IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO. 513 of 2014

ROBERT'S GROVE LTD. **CLAIMANT**

AND

JEAN-MARC TASSE **DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

2016
Hearings
8th March
9th March
6th April
Submissions
18th April – Claimants
19th April – Defendants
Decision
19th May

Mr. Eamon Courtenay, SC with Ms. Iliana Swift for the Claimant.
Mr. Derek Courtenay, SC with Mr. Philip Palacio for the Defendant.

Keywords: Company – Directors – Duties – Misappropriation of Funds – Breach of Fiduciary Duty – Taking of an Account – Damages – Pleadings – Defence – Extraordinary Circumstances – Companies Act Cap 250 (The Act)

JUDGMENT

1. On the beautiful Placencia Peninsula in Belize you will find The Robert's Grove Beach Resort (The Resort). It is owned and operated by Robert's

Grove Ltd (RGL). Jean Marc Tasse is a director of RGL and the managing director of The Resort.

2. RGL has as its shareholders, Sandhill Resorts Holdings Ltd. (9,999 shares) and Sandhill Ltd. (1 share). Sandhill Resorts Holdings Ltd. is owned by Sandhill Ltd. (667 or 666 shares - two certificates with same date but different figures) and Mannsfeld Family Partnership Belize Ltd. (MFPBL) (333 shares). Sandhill Ltd. has two shareholders Mr. Jean Marc Tasse (55 shares) and Mr. Michael Kramer (45 shares). It seems that with the exception of MFPBL the other companies form part of a group of companies, moulded and controlled mainly by Mr. Jean Marc-Tasse.

3. RGL says that from about October 20th, 2011 Mr. Tasse has been using The Resort as his own personal piggy bank, withdrawing funds for his personal benefit and using and disposing of its property arbitrarily and for his own gain. All in breach of his fiduciary duties as a director and/or trustee of the company. More specifically, RGL says that without its knowledge or authorization Mr. Tasse:

    1. *On November 18, 2011, the Defendant used US$23,230.48 of the Claimant's funds to purchase a land Rover for the Defendant's own personal use.*

    2. *On November 30, 2011, the Defendant used $150,000 of the Claimant's funds to purchase a Condominium, No. 23 Parcel 44 H4 Block 36 of the Placentia North Registration Section to his personal use.*

    3. *On December 5, 2011, the Defendant caused $200,000 of the Claimant's funds to purchase Parcels 836, 837, 838 and 839 in Block 36 of the Placentia North Registration Section from Dale Harshbarger, ("the Surfside Property").*

4. *During April to November 2012, the Defendant used $86,540 of the Claimant's monies to pay for the construction of the Defendant's personal home.*

5. *On September 13, 2013, the Defendant paid his personal attorney $6,000 from the Claimant's funds.*

6. *On October 17, 2013, the Defendant used the Claimant's funds to pay an unauthorized commission of $8,700 to himself.*

7. *On December 18, 2013, the Defendant caused $200,000 of the Claimant's money to be wire transferred to Dewey Dale Harshbarger.*

8. *On or about August 2013, the Defendant transferred the Claimant's property being Parcel 3257 in Block 36 of the Placentia North Registration Section to himself without any payment to the Claimant. Lot 9 was valued at $337,500.*

9. *During August 2011 to June 2014, the Defendant withdrew $649,466 from the Claimant's Accounts to his company, TMI International Inc.*

10. *During August 2011 to March 2012, the Defendant advanced BZ$403,362 from the Claimant's Accounts to his company, TMI International Inc.*

11. *From August 2012 to June 2014, the Defendant used $669,973 of the Claimant's funds to pay for his personal credit card bills.*

12. *On May 10, 2014, the Defendant used $78,657 out of the Claimant's funds for the payment of bills in connection with his personal ownership and use of the Surfside Property.*

13. *In total, between October, 2011 and June, 2014, the Defendant in breach of his fiduciary duties and/or in breach of trust to the Claimant, used, acquired or disposed of no less than $2,842.228 in value of the Claimant's funds and property for his personal use, interest and benefit without the Claimant's knowledge or authorization.*

4. When the Company became suspicious, a director's meeting was convened on the 21st day of August, 2014. Mr. Tasse, although he acknowledged the invitation, was absent where and when it was resolved to relieve him of his signatory rights to The Resort's bank accounts as well as most of his other managing director's duties. RGL now wishes an account to be taken and require Mr. Tasse to make amends for any misappropriation found.

5. Mr. Tasse does not deny using RGL's funds, but he denies that he misappropriated those funds. He refers to what he calls 'an advance' which he made to RGL in 2010 and 2011 of approximately $800,000 BZ. Most of the alleged misappropriated funds, he says, were paid from this personal advance account held or maintained with RGL. He goes on to dispute the legality of the director's meeting held in his absence on the 21st August, 2014 and states that Boris Mannsfeld is not a director of RGL.

Preliminary Issue:

6. The Defendant's pleaded case relied on a document prepared by the then General Manager of The Resort one Cindy Linarez - (The Linarez memo) It referred to that document rather than setting out the grounds of the Defendant's case. That same document, although stated in the defence to be attached, was absent, and it was not put into evidence by the defence. Ms. Linarez did not give testimony either. What ensued is a demonstration of the difficulties that arise when a case is very badly pleaded.

