

IN THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO: 143 of 2017

BETWEEN

TRITON ADVENTURES LLC

1st CLAIMANT

LAMONT EDWARDS LIPKA

2nd CLAIMANT

AND

EDUARDO AGUILAR JR.

1st DEFENDANT

FOUED AGUILAR

2nd DEFENDANT

EUGENIE MICHELLE AGUILAR

3rd DEFENDANT

AQUA ACUBA CENTER LIMITED.

4th DEFENDANT

Keywords: Claim for Monies Invested or Had and Received; Breach of Contract;

Company & its Directors; Directors as Agents of Company; Directors as Quasi-Trustees;

Fiduciary Duty; Trust & Confidence; Acting in Good Faith; Breach of Duty;

Fraud; Fraudulent Conduct of Directors and Shareholder.

Before the Honourable: Mr. Justice Courtney A. Abel

Hearing Dates: 20th March 2018
02nd May 2018
10th May 2018
02nd July 2018.

Appearances:

Mrs. Deshawn Arzu Torres for the Claimants.

Ms. Stevanni Duncan Counsel for Eduardo Aguilar Jr.; Foued Aguilar; Eugenie Michelli Aguilar; Aqua Scuba Center.

WRITTEN JUDGMENT

Orally Delivered and in Draft on the 2nd day of July 2018

Introduction

- [1] This contested claim is in respect of the total sum of US\$158, 285.39 which the Claimants allege that they invested/loaned over a period of a year (9th July 2015 to 20th July 2016) to the 1st Defendant (“Eduardo Jr.”) and/or the 4th Defendant (“Aqua Scuba”) for the purpose of their dive business under and subject to the terms of two written agreements both dated in July 2015.
- [2] The dive business has been based in and operated from the resort Island of San Pedro Belize over many years prior to and after 2013.
- [3] The claim is in relation to alleged agreements for the Claimants to fund the operations of Aqua Scuba for an interest in same; and with the Claimants alleging that in reliance upon these agreements they did, in various ways, so fund Aqua Scuba, following which the Defendants breached these agreements, and while acting in breach of trust and in a fraudulent manner, gave the Claimants nothing for their investments/loans, entitling the Claimants to have such sums returned.
- [4] The Claimants are in effect arguing that the Aguilar family, headed by Eduardo Jr., acted in concert to operate a scheme to extract from the Claimants, by way of ‘investments’ in their dive business, by dangling the carrot of an equity partnership in such business, but at all times the same was simply a rouse to defraud them.
- [5] It is alleged by the Claimants that the Defendants personally and as agents of Aqua Scuba effectively perpetrated a scheme to deny the Claimants any agreed benefits, by transferring all the assets of Aqua Scuba (which benefited from the advances) to a company owned by Eduardo Jr’s family, and that family members (Eduardo Jr., and his wife) have now declared personal bankruptcy to avoid having to repay the monies.
- [6] The 2nd Claimant is also alleging that Eduardo Jr., and his wife, Eugenie Michelli Aguilar, just as the 2nd Claimant exited the business, applied to the Supreme Court in September of 2016 to be declared bankrupt, after

receiving funds from and profited from such funds received, and that despite having filed this petition they continue to work at the business.

- [7] In order to get to the central issues, which concerns these contested allegations of bad faith, and even fraud by the individual Defendants, in relation to transactions concerning Aqua Scuba, I will now set out in more detail the general background of this case, most of which facts are generally not denied, or have otherwise been proved, or which this court has summarily found, before carefully considering such serious central allegations.

Background

- [8] The 2nd Claimant (“LIPKA”) is a citizen of the United States of America, a retired business consultant from New York, and, the beneficial owner of the 1st Claimant (“TRITON”).
- [9] The 1st, 2nd and 3rd Defendants are all family members; and Aqua Scuba is a company in which the other named Defendants either have an interest or have in some way been involved. Eduardo Jr., being the husband of Eugenie Michelli Aguilar, and together they are the parents of their male children, the 2nd Defendant (“Foued”), Eduardo Benjamin Aguilar (“Eduardo Benjamin”), Andrei Aguilar (“Andrei”), and their daughter, the 3rd Defendant (“Eugenie Michelle”).
- [10] Eduardo Jr. and his wife, and their above named children, have been involved, as a family, in Aqua Scuba which.
- [11] In or about the year 2013, LIPKA began visiting San Pedro Town, Belize, to scuba dive in and around the world renowned dive sites nearby.
- [12] At or around this time Aqua Scuba was then operating as a dive business from a hotel in San Pedro Town, Belize, and providing local dives as well as dives to the world famous Belize dive attraction, the Great Blue Hole.
- [13] LIPKA then came into contact with Eduardo Jr., and his wife Eugenie Aguilar when LIPKA signed-up to dive with them. He had apparently been training to become certified as a diver and after such certification he later trained and became certified as a dive instructor.

