fraudulent conduct and he prepared and encashed fraudulent invoices. Having misappropriated company funds he even admitted same during the second meeting.

Unjust enrichment

77. **Halsbury Laws of England 5th Edition (7) paragraph 521** states that:

> *"Where the claimant performs work for the Defendant or supplies goods to the defendant under a contract which is subsequently discovered to have been void, the claimant may be entitled to recover the value of the work done either on the basis that the work was done under a mistake or on the ground that the fact that the contract was void itself gives the claimant a right to recover the value of the work so done. The defendant must have been enriched as a result of the work done or goods supplied."*

78. In ***Chitty on Contract Vol.1*** at paragraphs 20-072 the authors state that:

> *"Where however, goods or services are provided by the claimant who has substantially performed the contract, the contractual regime still governs the award of remedies despite the repudiation of the contract. The creation of such a distinction dependent on the nature of the enrichment received by the defendant is difficult to defend…… In Sopov v Kane Constructions Pty Ltd (No.2) the Victorian Court of Appeal held that where a building contract had been repudiated by the landowner after building work had been substantially performed, the builder could elect to claim a quantum*

meruit rather than compensatory damages, although the court only reached this decision because the judges felt bound by authority."

79. ***Halsbury's Laws of England 5th ed. Vol. 8 para 410 states, 414 and 415*** *states that:*

> *'It is now generally accepted that there are four stages to any restitutionary claim: (1) the defendant must have been enriched; (2) the enrichment must have been at the expense of the claimant; (3) that enrichment must have been unjust; and (4) consideration must be given to any applicable defences. The claimant must satisfy the court that the first three elements of the claim have been satisfied. All three must be satisfied before a restitutionary claim can succeed.'"*

80. In **Kleinwort Benson Ltd. v. Lincoln City Council (1998) 4 All ER 513 at 560** Lord Hope of Craighead stated:

> "*The answer which is given to it will have significant implications for the future development of the law of restitution on the ground of unjust enrichment. In my opinion the proper starting point for an examination of this issue is the principle on which the claim for restitution of these payments is founded, which is that of unjust enrichment. The essence of this principle is that it is unjust for a person to retain a benefit which he has received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive."*

81. On the facts of the case before it, the Court felt that the principal of unjust enrichment did not apply as the claim against the Defendant was not one which was premised on a quantum merit basis.

DAMAGES

82. The standard measure of damages is the loss suffered as a result of the deceit: that is, such sum as will put the Claimant in the position he would have been in if he had not relied on the Defendant's statement **Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 at 167** .

83. Lord Blackburn in **Livingston v Rawyards Coal Co [1880] 5 App.Cas 25 at 39** stated that when damage is done maliciously or with full knowledge that the person doing it was doing wrong "*you would say everything would be taken into view that would go most against the wilful wrongdoer"*.

84. In contract, the wrong is occasioned by the breaking of the contract and the Claimant is entitled to be put into the position he would have been, had the contract not been broken .

85. The recoverable damages therefore is the amount misappropriated by the Defendant as a result of the cashing of cheques by virtue of his engagement in the fraudulent schemes.

86. It is trite law that the Claimant must prove special damages, however the level of proof varies according to the nature and circumstances of the case. The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages. The Court in

determining the level of proof required for special damages can adopt a fairly flexible approach. In examining the reasonableness of the evidence required, the Court must also consider the availability of contradicting evidence.

87. As Bowen L.J. stated in **Ratcliffe v Evans (1892) 2 Q B 524, 532 – 533**

> "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."

88. The Court must be reasonable and realistic when determining whether the damage alleged has been proved. Such an approach was succinctly outlined by the Court of Appeal in **Uris Grant v Motilal Moonan CA Civ 162/1985**. In this case the appellant's furniture was destroyed when a vehicle ran off the road and crashed into a house in which she lived. She claimed special damages in respect of the destroyed chattels without producing receipts or a valuation in respect of the prices of the chattel lost. The Court allowed the claim on the basis that there was a prima facie case of the fact of loss and cost of replacement upon which no evidence

had been called in rebuttal. The court found that the damage claimed had been proven and stated as follows:

> *"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."*

89. Similarly, in **Gunness and Another v Lalbeharry Civ Appeal 41 of 1980** t. Brathwaite JA stated at page 2:

> *"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."*

90. This point is also referenced in **McGregor on Damages 18th Edition 8-0002**]:

> *"The standard demanded can seldom be that of certainty. Even if it is said that damage must be proved with reasonable certainty, the word "reasonable" is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount"*

91. In **David Sookoo, Auchin Sookoo v Ramnarace Ramdath Cv. App. No. 43 of 1998** , the Honourable Chief Justice De La Bastide ,stated that "*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.*" He further stated "*that one would expect that if receipts and bills or estimates are produced, then unless there is some good reason for the other side disputing the figures shown in these documents, they will be accepted and agreed. Failure to act reasonably in this regard should attract some sanction in costs*."

92. **This case before this court involved a large-scale fraud which occurred over numerous months and at several different stores located throughout the country. A perusal of the bank statements revealed the voluminous number of transactions that Ms. Surijlal had to sift through in an attempt to locate specific transactions and she explained in re-examination, that it is not at all uncommon, in audits of this kind for there to be missing documentation.**

93. **As was stated in the passage from McGregor on Damages cited above, the Court is entitled to draw reasonable inferences from the evidence before it in determining whether loss has been proven.**

94. **In respect of the fraudulent invoices for which Ms. Surijlal was unable to locate the bank transaction, the Court felt that the Claimant did not discharge the burden the proof placed upon it and was not prepared to infer or assume that the cheques in respect of which no bank records were adduced were in fact encashed by the Defendant.**

95. **On a balance of probabilities, the Court was however satisfied that the Claimant adduced reasonable proof of some of the loss alleged.**

96. **The actions of the Defendant cannot be condoned. In this society fraud and white collar crime has not been prosecuted with any measure of alacrity. Evidence was adduced before this Court that the Defendant's actions were reported to the fraud squad. At the trial the court was told that the Claimant received no notification as to the status of the report which was made to the Fraud squad. It is evident that a new approach to lawlessness has been engaged by the Trinidad and Tobago Police Service and it is hoped that fraudulent conduct would be prosecuted with precision. There is a preponderance of evidence in this case which should be reviewed by the police. Fraudulent and corrupt activity for far too long has plagued this Republic. Unless this manner of indefensible conduct is curtailed, our fullest potential would not be realised, and mediocrity would continue to define us. In the circumstances, the Court hereby directs that the Registrar of the Supreme Court shall forward a copy of this judgment to the Commissioner of Police within 14 days of the date herein for his attention.**

97. **In the circumstances and in accordance with the reasons outlined this Court hereby orders that there shall be judgment in favour of the Claimant and the Defendant shall pay to the Claimant the sum of $2,294,803.83 which is the amount claimed by the Claimant, less the sums found to be unproven by the Court ($3,982,637.70-($549,633.88+$1,138,199.99). Interest is to accrue on this sum at the statutory rate of interest from the date of this judgement**

98. **The defendant shall also pay to the claimant costs calculated on a prescribed cost basis.**

_____

FRANK SEEPERSAD

JUDGE