7. In an earlier written decision by this court, the Defendant's application to amend the defence during trial was denied. It therefore would ordinarily mean that his entire defence failed. But this was an extraordinary situation. Before trial, the parties had agreed to the appointment of a joint expert to review the account of RGL. That exercise had been done on the premise of the Defendant's alleged advance of $800,000 and the parties had most definitely joined issue on this.

8. Furthermore, counsel on both sides, in their haste to belatedly comply with the case management order to agree the documents to be used at trial, blindly agreed every single document disclosed except the Linarez memo.

This meant that even documents not attached to witness statements were also agreed. A most unsatisfactory position for the parties and the court. These, of course, included documents disclosed by the Defendant in support of the allegation of the existence of the $800.000 advance account. They were all existing bits of evidence before the court.

9. When the court considered the state of the matter it strongly urged the parties to effect a resolution. A decent adjournment was given to pursue attempts, all of which proved unsuccessful.

10. On the Claimant's application, the court did its best to exclude from the Defendant's testimony most of the references to The Linarez memo and the advance. However, in light of the expert report which formed an integral part of the evidence and the fact that the parties had joined issue, the purported advanced account could not be expunged or ignored in its entirety.

11. The court relies on ***Slater v Buckinghamshire County Council [2004] EWCA Civ 1478, LTL 10/11/2004*** about which Blackstones Civil Practice 2013 states at paragraph 23.7:

> *"… it was held that the trial judge was entitled to make a finding of fact on an issue which had not been specifically pleaded, but which the parties clearly regarded as live and crucial to the case, and that they adequately dealt with at trial."*

12. Then again at paragraph 24.24 under the heading 'Unpleaded Allegations':

> *"However if a factual issue has been adequately dealt with at trial and is clearly regarded by all parties as a live issue which is crucial to the case, the judge is entitled to make a finding of fact, even if the issue was not raised in the statements of case …"*

13. The court is not saying that the rules relating to the contents of a defence ought to be flouted. Nor is it irreverently trampling on Rule 10.7 which

indicates the consequences for not properly setting out your defence. Rather, it acknowledged the special circumstances of this case and endeavoured to do what seemed just. Paragraphs 5, 10 and 11 (part) of Mr. Tasse's first witness statement and paragraphs 3, 7, 10(L) 11 and 12 of his second witness statement were accordingly struck out.

14. Moreover, to my mind an application to strike out the defence would have been quite appropriate and more than likely successful once made after the first case management conference, even at the pretrial review. That, not having even been attempted, left the badly pleaded defence as a proper statement of case demanding the court's attention. For this very reason the Claimants submission, that if successful, their costs ought to be awarded or an indemnity basis, is denied. The power to award costs on a solicitor and client scale is within the discretion of the court. However, it is a discretion to be exercised in special and rare cases. This case has not been found to be appropriately special or rare.

The issues for the court to consider are:

15. 1. Who are the directors of RGL?
    2. Whether Jean Marc Tasse misappropriated RGL's funds between 2011 and 2014.
    3. Whether this misappropriation was in breach of his fiduciary duty to RGL.
    4. If there was a breach what remedies are available to RGL.

Who are the Directors of RGL:

16. Section 77(1) of The Act directs that a list of directors shall be sent to the Registrar from time to time notifying of any change among its directors or

managers. Section 76 directs that the acts of a director shall be valid nothwithstanding any defect which may afterwards be discovered in his appointment or qualification.

17. The evidence as provided reveals that prior to the meeting of September 6th 2014 Jean Marc Tasse, Michael Kramer and Boris Mannsfeld were the directors of RGL on record at the Company Registry. The September 6th meeting purported to increase the composition of the board for Sandhill Resort Holdings Ltd not RGL and to relieve Michael Kramer and Boris Mannsfeld of their duties.

18. Although The Act does not define a corporate group it is typically made up of a holding company and its subsidiaries. The English Court of Appeal decision in ***Adams v Cape Industries plc [1990] Ch 433*** reaffirmed the principle of separate legal entities within a corporate group. Slade LJ said at page 532:

> *"There is no general principle that all companies in a group are to be regarded as one. On the contrary the fundamental principle is that 'each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities.'* ***The Albazero [1977] AC 774, 807 per Roskill LJ****."*

19. Consequently, any resolutions made for Sandhill Resorts Holding Ltd. could not change the directors of RGL. In the absence of any evidence to the contrary, the directors of RGL are Jean Marc Tasse, Michael Kramer and Boris Mannsfeld. If there has been an error, then it is for the company to correct, not for this court to interfere.