- [14] LIPKA during one of his trips spoke with Eduardo Jr., and obviously attracted by the possibility of retiring to Belize to pursue his diving passion, during this conversation, he inquired about the possibility of investing with Eduardo Jr., in the dive shop.
- [15] Visits and discussions between LIPKA and Eduardo Jr., (and not Eduardo Jr., children) continued thereafter.
- [16] In or about May of 2014, Eduardo Jr., and LIPKA apparently shook hands on an agreement for the latter to enter into the business as a partner with Aqua Scuba. But at the time nothing else was formalised and no agreement had been formally entered into or even presented; but despite this, apparently LIPKA had provisionally made a decision of some sort to invest in Aqua Scuba.
- [17] On or about July 7, 2015, no doubt realizing LIPKA's genuine interest, he was solicited by Eduardo Jr., for financial assistance, by way of funds, as the latter person required such assistance in paying for some of the business's equipment, namely the replacement/installation of a head assembly on a 57' vessel which had recently blown a head on the starboard side Caterpillar C12 Marine diesel engine.
- [18] In order to facilitate the funding, a partnership agreement was signed between LIPKA and Eduardo Jr. At this stage a contemplated contract for LIPKA's equity purchase of Aqua Scuba had been discussed but not been completed. The discussions about this was entirely between LIPKA and Eduardo Jr., and the former thought that he was only dealing with the latter.
- [19] Some due diligence then followed by LIPKA and upon being sent a copy of Aqua Scuba's annual returns for the year 2014, however, LIPKA then became aware that Eduardo's son, Foued, to be a part owner of Aqua Scuba. LIPKA then realized that Foued, as a shareholder in Aqua Scuba, would have to sign any agreement.
- [20] LIPKA's dealings, up to this point, however, had been primarily with Eduardo Jr., the father.

- [21] In the Annual returns sent to him by Eduardo Jr., as part of LIPKA's due diligence, in relation to the name Eduardo B Aguilar, no designation of Sr. or Jr. was however included. LIPKA therefore felt that all times he was doing business with the father. The email address being used by him was eaquilarbz1@yahoo.com.
- [22] Much confusion appears to have subsequently been caused by individual members of the Aguilar family bearing similar names. Eduardo Jr. (the father) has the same first name as and his son Eduardo Benjamin Aguilar. The wife of Eduardo Jr., Eugenie Michelli Aguilar and their daughter Eugenie Michelle Aguilar also have the same first name. It appears to this court that such similarities and confusion likely may have been exploited by them, particularly Eduardo Jr.
- [23] Eduardo Jr., via e-mail dated 8th July, 2015, provided LIPKA and Triton with the banking information for his son Andrei, account in the United States with Citibank (USA) #9118555031, and which was to be utilized for the transfer of all funds to them going forward and in accordance with the said agreement.
- [24] Andrei was to act, and indeed subsequently acted, as intermediary in the receiving and handling of the funds to be sent by LIPKA for the purchase of items for and on behalf of Aqua Scuba.
- [25] On or about the 9th July, 2015, LIPKA, on behalf of Triton, signed an initial written agreement, along with Eduardo Jr., and Foued, for the purchase of 30% interest in Aqua Scuba and which LIPKA knew to be legally registered as Aqua Scuba Center Limited. This was after corporate documents had been seen by LIPKA.
- [26] The Agreement provided as follows:
- (a) There was a targeted closing date of January 15, 2016.
 - (b) Triton would make a down a payment of US\$12,000 on the 9th July 2015.

- (c) Triton would be paid interest of US\$12,500 per annum prorated to length of accounting period.
- (d) Aqua Scuba would negotiate in good faith transition of Aqua Scuba and upon breach Aqua Scuba and principal liable to Triton for return of Purchase Price plus interest at 10% and all reasonable costs and attorney's fees.

[27] From the evidence, it is undisputed that this agreement, dated 9th July, 2015 (as shown at the bottom of the agreement) is valid and enforceable and that the parties to it are Aqua Scuba and Triton.

[28] This 9th July agreement is signed by the representatives of the two companies and was entered into after LIPKA had carried out due diligence in relation to the transaction. At this time Aqua Scuba appeared to LIPKA to be, and probably was being operated by Eduardo Jr., and his wife.

[29] LIPKA then proceeded to wire funds, he thought, to Eduardo Jr., to Citicorp Bank, in the name of Andrei, his son residing in Florida, with an address in Hialeah, Florida in pursuance of the agreement.

[30] On the 29th July, 2015, LIPKA and Triton additionally proposed via e-mail that the current business operations of the Aqua Scuba would be restructured as follows:

- (i) That a new company would be re-incorporated as Triton Adventures Belize Limited with a shareholding of 70% to Eduardo Jr., and 30% to Triton Adventures LLC;
- (ii) New directors would be placed on record;
- (iii) Creation of bank accounts;
- (iv) Creation of PayPal account;
- (v) Launch of website;
- (vi) Implementation of ledger;
- (vii) Establish new employee structure.