Did Jean Marc Tasse misappropriate RGL's funds:

20. In an attempt to assist the court in the consideration of this matter all parties agreed that a financial review be done of RGL. They agreed on a joint expert and jointly instructed him by preparing his terms of reference which were approved by the court. That report will be considered later

The Evidence:

21. The Claimants presented one witness (two witness statements) – Michael Kramer, a director of RGL, who says that he, with Mr. Tasse, were the original purchasers of The Company on January 22nd, 2011. By that time The Resort had been doing business for some 14 years. He does not state the sum of his investment or when he made such investment but he values it at 50%. He claims that together, he and Mr. Tasse were directors of RGL until a Shareholder's Agreement of 20th October, 2011 (The Agreement) made between Mr. Tasse, Sandhill Ltd., and Mannsfeld Family Limited Partnership II (MFLP ll). By Clause 2 of The Agreement Boris Mannsfeld was also appointed a director of RGL. It is clear from a perusal of The Agreement that Mr. Kramer is also a party thereto. Further, that Clause 2 appoints a representative of MFLP II to the board of directors of Sandhill Ltd. The Agreement has absolutely nothing to do with RGL. How Boris Mannsfeld became a director of RGL is unknown but irrelevant in any event, since he is registered as such in the company registry.

22. At some point serious concerns arose when a review of RGL's financial statements revealed a deficit of $1,228,866. A preliminary investigation disclosed the possible misappropriation of Company funds by Mr. Tasse. Having discussed the issue with his fellow director, Boris Mannsfeld, it was

agreed that Mr. Tasse ought to be removed from the operation of The Resort. To that end a notice of a Board of Directors meeting was issued on August 19, 2014. That notice informed that the meeting would be held on 21st August, 2014. Although receipt of same was acknowledged by Mr. Tasse, he never attended and resolutions were accordingly made in his absence. These included the removal of Mr. Tasse from an operational role with RGL and as a signatory of any of its bank accounts. He was no longer allowed on RGL's premises.

23. Mr. Kramer goes on to explain that an in depth review was conducted of RGL's accounting records and it revealed that funds had been misappropriated by Mr. Tasse. Those, have been particularized at paragraph 2 of this judgment. He said that at no time were any arrangements made for Mr. Tasse to inject $800,000 into the company for improvement. There have never been any receipts, cancelled checks, wire transfers or credit card charges produced to show payment of such a sum. He denied that any arrangements had ever been made with RGL for an advance or loan account in Mr. Tasse's name.

24. He admitted that for expediency sake Mr. Tasse used his personal credit card to purchase goods for The Resort. Further, Mr. Tasse refused to get a company credit card as he wanted the miles which accompanied the use of his own personal card. He explained that payments by RGL to Mr. Tasse's credit card account were always made in a lump sum with no commentary in the accounts to distinguish between personal and business expenses.

25. Under cross-examination Mr. Kramer opined that to a certain extent there were adequate mechanisms in place for the oversight of the accounting

system at RGL. Amazingly, this statement came immediately on the heels of his proffering that he was not intimately involved in the day to day running of RGL; and just before he agreed that there were no consistent monthly financial reports generated for the directors to examine. The Quickbooks accounting system, he accepted, was always accessible to him as a director and the advance account ledger did form part of that system. However, he offered that the system was so huge, he may not have seen it. He also agreed that there was money owing to both Mr. Tasse and himself as directors, with perhaps more being owed to Mr. Tasse. He was not asked to elaborate.

26. I found this witness to be honest and forthright, but noticed how he seemed oblivious of his own duties and responsibilities as a director. This caused serious concern.

27. For the defence, Jean Marc Tasse filed two witness statements. He testified to being the majority beneficial owner and principal investor in The Resort. He says he liquidated his assets in the United States in order to invest in the tourism industry of Belize. The Resort is the second of his endeavours. He negotiated and concluded its purchase between 2010 and February 2011. Prior to its acquisition and with the consent of the then owners, he invested approximately BZ$800,000 in The Resort.

28. After the change of ownership he gave all his personal receipts evidencing this investment to a Mr. Rhaburn of the auditing firm of Wilfred Rhaburn & Co. in order for the sum to be included in RGL's annual audited report. He does not say when this was done, but it is his testimony that Mr. Rhaburn misplaced those receipts thereby leaving him in a most precarious position.

This unfortunate turn of events led to the eventual breakdown of his relationship with the auditing firm and they subsequently parted ways. Nevertheless, his advance was duly reflected in the audited financial report for the years 2012 and 2013. Those reports, though available to all the directors, were never signed by the board. He was unable to recall whether they had ever been approved by the board.

29. The Advance was subsequently removed, from the auditor's report at Mr. Tasse's own behest. He said he elected to do this to satisfy the representative of the newly introduced investment group MFPBL, as neither Mr. Rhaburn nor Ms. Cindy Linarez could produce the receipts to support the advance. His intention was to remove same until such time as he could find the misplaced receipts. In fact, he exhibits an e-mail, addressed to Michael Kramer from Wilfred Rhaburn, which states:

> *"If I remember correctly what happened, at the time of Jean-Marc and yourself acquiring Robert's Grove in February 2011, the QuickBooks data file as maintained by Rob was in quite a mess. As such in August of 2011 I believe, it was decided to start a new QuickBooks data file. As part of recording the beginning balances, Jean-Marc represented to me (verbally) that he had place BZ$800K into the company. As this was a multi-million dollar transaction, funded largely by the Atlantic International and Atlantic local, the idea of Jean-Marc putting in BZ$800K seemed believable. So I did not have a problem recording it, note that at this time there were only two shareholders, Jean-Marc and yourself. You guys appear to have a good working relationship, so I also did not have problem recording the $800K because based on the size and the transaction, representations and shareholders working relationship, it all seem plausible."*

30. Mr. Tasse accepts that he was in charge of the day to day management of RGL but maintains that the financial administration was the responsibility of Cindy Linarez whom he insists made quite a mess of things. He says *"The Claimant relies on unofficial documents that are skewered to reflect inaccurate account*

of the true position of the finances as they relate to me. The existence of this claim constitutes an attack on my integrity and reputation as a businessman, I have never lied or cheated my partners or have I stolen from our company or business. I have tried always to act solely for the full benefit and profitability of the business in the interest of all its shareholders and employees …"

31. He denies that any Shareholders Agreement or any other agreement limited the powers of the directors of RGL to borrow money from the company or to spend money in excess of a specified sum. He also rejected that a protocol for record keeping and accounting standards existed in relation to RGL at any time prior to February 24th 2014. He says because of the relationship between himself and Michael Kramer (whose shares in RGL he Jean Marc-Tasse paid for), the accounting system was more informal than would have been applied if the interest of strangers had been affected. He also faulted the unreliable Quickbooks data file maintained by the former owners of The Resort. Astoundingly, he adds that when a new Quickbooks data file was eventually opened some of the records were created from data retrieved largely from the memory of those involved.

The Magaña Report:

32. Reynaldo Magaña a senior partner of the accounting firm of Moore Stephens Magaña LLP was appointed a joint expert by Court Order dated 13th April, 2015. He was mandated to conduct a review of all financial documents and accounts relating to the Claimant during the period February 2011 to August 2014 to determine whether funds, if any, were misappropriated by the Defendant and if found, to give the amount of such funds. He was not confined merely to those allegations made in the Statement of Claim.

33. These terms were agreed to by both parties and approved by the court. His report was filed on the 16th July, 2015 with addendums 1 and 2 being filed on the 9th October and 16th December, 2015 respectively. On the 25th September, 2015 he also filed answers to questions put to him by Mr. Tasse. All these documents comprise what will be called collectively The Magaña Report and individually by their specific names.

34. There is no doubt that Mr. Magaña and his team were relevantly qualified and sufficiently experienced for the task at hand. The examination concerned *"the testimony and supporting documents provided by the Claimant and the Defendant and scrutiny of all accounting and financial records of the current case during the time period from October 2011 to August 2014. I performed other procedures as I considered necessary in the circumstances to enable me to express an opinion."* The review was done in phases – an initial assessment then a forensic data analysis and operational assessment.

35. It appears that from the initial assessment Mr. Magaña seems to have been misled by The Agreement. The Agreement, which this court finds does not apply in anyway to RGL. The court's finding is based on the same principles of separate legal entities existing within a group of companies as discussed in paragraph 18 of this judgment.

36. So, having been thus misled, Mr. Magaña proceeded to base his findings of misappropriation in his first report on Mr. Tasse's neglect, as a director, to abide by The Agreement. He termed the offending transactions as unauthorized where the following had not been complied with:

> *"… the unanimous consent of the parties shall be required in respect of any decision not in the normal course of business of the corporation and any and all decisions concerning any of the following matters: 3.1.15 The signing of any agreement not within the*

normal course of business of the Corporation if the amount involved exceeds $10,000."

37. By his first and second addenda he wisely made no mention of The Agreement. Through their cross-examination of Mr. Magaña (with the leave of the court) and their filed submissions, the defence seems to urge that The Magaña Report ought to be disregarded in its entirety. However, the purpose of an expert is to render assistance to the court. The expert offers his knowledge and experience in an effort to help the court to understand the issues of a case and to make a sound decision. The expert offers only an opinion. They cannot determine issues of fact which are in the purview of the court alone.

38. It has always been clear law that the expert's opinion on the ultimate issue is not admissible. Furthermore, irrespective of the expert's experience and standing, the judge must decide what weight his evidence is to be given. Therefore, where Mr. Magaña may have made certain conclusions on a wrong premise, that is not the end of the matter. This goes to the strength of his findings and may prompt the court to place less weight on his evidence where it deems this necessary. It also highlights the need for an expert to pay special attention to the facts they are relying on and to seek the court's assistance if they are unsure. The court nonetheless is allowed to use the content of his report to make its own findings as is its duty.

Consideration:

39. Counsel for the Claimant submitted at paragraph 25 of their closing submissions:

"In the case at bar, it is evident that Tasse continuously took monies from RGL without its approval, Tasse claims these funds were either for the benefit of the

company or as repayment to him. However, he failed to provide any documentary evidence to support his contention."

40. There is no evidence before this court of what approval ought to have been given by RGL nor the form that approval ought to have taken. There is no evidence before the court of what authority a director or managing director of RGL has or does not have.