- [31] Via e-mail on the 29th July, 2015 Eduardo Jr., formally accepted the terms of investment and formation of the new venture as stated above.
- [32] Thus this court summarily determines, contrary to the Defendant's case, that there was indeed an agreement to this effect.
- [33] LIPKA then, and thereby, became an invested partner in the dive business with some equity in relation to this business, and was in communication with Eduardo Jr., on a regular basis.
- [34] It was around this time that Eduardo Jr., communicated with LIPKA about further dive equipment, by informing him that the dive business, including Aqua Scuba, should prepare for the high season by inspecting/replacing the scuba tanks in service as well as rebuilding a second Bauer VT26 breathing air compressor which they had as backup to the primary one.
- [35] Eduardo Jr., then requested that the sum of US\$23,000 be transferred for use in the dive business and for the purpose of dive equipment. Of this it was expressed by Eduardo Jr., that US\$13,000 would be utilized for the purchase of 200 new tank valves, and that US\$10,000 would be used for the rebuilding of the second compressor. LIPKA received email confirmation from Eduardo Jr., on the 3rd August, 2015 on the purpose of the funds to be transferred.
- [36] LIPKA visited San Pedro on or about September 2nd, 2015 and, in pursuance of the agreement which he had with Eduardo Jr., and Aqua Scuba, continued to assist Aqua Scuba with their dive business specifically with the inventory of assets, interviewing of staff, the documentation of processes etc.
- [37] LIPKA then enquired about the status of the tank valve purchase and status of compressor rebuild, and was informed that the tank valves were in the process of being ordered, and that the compressor was being rebuilt with parts on order.
- [38] By the 17th of November, 2015 LIPKA had completed the payment of over 50% of the agreed equity purchase amount as follows:

- (a) Wire transfer dated July 9th 2015 and being deposited payable upon execution of agreement - US\$12,000.00.
 - (b) Wire transfer dated August 3rd, 2015 for the purchase of diving gear/equipment - US\$23,000.00.
 - (c) Wire transfer dated September 17th, 2015 representing equity investment payment - US\$27,500.00.
 - (d) Purchase and shipping of diving gear/equipment to Belize on the 17th November, 2015 – US\$26,135.96.
- [39] The diving gear/equipment, which had been ordered and paid for with funds provided by LIPKA was indeed purchased, sent and subsequently cleared in Belize with the assistance of Eduardo Jr.
- [40] LIPKA then prepared to travel, indeed to migrate, to Belize after the Christmas holidays. He arrived in San Pedro Town on January 9, 2016.
- [41] By this time LIPKA had visited Belize on average of four (4) times per year between 2013 and 2016. Also by this time, and in any event, some kind of a *de facto* or quasi partnership had been created.
- [42] LIPKA immediately went about getting things organized in the dive business the following day including by following up on outstanding items, observing operations, documentation of processes, process improvement, etc.
- [43] To LIPKA's surprise, upon close examination however, nothing had been completed, as agreed, in relation to the formation of the new company (as Triton Adventures Belize Limited with a shareholding of 70% to Eduardo Aguilar and 30% to Triton Adventures LLC) and neither were the assets transferred to undertake the operations. LIPKA considered that these were all required, as deliverables, and were supposed to have taken top priority.
- [44] LIPKA was also surprised to find out that no formal accounting process was in place i.e. no cash register etc.
- [45] All of these matters, of which this court accepts the testimony of the Claimants witness, LIPKA, put the Defendants in apparent breach of their agreements with the Claimants.

- [46] This court accepts that the Claimants were to make payment of US\$125,000.00 by January 15, 2016 and that this was not done but given the breaches, which this court finds by the Defendants, the Claimants may be, and is excused, for not by then, making any further payment.
- [47] In any event and to remedy the situation LIPKA immediately started to visit the shop every day; and each day he inquired on the status of the outstanding deliverables. Eduardo Jr., assured him, however, that things were in process, and would remind LIPKA, which he appeared to have accepted, that he was not in New York anymore and that things did not move that fast in Belize.
- [48] LIPKA continued to familiarize himself with the then current operations and began making suggestions on changes to implement and to improve productivity and the customer experience.
- [49] At the end of January, 2016, Eduardo Jr., then informed LIPKA of a boat that was available for purchase.
- [50] LIPKA was ready to assist financially and after walking the proposed vessel for purchase, LIPKA, perhaps foolishly, but in good faith, agreed to fund the purchase of the boat, but with the understanding that it was his boat and that it would be registered under the company's name. Funds for the boat, in the sum of US\$45,000.00, were then transferred by LIPKA on February 4, 2016 to the US account of Andrei at Citicorp Bank.
- [51] LIPKA checked and was satisfied that the boat was indeed purchased as it was later in use by Aqua Scuba.
- [52] After continued inquiries as to the formation of the new company and his obtaining a work permit, Eduardo Jr., informed LIPKA that he knew someone that could expedite the processing of his work permit at a total cost of US\$4,650. LIPKA then transferred the funds for the work permit on February 23, 2016 to the US account for him to facilitate this on his behalf.
- [53] The rebuilding of the boat LIPKA purchased in February was nearing completion and a power train had to be procured. Motors became available and Eduardo Jr., again approached LIPKA but this time about funding for

the power train. The funding for the purchase of the motors was structured as a loan. The first two of the three motors were purchased with a loan in the amount of US\$15,000 agreed to by Eduardo Jr., and LIPKA. The term was 18 months, with 6% interest, and with payments of US\$908.33 beginning August 20, 2016. To date, nothing has been made by any of the Defendants towards this loan obligation.