41. As a corporation RGL is governed by its Article of Association. Directors must act within the powers given in the Articles. They have full powers of management and are only subject to shareholder control in a manner laid down by Statute or the Articles. Nowhere in the evidence were these Articles ever introduced by either party. The precise nature of the rules relating to incurring debt (or even paying commissions for that matter) is unknown.

42. Further, the knowledge imputed to a company is that of its directors. They are the puppet masters. What is certain however, is that where one has the responsibility to care for and protect another's' assets but illegally uses those assets for ones own purpose that purpose is accordingly unauthorized and the use of the assets amounts to a misappropriation.

43. Mr. Kramer, as a director, certainly speaks to his lack of approval of any advance account maintained by RGL on Mr. Tasse's behalf. He maintains that there was no proof of such a loan being made to RGL and rejects the debt entirely. By his own admission (first witness statement) the Defendant accepted that he used RGL's money to purchase a land rover (allegation 1); purchase Villa No. 23 at Robert's Grove (allegation 2), transfer $200,000 on

18th December, 2013 (allegations 3 and 7); pay $86,540 during April to November 2012 (allegation 4); pay $6000 to his attorney on September 13 (allegation5); transfer $649,406 between August 2011 and March 2012 (allegation 9); transfer $403,362 to his own company TMI between August 2011 and March 2012 (allegation 10); pay bills totaling $78,657 in connection with Surfside property on May 10th 2014 (allegation 12).

44. In his second witness statement, made after The Expert Report was released, he claimed that the land rover in allegation 1 was worth much more than RGL had paid and in fact RGL had had the full use of same throughout. He also expressed for the first time that he had bought the land rover himself for US$78,000. What he did not explain was why RGL made payment of US$23,000 to Chase Auto Finance for the said land rover. Moreover, he need not have waited on the expert's report to know the details surrounding the purchase of that vehicle. I rejected this new edition wholesale and did not find the use of the vehicle to be of any importance.

45. As to allegation 2 he said he had only paid $50,000 from his advance account. This was an almost complete back track from his original statement. He also back tracked on allegation 4 by saying those payments were for a Marina at The Resort. The Payments to Ryan Wrobel under allegation 5 he said were for advice in realizing the group corporate structure. He does not explain how this became an expense to RGL alone. Allegation 8, he said, he had directed Cindy Linarez to make a $200,000 deduction from his advance account as payment in full for this property. This therefore means that if no deduction was found in the advance account

that property had clearly not been paid for. The Magaña Report found no corresponding payment of $200,000 into the RGL's books.

46. In allegation 9 he pointed to two amounts in the expert's report which had been paid by cheque to "Hyon" and sought their exclusion as he had no knowledge of and did not authorize either. The transfer or advance to TMI (allegation 10) he said was for onward transmission to condo owners. He presented no proof of this. Certainly TMI would have kept the necessary records of these transactions. He concluded by saying he was certain that the figure of $134,051 found by the expert to be due to RGL under this particular allegation must have eventually been credited to them. Again he brought nothing in support except his word.

47. For allegations 1, 3 & 7, 5, 8 and 12 discussed above, Mr. Tasse relies entirely on that advance account. He must accordingly prove the existence of such an account to legitimize the use of RGL's assets.

48. I considered the Defendant's testimony and found him to be less than honest. Moreover, I rejected the notion of an advance account of $8000,000 or any sum for the following reasons:

1. Mr. Tasse can point to nothing other than his 'say so' and the auditor's report to evidence this $800,000 advance. He claims to have injected this money prior to his actual ownership of The Resort. Consequently, all expenses were incurred before RGL had been acquired. That makes no good business sense at all. Negotiations break down all the time, why risk incurring such expenses before the ink has even been placed, far less had a chance to dry, on the paper.

2. His fellow director Michael Kramer says Mr. Tasse never informed him of any such advance when he became a director of RGL. I believed him. Even assuming Mr. Tasse was brave enough or foolhardy enough to do so, why was his fellow shareholder and director not informed. It seems incumbent upon him to inform of such a sizeable out lay if he intended it to be a loan to a company in which he was not the only shareholder. It is very interesting that nowhere in his pleadings or witness statement does Mr. Tasse ever say he discussed this debt with Mr. Kramer. In fact, he seems to place the onus on Mr. Kramer to recognize the debt in the Quickbooks system or to query the debt when it appeared in the auditor's report. He seemed genuinely affronted that he was, only at this late stage, being asked about it and about his alleged repayment arrangement. Even assuming that Mr. Tasse felt the company was his own, he knew he, himself, was not a direct shareholder or the sole director. He ought to have revealed the existence of the loan as well as the terms and conditions of its repayment. The fact that he never did, raises high suspicion as to the truth of his allegation.

3. Since the purchase of the Company there were originally two directors. They both should have agree such a loan or at the very least sanctioned it by a resolution. There is no evidence of this ever having been done. Mr. Tasse himself admitted that it was never done.

4. Mr. Tasse says he was given permission by the previous owners of RGL to incur the debt. There is no evidence provided of such permission. Nor is there any evidence that RGL was bought with this $800,000 debt. Mr. Tasse does not attest to entering into any contracts with RGL. He provides no evidence that any genuine business services were provided to RGL.