- [54] A third motor became available and an additional US\$5,000 was then solicited of LIPKA by Eduardo Jr., for the business of Aqua Scuba, and provided by LIPKA as loan, to be folded into the original US\$15,000 loan.
- [55] This brought the total loan principal to US\$20,000. The terms remained the same -18 months at 6% interest with payments of US\$1,211.11 beginning August 20, 2016. Again nothing has ever been made toward this loan obligation.
- [56] The sums of US\$5000.00 and US\$15,000.00 were sent by LIPKA via wire transfer dated 20th July, 2016 and 17th June 2016.
- [57] The cash invested in Aqua Scuba therefore now included equipment purchase and as well as defaulted loans to Eduardo Jr., and/or Aqua Scuba totaling US\$158,285.00.
- [58] It appears uncontested that the Claimants did indeed transfer a total of about US\$107, 500 to the some or all of the Defendants. But it is somehow suggested, which this court does not accept, that some such funds were in breach of the agreement with Aqua Scuba and/or was otherwise unsolicited. This court considers that if there was a breach of agreement it was on the part of the Defendants; in particular Eduardo Jr., Eugenie Michelle and Aqua Scuba.
- [59] In early August 2016 hurricane Earl made passage over Belize including San Pedro. I accept the testimony of LIPKA that the business of Aqua Scuba was not destroyed. Indeed this court accepts that three days after the hurricane the business of Aqua Scuba was operating, and is more likely than not still operational.

- [60] Eduardo Jr., and the other Defendants have sought to blame the hurricane for the loss of documentation and assets which were bought by LIPKA. In view of the operation of Aqua Scuba shortly after the hurricane and in accepting the testimony of LIPKA this court does not accept that any such loss took place which in any way inhibits the Defendants from performing their obligations.
- [61] LIPKA also made several other purchases for the business.
- [62] LIPKA, when they, Eduardo Jr., and his family, refused to allow him access to funds and to correct the shortfalls in the business, and after his realization that bad faith was apparent from his business partners, Eduardo Jr., and his family, and that his investments and contributions were therefore in jeopardy, formally exited the business in September of 2016, some 9 months after entering the agreements above.
- [63] This court does not accept that there was any abandonment of the commercial venture in or about September 2017 as alleged by Eugenie Michelle. Not does this court accept that Aqua Scuba has suffered any loss or damage on account of any breach of the Agreement with the Defendants or any of them as alleged by Eugenie Michelle. On the contrary the Defendants have been enriched and have profited from the payments from the Claimants.
- [64] By this time, September 2016 Eduard Jr., Foued and Eduardo Benjamin had failed to transfer to the Claimants the 30% shareholding in Aqua Scuba to which their contribution had entitled them, despite requesting for same to be transferred.
- [65] It is also clear to LIPKA, and it is evident, that Aqua Scuba was not being administered in a proper manner in that:
- (i) From the evidence it does not appear that accounting procedures was clearly being implemented;
 - (ii) There is no evidence that the Claimants were invited to any meetings.

(iii) There is no evidence that dividends for 2015 to 2017 were declared and nor is there any evidence that Triton and LIPKA had obtained any benefits;

(iv) No new entity, in which the Claimants had an interest, had transferred to it or either of them, shares representing 30% interest in Aqua Scuba.

[66] On the contrary the indications to the Claimants, and to this court, were that the Defendants were operating Aqua Scuba for their own benefit and without any regard to the interest of the Claimants.

[67] Apparently since September 2016 shares have been offered to LIPKA in Aqua Scuba which now has little or no assets as all of its assets had by then been transferred to another company, Aqua Scuba Center Limited, formed by the Aguilar family and owned by some of them.

[68] Triton and LIPKA, based on the agreements dated 9th and 29th July 2015, which have been breached by the Defendants, are obviously entitled to hold 30% shares in Aqua Scuba. But it would appear that due to the bad relationship which has in fact now developed, including by the present contested claim, and the lack of trust between the Claimants and the Aguilar family, Triton and LIPKA, understandably, are no longer interested in holding such shares. They want their monies repaid and this court has to determine whether they should get such funds.

[69] Since then, LIPKA have made numerous attempts to collect on the defaulted loan with no direct response from Eduardo Jr.

[70] Triton and LIPKA have made attempts to sever the relationship by demanding return of vessel, motors and scuba equipment which LIPKA had purchased. LIPKA has, however, received no response.

[71] Both Eduardo Jr., and Eugenie Aguilar are operating Aqua Scuba Center Limited and Eduardo Jr., is listed as a shareholder until 2015 together with Foued.

[72] Eugenie Michelle Aguilar and Foued are now listed as the shareholders, being their children.

- [73] LIPKA also now alleges that the Defendants owed a duty to him as a 30% shareholder in the Company to act with the degree of skill, care and diligence in the management and operation of the business. No system or process was established and all control is still maintained by Eduardo Jr.
- [74] That LIPKA wish to recover all funds invested in the company and/or for his 30% interest in the company to be recognized.

The Court Proceedings

- [75] A claim form was filed on the 14th March 2017 by Triton and LIPKA against Eduardo Jr., and his son and daughter and Aqua Scuba. The claim was for breach of agreement, duty of care, breach of trust and for fraudulent transfer.
- [76] The claim relates to an agreement for LIPKA and Triton to fund the operations of Aqua Scuba for an interest in same and upon reliance of the agreements LIPKA and Triton did fund Aqua Scuba when thereafter the Defendants sought to deprive LIPKA and Triton from any benefits by transferring all the assets of Aqua Scuba to a company owned by Eduardo Jr's family and then certain family members (Eduardo Jr., and his wife) declared personal bankruptcy to avoid repaying the monies.
- [77] The Claim was amended on the 12th April 2017 to add all of Eduardo Jr's children into the claim as well as the company in which the assets had been transferred.
- [78] Defences were filed by the Defendants, between 23rd and 27th May 2017. A Counterclaim was also filed by Eduardo Jr., against Lipka and Triton for breach of agreement.
- [79] In the defenses the Defendants deny there was an agreement made on or about 9th July 2015 with Eduardo Jr., but alleges that such agreement was with Aqua Scuba and that Aqua Scuba was not operated by Eduardo Jr., and his wife but by his children and that he and his wife had no interest Aqua Scuba which was owned by other family members.
- [80] It is also denied that there was an agreement that Aqua Scuba restructured and that a new company would be re-incorporated as Triton Adventures

Belize Limited with a shareholding of 70% to Eduardo Jr., and 30% to Triton subject to the alleged terms.

- [81] All the allegations of the partnership, the alleged agreement, duty of care, breach of trust and fraudulent transfer were denied.
- [82] Replies and a Defence to Counterclaim were filed by LIPKA and Triton between 21st June 2017 and 22nd November 2017.
- [83] In the meantime CMCs were held between 8th May 2017 and 5th February 2018 at which various applications were heard (including the successful application to strike out Eugenie M. Aguilar, Eduardo Benjamin Aguilar and Andrei Aguilar), directions given, an order for mediation made, and pre-trial directions given.
- [84] The trial was fixed for the 20th March 2018 on which occasion evidence was taken on behalf of the Claimants and remaining Defendants.
- [85] At the trial LIPKA testified on behalf of himself and Triton and was extensively cross-examined. This court found his evidence, including of the monies deposited, to be very credible and well corroborated by contemporaneous emails and other documentary evidence.
- [86] This court having seen and heard LIPKA testify under oath found him to be a witness of truth and veracity. This court accordingly found the case as presented by LIPKA, credible, highly persuasive and compelling, as largely reflected in the facts already found above.
- [87] Testifying on behalf of the remaining Defendants were Eduardo Jr., and his daughter Eugenie Michelle Aguilar. This court upon seeing and hearing the sworn testimony, which this court unhesitatingly considered was to a large extent perjured and discredited testimony of the witnesses for the Defendants, has generally concluded that wherever the testimony of LIPKA disagreed with the witnesses for the Defendants this court generally preferred the testimony of LIPKA.

Issues

- [88] Whether the Defendants generally all acted in concert against Triton and LIPKA, and specifically, whether they agreed for the transfer of Eduardo and Foued's shares in the company to Eugenie Michelle?
- [89] Whether the Defendants breached their duty or obligation towards the Claimants in transferring shares to the Eugenie Michelle?
- [90] Whether the Defendants acted fraudulently towards the Claimants?

Whether the Defendants generally all acted in concert against Triton and LIPKA, and specifically, whether they agreed for the transfer of Eduardo and Foued's shares in the company to Eugenie Michelle?

- [91] As this court has already determined Eduardo Jr., and his wife Eugenie Michelli, during the period of initial contact with Aqua Scuba, were both working in the dive business which was owned by Aqua Scuba, and LIPKA initially and at all material times visited with and had business discussions with Eduardo Jr., in relation to investing in Aqua Scuba.
- [92] On the admission of the witness Eduardo Jr., Aqua Scuba was, so he testified, started by his children, all of whom, at some point, each were either its shareholder and/or a director, with Foued and Eugenie Michelle at the time of the trial being its shareholders and directors.
- [93] Also on the admission of Eugenie Michelle she and Foued are the current directors and shareholders of the Aqua Scuba with Eugenie Michelle having 250 shares while Foued having 750 shares and with Eugenie Michelle having been its director from incorporation. Eugenie Michelle also testified that her 250 shares were previously owned by Eduardo Benjamin but with the same being transferred to her on 25th July, 2015.
- [94] It is also clear to this court, and generally uncontested, that Andrei's account in the USA was used, to a large extent as the conduit, or intermediary, facilitating for the transfer of funds by LIPKA for the business of Aqua Scuba.