5. What he presented deal predominantly with debts incurred by Sandhill Ltd., Sandhill Resort Holdings, Sandhill, Sandhill IBC and Sandhill Management Ltd., all unrelated to the separate legal entity that is RGL. How could the expenses of some third party be that of RGL? The remaining expenses seem to be closing costs and sums associated with the purchase of RGL and the appraisal of its realty. None of which could possibly be a debt incurred by RGL.

In fact, Sandhill Resort Holdings Ltd purchased RGL. Is that not a debt incurred by the acquiring company? When RGL was purchased, the company and its stock became the assets purchased and fell into the ownership of their purchasers. RGL bought nothing and so such a debt, without more, cannot legally be ascribed to it.

The members of a company are not personally entitled to the benefits nor are they liable for the burdens arising thereby. Their right is to receive their share of the profits from the company once it is solvent. How exactly Mr. Tasse determined these to be debts of the acquired company defies logic and explanation. By the same token why did he not determine the debt to be that of Sandhill Ltd. Moreso, why did he determine that MFPBL was only *"brought on to assist in the development of the resort and partake in its profits…"* (Paragraph 7 of his first witness statement). Why weren't all the due diligence fees etc incurred by MFPBL likewise ascribed to RGL?

6. Expenses relating to a stock purchase agreement for RGL is similarly included. RGL was not part of that agreement how then could it have incurred such a debt? The Defendant hit the proverbial nail on its head in paragraph 11 of their skeleton submissions when they state in relation to another issue:

> *"So that the net effect is that the Shareholders Agreement restrictions regarding expenditure imposed on Sand Hill Resorts Ltd. as from the 20th October, 2011 were not adopted by the Claimant until the 28th March 2014 … it had no applicability to the Claimant until March, 2014."*

They also raised the doctrine of privity of contract and urge that RGL was not a party to The Agreement. This shows that the Defendant is well aware of the fact that each corporation is a separate legal entity. Debts incurred by one cannot simply be ascribed to another without more. Mr. Tasse has not proven that his $800,000 advance was ever "adopted" by the Claimant thereby becoming a debt due from and owing by it.

7. What is even more bizarre is that Mr. Tasse claims Mr. Rhaburn misplaced all of his receipts which evidence the advance yet in his witness statement he expected them to be found by either Mr. Rhaburn or Ms. Linarez. He does not explain how they may have gotten into Ms. Linarez's possession.

8. Then there are credit card purchases by and the transfer of various assets from, Jean Marc Tasse to RGL. These are not substantiated in anyway. Even assuming that Mr. Tasse wrongly felt the company was his alter ego he must have been equally aware that proper records ought to have been kept and reconciliations ought to have been done accordingly.

9. The way in which Mr. Tasse, by his own admission, had figures inserted and then subsequently removed from the auditor's report when it was convenient to him to do so gives his allegation even less credence. Further, had that debt been legitimate he certainly would, in the ordinary course of things, have reacted far differently. It also demonstrated how he had no reservation in manipulating the accounts as it suited his need.

10. A conclusion of The Magaña Report with which I unreservedly agree

was:

> *"I was unable to ascertain that a shareholder loan of BZ$800,00 was payable to the Defendant because there was insufficient data to support the Defendant's claim."*

49. For all these reasons I find that Mr. Tasse never loaned $800,000 to RGL and no advance account ought to have existed. Having so found it becomes obvious that allegations 1, 3, 5, 8 and 12 are accordingly found to be acts of misappropriations by Mr. Tasse.

50. However the expert found a sum of $14,472.51 reimbursed to Sandhill Ltd per customs duties on the said land rover re allegation 1. That sum will be added as it has also been found to be misappropriated. Under allegation 5 the expert only found $3,524.06 as payment towards Mr. Tasse's attorney. That sum and no more is taken as proven. Although under allegation 12 Mr. Tasse admitted using BZ$78,657 for payment of bills related to his Surfside Property, the expert only found proof of $47,500 being transferred from RGL in relation to Surfside. That sum and no more is found to have been misappropriated.

51. Consideration of these particular allegations and Mr. Tasse's use of his blanket defence (advance account) simply fortifies my finding that no such account ever existed.

The Other Allegations and The Magaña Report:

52. Allegation 2 - The Magaña Report did not find that the sum of $150,000 had been used by Mr. Tasse to purchase his condo. However, they did find evidence of a transfer of $150,000 from RGL to Mr. Tasse's personal account. No explanation has been offered by Mr. Tasse for this. The court

accepts that it was transferred for his own use and has therefore been misappropriated.

Allegation 4 – Having considered all of the evidence presented I find that this allegation has not been proven to the required standard and it is, accordingly, rejected.

Allegation 6 – No proof whatsoever has been provided that this commission of $8,700 was unauthorized since the requisite authority remains unknown. It is rejected.

Allegation 7 – It is accepted that this allegation is one and the same with allegation 3 which has been adequately dealt with above. It is likewise rejected.