- [95] Frankly having seen and heard Eduardo Jr., and his daughter, I don't believe him, Eduardo Jr., for one second, when he said that he did not represent to LIPKA that he, Eduardo Jr., was a shareholder, director, manager, officer or employee of Aqua Scuba.
- [96] I certainly do not believe Eduardo Jr., when he testified that at all material times he informed and advised LIPKA, that Foued and Eduardo Benjamin were the shareholders and directors of Aqua Scuba.
- [97] I have already determined, contrary to Eduardo Jr.'s evidence, that the latter did not enter into any agreement with the Claimants dated 9th July, 2015 for the purchase of 30% shareholding in Aqua Scuba for the sum of US\$125,000.00. Nor do I believe Eduardo Jr. that his sons, Foued and Eduardo Benjamin, entered into and executed said agreement on behalf of Aqua Scuba.
- [98] I also do not believe Eduardo Jr., when he testified that he was not aware of any agreement dated 29th July, 2015 and that this was merely a proposal which was not accepted. I have already determined the opposite to be the case.
- [99] As already noted, based on my examination of the documentation in the case, and comparing it with Eduardo Jr.'s, and Eugenie Michelle's account of what transpired, as well as having observed their demeanor in the witness box as well as in the court, and the whole conduct of the Defence, I have determined that Eduardo Jr., is not a witness of truth and is therefore not to be believed.
- [100] I have also determined that there was indeed communication by Eduardo Jr., with LIPKA via the former's e-mail address eaguilarbz1@yahoo.com; and further that all communications with, or to, LIPKA, were not necessarily only on the instructions and on behalf of his children. Such children I accept, may have been involved, as he testified, not merely as the principals and representatives of Aqua Scuba, but that all of them were ad idem and working in concert not only in the initial stages of the transactions with LIPKA but, I have inferred from their general cohesion and operation in

concert, likely at all times were operating with each other to extract funds from LIPKA for the purpose of their dive business.

[101] I have no hesitation in also concluding, having carefully considered all the evidence, and heard all the witnesses in the case, that it is very likely that not only Eduardo Jr., but certainly Foued and the witness Eugenie Michelle; and, based on the cohesion with which the family operated in relation to the dive business of Aqua Scuba, possibly even the rest of the family, were involved, in the following decisions, and acts of bad faith towards the Claimants, of which complained has been made by the Claimants:

- (a) Failure and/or refusal to transfer to the claimants the 30% shareholdings in Aqua Scuba;
- (b) Failure to institute proper accounting procedures;
- (c) Failure to provide accounts to the Claimants on a regular basis;
- (d) Failure to hold meetings of Aqua Scuba;
- (e) Failure to provide information about Aqua Scuba about this company's affairs;
- (f) The appointment of directors to Aqua Scuba without the knowledge of the Claimants;
- (g) The running of the affairs of Aqua Scuba for their own benefit and in disregard to the right of the Claimants;
- (h) Failure to transfer shares of Aqua Scuba to the Claimants;
- (i) Transfer to his wife or Eugenie Michelle shares in Aqua Scuba and for their appointment as a director; and
- (j) Formed a new entity for the transfer of shares to Belize Aqua Scuba Center.

[102] This court is prepared to find, and has determined, as alleged by LIPKA, that Eduardo, in breach of their duty of care and acting in bad faith, carried out acts of mismanagement and acted for an improper purpose, and in breach of trust and the confidence they shared, by transferring his shares to his daughter, the witness Eugenie Michelle Aguilar, and to the Claimant's

detriment. LIPKA was not aware that any or all of these transfers had been done and nor was LIPKA consulted about this.

[103] This court is also prepared to find, and has determined, as alleged by LIPKA, that the Defendants have failed to manage the business as agreed, by holding meetings, declaring profits or dividends, or by appointing directors. All of these omissions were done without LIPKA'S knowledge and concurrence, as well as by failing to transfer LIPKA's shareholding interest to him. The remaining Defendants have all profited from the venture to his exclusion. LIPKA has not received any return on his investment.

Whether the Defendants breached their duties or obligations towards the Claimants in transferring shares to the Eugenie Michelle?

[104] It is well established that a relationship of trust and confidence, often described as one involving 'a fiduciary', may generally arise in which certain duties or obligations may be established. This has been authoritatively stated by Millett LJ in the English court of Appeal case of Mothew v Bristol & West Building Society¹, when he stated:

“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

¹ [1996] EWCA Civ 53.

fiduciary obligations. They are the defining characteristics of the fiduciary.”

[105] This duty, as a fiduciary, may arise in relation to a company and its directors, who are also its agents, and may in certain circumstances even be a quasi-trustee. This relationship, between a company and its directors, may give rise to duties in the exercise of any powers as director, in good faith, in a bona fide way, which may result in legal remedies being available and which may properly be claimed and ordered against such director or the company. The opinion of Awich J (CJ Ag) in the Belize Supreme Court case of Bank & Trust of Belize v August Tabony et al² is illustrative of such a position. In this case Justice Awich, in the opinion of this court, correctly stated the legal situation as follows:

*“24. A director is an agent of the company in the transactions the contracts, that he enters into on behalf of the company – see **Turner’s case, Aberdeen Railway Co. v Blaikie Bros (1854) 1 Macq. 461**; and generally, the view of Bowen L.J in **Imperial Hydropathic Noted Co, Blackpool v Hampson 23 Ch D.1**, at page 12, that the position of a director is identified according to the person to the problem at hand.*

25. In both capacities as quasi trustee and agent, a director of a company is a fiduciary; he owes fiduciary duty to the company. As a fiduciary he must exercise his powers for the purposes for which they were conferred, and he must act bona fide, that is, in good faith, and for the benefit of the company, the shareholders as a whole. From that, the rule was established that, a director must not put himself in a position in which his duty to the company and therefore interest of the

² (Supreme Court Claim No. 334 of 2006).

*company, and his personal interest may, or likely to conflict.
The claim of PBTB is based on that rule.”*

[106] Justice Awich went on at paragraph 28 to speak of the consequence of a breach of such a duty as follows:

*“28. The consequences of a breach of his fiduciary duty is that a director will be held liable to the company even if he did not act fraudulently, and even if the company has suffered loss. He will be liable to render account of the transaction which is the result of his abuse of, or any failure of his fiduciary duty. If he has made profit, the director will be required to surrender the profit of the company. Moreover, the company doesn't not have to show that it suffered loss as a consequence, or that the profit would have been made for the company and it is not a defence that the company had no capacity to make the profit – see **Boston Deep Sea Fishing Co v Ansell [1889] 39 Ch. D339 (CA)**. If the breach of duty is in the form of a contract that the director has entered into, it will generally be treated as voidable as in **Transvaal Lands Company v New Belgium (Transvaal) Land and Development Company [1914] 2 Ch 488 (C.A.)** and in **Hely – Hutchinson v Brayhead Ltd., and another [1968] 1Q.B.549 C.A.** Sometimes the contract is treated as void as was the case in the *Piercy's case* above.”*

[107] A Breach of duty by a director, within the context of his/her actions as a director, may range from the almost innocuous to the outright dishonest (including theft), or even fraudulent, which may vitiate any transaction undertaken by the director, that may arise.

[108] Again it has been noted in the English Court of Appeal case of Clark v Cutland³, this time by Arden LJ, that disclosure, of one kind or

³ [2003] EWCA CIV 810.

another, may be an important distinguishing factor which may mitigate or aggravate such a situation, when he noted as follows:

“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.”

[109] Even in a less defined situation than that existing between a director and a company, such as a relationship of a personal character, may give rise to a relationship of trust and confidence being established, such that legal duties and obligations may arise, and may result in legal remedies being available which may properly be claimed and ordered by a court. As

already noted a quasi/de-facto partnership may be considered to have been created by the court in a somewhat less formalised situation.

[110] The English House of Lords Case of Ebrahimi v Westbourne Galleries⁴ provides one such example. In this case a company had operated effectively as a partnership between two and then three directors. No dividends had been paid, but the directors had received salaries. One director was removed and sought an order for the other to purchase his shares, or alternatively for the company to be wound up on the just and equitable ground. The company had promised to begin to pay dividends. In the case of a small company the rights and obligations of a company went beyond bare company law requirements. The applicant had been excluded from being involved in the management of the company against his reasonable expectations. Equitable considerations could be relied upon and prayed in aid by the applicant where the relationship has personal characteristics and rests on a relationship of trust and confidence, and all members are expected to take an active part in the management of the operations.

[111] Lord Wilberforce in his decision authoritatively had this to say:

“A limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The ‘just and equitable’ provision does not, as the respondents suggest, entitle one party to

⁴ [1972] 2 All ER 492.

disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.”

- [112] In these circumstances, the House of Lords took the view that the company had been formed on the basis of mutual confidence between the ‘quasi-partners’ (Ebrahimi and Nazar), and the breakdown of this, coupled with Ebrahimi’s inability to take out his stake and go elsewhere due to its being a private limited company.

Submissions

- [113] Counsel for the Claimants submit that as the Defendants used the funds invested in Triton, issued no financial statements and provided no bank statements to the Claimants, and/or failed to provide any accounting to this Court of such funds, it is to be concluded that such funds were used for their own benefit, in breach of the Agreements with and their duty to the Claimants, and they are liable to account to the Claimants for such funds and to return such funds.
- [114] Counsel for the Defendants submit that even if there is a breach of Agreement, which this court has summarily found, no loss has been proved and in any event such loss should be nominal. Further that any such loss is due from Aqua Scuba (with which the Claimants may have had an agreement).
- [115] Counsel for the Defendants also submit that there was no breach of fiduciary duty as no such duty exists between shareholders (where there is an allegation of a transfer of shares between shareholders). Also there was no evidence of a partnership but on the contrary any evidence points to an equity investment contract.