Allegation 9 – The expert found that a total of $505,600 had been verified. I therefore hold that the sum of $505,600 and no more was misappropriated.

Allegation 10 - The expert found that the sum of $134,051.94 was wire transfers and credit card payments made by customers for reservation bookings at RGL and there was no corresponding deposit made by Mr. Tasse into RGL's account. This court finds that the sum of $134,051.94 and no more has been misappropriated.

Allegation 11 – I have reviewed the evidence provided including The Magaña Report. The transactions seem almost inextricably bound up. I am not satisfied that this entire allegation has been made out, nor am I satisfied with the auditor's conclusion. Michael Kramer himself admitted that Mr. Tasse used his credit card to make purchases on RGL's behalf. Mr. Tasse states the very same thing. It does not mean that simply because a sum had been paid into Mr. Tasse's purported advance account that it had been misappropriated. An account of profit is therefore ordered to be taken of

the credit card payments from August 2012 to June 2014 and Mr. Tasse must pay over to RGL any sums found to have been misappropriated.

New Issues:

53. The Magaña Report revealed additional items which had not formed part of the claim:

A. The sum of $29,848.90 spent on travel. B. The Placencia Princess owned by Mr. Tasse and its maintenance expenses. C. Expenses relating to As You Wish boat owned by Mr. Tasse. D. Expenses relating to Amazing sail boat operating under an agreement between Sandhill Ltd and The Amazing Enterprises Management Ltd.

54. In their written closing submissions counsel for the Claimant asked for The Placencia Princess and As You Wish to be transferred to RGL. It was incumbent on the Claimants to apply to amend their claim to include these new matters. This is a claim for breach of fiduciary duty involving dishonesty on the part of the fiduciary. The court is expected to apply rules similar to those applicable if the claim was for fraud at common law. Fraud action which covers a multitude of claims has a heightened pleading standard. The main purpose of which is to give the Defendant an opportunity to make meaningful responses to the allegations. It requires the Claimant to conduct sufficient in depth investigations to ensure that their allegations of fraud are duly supported by facts. So it must be proven that Mr. Tasse acquired the asset in breach of his fiduciary duty. The Claimant needs to rely on proof of that breach in order to found his claim to that asset. For this reason, the additional items, save The Placencia Princess will not be discussed. Moreso, because Mr. Tasse never spoke to any of the new items

in his testimony nor does it seem (by The Magaña Report) that he was ever given an opportunity to offer an explanation before certain conclusions were drawn.

55. As it relates to the Placencia Princess however, Mr. Tasse gave evidence that this boat was only registered in his name because he had a boat captain's licence. During trial he offered to hand over ownership. The Magaña Report revealed that the boat had been bought and maintained by RGL. On the same premise for allowing certain unpleaded allegations of the defence to be considered; I also make a finding of misappropriation on the Placencia Princess.

56. A consequence of misappropriation is that the participant has incurred a debt to the company and it must be paid. This court therefore finds that the following sums or assets have been misappropriated:

BZ$ 60,932.50	(Allegation 1)
150,000.00	(Allegation 2)
200,000.00	(Allegation 3)
3,524.00	(Allegation 5)
505,600.00	(Allegation 9)
134,051.94	(Allegation 11)
47,500.00	(Allegation 12)
$1,101,608.44	Total

Parcel 3257 Block 36 (Allegation 8)

Placencia Princess

Whether the misappropriation was in breach of his fiduciary duty to RGL:

57. Mr. Tasse, as the managing director of The Resort was entrusted with control over RGL's money and assets. He was not their owner. Directors owe fiduciary duties to the company they manage. ***Regal (Hastings) v Gulliver [1942] 1 All ER 378, 395 f –*** *"Directors, no doubt are not trustees but they occupy a fiduciary position toward the company whose board they form."*

58. The classic description of that fiduciary duty was set down by the Court of appeal in ***British & West Building Society v Mothew [1996] 4 AER 698 peer Millett LJ at 711 j – 712 b***. *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstance which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith, he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive test, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary."*

59. At common law the directors of a company are under a fiduciary duty to act in the best interest of the shareholders collectively, not individually. All shareholders must be treated equally. Further, that fiduciary duty is to the company, not creditors unless the company is no longer solvent.

60. The Claimants presented the case of ***Clark v Cutland [2003] 2 BCLC 393*** where Arden LJ concluded:

> *"At the heart of Mr Seymour's submissions on behalf of Mr. Cutland is a submission that there is a difference in legal consequence between (on the one hand) a breach of duty which consists of making a payment out of the company's funds which could have been lawfully made if procedures for obtaining approval under the company's constitution had been followed and (on the other hand) a payment which was in effect a theft. Both such payments are, however, breaches of duty. It is the duty of directors to follow the appropriate procedures in the company's constitution as much as it is their duty to apply corporate property only for proper purposes. Failure to obtain appropriate approval and insufficient disclosure is a serious matter. Disclosure plays an important role in company law and the quality of disclosure is important. Disclosure is required for many purposes and it performs at least two valuable functions. It ensures that information is passed from the directors to the shareholders or from one director to another. It also acts as a deterrent against self-dealing. As Brandeis J (a justice of the United States Supreme Court) said extra-judicially, 'sunlight can be the best of disinfectants'. Meaningless disclosure does not perform these functions and inadequate disclosure is often little better than no disclosure at all."*

61. I find that when Mr. Tasse purported to create a debt and to place that debt into RGL's account he acted for a collateral and improper purpose. He was thereby enabled to illegally direct RGL's funds and assets to his own pocket, to the disadvantage and detriment of RGL. It is clear that all the acts of misappropriation found by this court were in breach of Mr. Tasse's fiduciary duty to RGL.