Determination

- [116] Apart from the Agreements respectively dated 9th July 2015 (between Eduardo Jr., and Foued) and 29th July 2015, this court finds that there is ample evidence that a fiduciary relationship also exists between Eduardo Jr., and Foued towards the Claimants as well as a relationship of trust and confidence existing between them.
- [117] This court is also satisfied that, in any event, on the facts and circumstances as found by this court, Eduardo Jr., Foued, and Eugenie Michelle were acting as agents and quasi trustees of the assets of Aqua Scuba and held a duty to Aqua Scuba as well as had obligations of good faith towards the Claimants.
- [118] Having seen and heard the witnesses for the Defendants, about whom this court has formed a decidedly unfavorable, even a decidedly dishonest view, this court has concluded that the Defendants had determined that at any and all costs, any by any means, they would do all in their power to ensure that the Claimants not have any benefit or access to the funds which the Claimants had invested in/loaned to Aqua Scuba and/or the Eduardo Jr.,.
- [119] As such this court finds that Eduardo, Foued, and Eugenie Michelle ought not to have and did wrongly transfer the assets of Aqua Scuba from Aqua Scuba to Belize Aqua Scuba Center and are each personally liable to account to Aqua Scuba and to the Claimants for such funds which were transferred for an improper purpose, namely to benefits themselves and their family, and to deprive the Claimants of any such direct or indirect benefit to such funds.
- [120] From the evidence before this court all such transfers were done without appropriate procedures of Aqua Scuba and without any proper disclosure to the Claimants who were each entitled to be informed of such transfers. Such transfers, in the opinion of this court, amounts to self-dealing, and breaches of fiduciary and other duties owed to the Claimants.
- [121] Such transfers were done not only to deprive the Claimants of any benefit but were unjust and inequitable to the Claimants but were activated by

dishonest motives, and also likely involves a theft or misappropriation of the property belonging to Aqua Scuba done with the objective to deprive the Claimants of any benefit from it, whether directly or indirectly, to which the Claimants were or had an interest as persons who were by agreement entitled to a 30% share in Aqua Scuba.

[122] This court therefore considers that the only equitable thing, given the circumstances of the case, including the relationship of the parties, is that Eduardo Jr., Foued, Eugenie Michelle and Aqua Scuba are jointly and severally liable to refund all such sums, without deduction, which the Claimant has invested in Aqua Scuba.

Whether the Defendants acted fraudulently towards the Claimants?

[123] Based on the determination which I have made in relation to the previous issue concerning whether the Defendants acted in concert against the Claimants, I have no hesitation in concluding that Eduardo, Foued and Eugenie Michelle indeed acted fraudulently toward the Claimants in relation to obtaining the claimed funds from him, and in any event did so in bad faith.

[124] But moreover, this court based on the findings that the Aguilar family, specifically the individual Defendants, has come to this court to fabricate a web of untruths with the deliberate intention to mislead this court, has determined that they acted fraudulently.

[125] There is clear evidence to this court's satisfaction that such lies which this court has concluded they have told to this court, were designed not only to mislead this court but also to ensure that the Claimants should not obtain any benefit from the sums which they invested/loaned to Aqua Scuba and/or Eduardo Jr., as agreed or otherwise, and also they were intending to do whatever in their power for the Claimants not to have such funds returned to them.

Costs

[126] Because Triton and LIPKA have wholly succeeded in their claim they are entitled to their costs on a prescribed basis with the value of the claim being

that which the Claimants have invested in/loaned to Aqua Scuba and/or Eduardo Jr., in the sum of US158, 285.39.

Disposition

[127] As a result of my determination above I will grant judgment for the Claimants in the sum of US158, 285.39 with costs on a prescribed basis on this amount to be paid by Eduardo Aguilar Jr., Foued Aguilar, Eugenie Aguilar and Aqua Scuba Centre Limited, and will, in the circumstances make the following orders:

1. A Declaration that the agreements in writing dated 9th day of July, 2015 and 29th July, 2015 made between the Claimants and the Eduardo Aguilar Jr., and Aqua Scuba Centre Limited by which Eduardo Aguilar Jr., and Foued Aguilar Second agreed to transfer 30% of the shareholding of Aqua Scuba Centre Limited to the Claimants is enforceable.
2. A Declaration that the Claimants are beneficial owners of 30% of the issued shares of Aqua Scuba Centre Limited.
3. An Order for rectification of the register of the members of Aqua Scuba Centre Limited naming the Claimants as the owner of 30% shares therein.
4. A Declaration that any assets or property transferred from Aqua Scuba Centre Limited in breach of the above agreements is held on trust for the Claimants.
5. A permanent injunction restraining the Defendants whether by themselves, their servants or agents or any of them or otherwise howsoever from in anyway taking, selling, pledging, transferring, charging, diluting or in any way disposing of or taking any steps to bring about or facilitate or register the transfer of the ownership of the Claimant's shares held in or the assets of Aqua Scuba Centre Limited without the Claimant's consent.

6. That the Claimants are entitled to trace the assets of Aqua Scuba Centre Limited in the hands of any person or company of which the Defendants or any of them may have an interest.
7. Interest at the contractual rate of 6% per annum from the date of the agreement until payment.
8. The Defendants are jointly and severally liable for the payment of the Claimants prescribed costs on the value of the claim being US\$158,285.39.
9. This court dismisses the counterclaim against the Claimants.
10. The injunction granted on the 16th March 2017 shall forthwith cease to have effect.

The Hon. Mr. Justice Courtney A. Abel

2nd July 2018