Remedies:

62. For breaches of a director's fiduciary duties the common law provide a range of remedies, the enforcement of which lies in the hands of the company. In their closing submissions the Claimant asks for damages. Damages are available in respect of the loss which is shown to have been caused by the breach of the fiduciary duty. RGL is entitled to be placed in the same position it would have been if the breach had not been committed. The company would certainly be placed on sounder footing if the award was expressed as damages in the amount of their loss. There can be no doubt

that Mr. Tasse has caused loss through his breach of duty. He must be stripped of his unauthorized gains and he must account for those gains by paying their monetary value to RGL. Where there are traceable assets then restitution of the actual asset can likewise be ordered.

Determination:

63. What is apparent throughout this case is that the accounting systems, checks and balances at The Resort were woefully inadequate. The accounting system was not efficient nor were there any key performance indicators which were being monitored regularly. The Magaña Report stated – *"Based on the information provided, I assessed that there was information available to perform a proper forensic analysis of the allegations. There was (sic) substantial doubts, however, that the examination would be able to detect other irregularities with any precision as a result of the inadequate control and record maintenance structure."* The records were an obvious mess. Mr. Tasse himself admits this, but blames the General Manager. He seems to have forgotten his own role as the managing director.

64. There seemed to be few, if, any directors' meetings or shareholders' meetings. Further, as is often seen in companies, where the owner and manager are one and the same, an overlap occurs which causes confusion for the company as a separate legal entity.

65. Limited companies are by Section 27 of The Act required to produce and register audited annual accounts. This account should be sufficient to demonstrate that the company's transactions are properly kept. It must give a true and correct view of the state of the company's affairs. By section 114(2)(b) the auditor is *"to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them as shown by the books of the company. The auditor is thereby empowered to*

examine and enquire and to state whether or not they obtained all the necessary information and explanations they require." It is the directors' obligation to keep such records and it is the auditor's duty to present the true financial position of the company or to explain why such a view cannot be given.

66. Audited reports for RGL were not approved, signed or even filed as required by law. I find that the auditor included matters in his statement on the oral directive of a single director. There was no proper verification. Then he allowed matters to be removed, again on the directive of a single director, all in derogation of his duty to be independent. The auditor seemed to allowed his duty to be entirely usurped, enabling the manipulation of his auditor's report. To my mind, an auditor would not easily admit to such an act unless it really was true. He would certainly be aware that by doing this he not only opened himself to professional ridicule, but also potential legal action for such a breach. I am of the view that Mr. Tasse never provided Mr. Rhaburn with any receipts because no such receipts existed. Nonetheless, where a single director could alter the auditor's report at will, something is gravely wrong.

67. When Mr. Magaña said *"that fraud risk was high at RGL during the period October 2011 to August 2014, due to the inadequate controls and weak corporate governance specifically,"* I have to agree. There is really no wonder that the company is in its present state or that Mr. Tasse was able to do all that he did with neither conscience or consequence. That conditions were allowed to continue for as long as they have, speak either to sleeping or complacent, shareholders. Likewise, the long standing second director, Michael Kramer, who claims not to have been intimately involved, might as well not have been involved at all. His inactivity as a director is also a derogating of duty

which is again cause for serious concern. The court also considers how he signed a land transfer from RGL to Mr. Tasse although he realized Mr. Tasse was diverting $200,000 from RGL for payment on his personal purchase. He enquired but did nothing more as Mr. Tasse *"was a family member and business partner."* They both acted in a seriously improper manner.

68. All of this leads me to the inevitable conclusion that the accounts of this company have been manipulated. Mr. Tasse, as a director, owed a fiduciary duty to RGL. When he used RGL's funds for his own benefit he breached that fiduciary duty and caused devastating loss to RGL. He must make good that resulting loss.

IT IS HEREBY ORDERED:

1. Judgment for the Claimant.
2. An account is to be taken of the credit card payments made to Mr. Tasse by RGL between August 2012 to June 2014.
3. On completion of that account any sums found to be misappropriated must be paid over to RGL and will form part of the award of damages ordered herein.
4. The Defendant must pay the full costs of the taking of this account as well as the sum of $14,949.98 in outstanding fees owed to the court expert by the Defendant.
5. Damages is awarded to the Claimant in the sum of $1,101,608.44.

6. Restitution orders are made for Parcel 3257, Block 36 and the Placencia Princess.
7. Costs to the Claimant in the sum of $75,000 as agreed.

SONYA YOUNG
JUDGE OF THE SUPREME COURT