**[2020] JMCA Civ 39**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 82/2017**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MR JUSTICE BROOKS JA**
**THE HON MISS JUSTICE P WILLIAMS JA**

| | | |
|---|---|---|
| **BETWEEN** | **CAPITAL SOLUTIONS LIMITED** | **APPELLANT** |
| **AND** | **MARIETTA RIZZA (who claims by her attorney, Roberto Rizza)** | **1st RESPONDENT** |
| **AND** | **ROBERTO RIZZA** | **2nd RESPONDENT** |
| **AND** | **WILLIAM MASSIAS** | **3rd RESPONDENT** |

**Christopher Dunkley, Ms Kayolla Muirhead and Ms Tiffany Sinclair instructed by Phillipson Partners for the appellant**

**Lord Anthony Gifford QC and Glenroy Mellish instructed by Byfield Mellish & Rushton for the 1st and 2nd respondents**

**23, 24, 26 October 2018 and 25 September 2020**

**MORRISON P**

## Introduction

[1] At all material times, the appellant ('Cap Sol') was licensed by the Financial Services Commission ('the FSC') as an investment advisor and securities dealer under the

Securities Act ('the Act'). As such, Cap Sol was authorised to accept money from members of the public, as well as to give them investment advice and make investments on their behalf.

[2] In the words of Mrs Vanceta Ramsay, who was the chief executive officer ('CEO') of Cap Sol at the time of the trial, Cap Sol was "in the business of matching borrowing and lending clients as well as organizing their participation in a Commercial Paper Investment"[1]. Mrs Ramsay would later confirm this evidence in cross-examination, when she agreed with the suggestion that "[Cap Sol] is in one sense an intermediary between people who have money to lend and … people who [want] ~~have money~~ to borrow"[2].

[3] Mr William Massias ('Mr Massias'), who was initially a party to the action in the court below, but played no part in this appeal, was at one stage at least an 85% shareholder of Cap Sol. Prior to January 2008, Mr Massias, who was also a licenced investment advisor, was the president and CEO of Cap Sol. But it was a critical part of Cap Sol's case at trial, as it has also been in this appeal, that Mr Massias had no authority to do or say anything on its behalf after January 2008.

[4] The second respondent ('Mr Rizza'), is the son of the first respondent ('Mrs Rizza), and was authorised to conduct business on her behalf. Save where it is necessary to refer to them individually, I will refer to Mr Rizza and his mother together as 'the Rizzas'.

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[1] Witness statement of Vanceta Ramsay dated 17 December 2013, para. 1.
[2] Record of Appeal, Volume IX, page 40A

[5] The Rizzas were longstanding customers of Cap Sol. It is common ground that Mr Rizza and Mr Massias also enjoyed a close personal friendship.

[6] In or around February 2008, Mrs Rizza became concerned about the status of her investments at Cap Sol, having heard rumours that Mr Rizza had lost a significant portion of their investment with a third party. This triggered a series of communications between the Rizzas and Mr Massias as to the status of the investments, with the Rizzas demanding repayment of their funds and Mr Massias attempting to give various assurances of their security.

[7] One result of this was a letter dated 14 February 2008 to Mrs Rizza, over the signature of Mr Massias, writing as president and CEO on Cap Sol's letterhead, confirming various balances held by Cap Sol for the Rizzas' account. As will be seen, this letter, and Mr Massias' authority to write it on Cap Sol's behalf, later assumed central importance in the subsequent dispute between the parties. For ease of reference, I will describe it, as the judge did, as 'the Valentine's Day letter'.

[8] By the end of October 2008, Cap Sol had not repaid the funds due to the Rizzas and Mr Massias issued successive promissory notes (in his personal capacity) in their favour[3]. The first of these notes was dated 15 November 2008, with a maturity date of

[3] The notes are to be found in the Record of Appeal, Vol II, pages 142 and 143

15 January 2009. In it, Mr Massias promised to pay the Rizzas the sum of US$572,960.52 with interest at 2.5% per month. This note was not honoured on maturity.

[9] Consequently, on 31 March 2009, Mr Rizza sent a letter to Cap Sol, for the attention of Mr Massias. In the letter, which was captioned, "Loan to William Massias & Island Networks Ltd.", Mr Rizza stated that, "I will need your new promissory note which will **expire May 11, 2009**"[4]. Accordingly, on 1 April 2009, Mr Massias issued the second note in the same amount of US$572,960.52, with a maturity date of 1 May 2009, but this time at a reduced interest rate of 18% per annum.

[10] Mr Rizza's evidence was that the first note was issued in response to his repeated demands for the return of the moneys due to him and his mother, and his threats to sue Cap Sol and, if necessary, report it to the FSC[5]. In a finding that is not challenged on appeal, the judge held[6] that it was the "build-up of pressure" from Cap Sol's failure to repay the funds due to the Rizzas "that precipitated that first promissory note issued in November 2008". The judge also accepted Mr Rizza's evidence that the 31 March 2009 letter and the second note did not represent the true nature of the transaction: "It was a 'fake loan' quite likely designed to appease Mrs Rizza that there was some hope of recovery of the money"[7].

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[4] Supplemental record of appeal, Vol XI, page 35 (emphasis as in the original)
[5] Witness statement of Roberto Rizza, Record of Appeal, Vol II, page 183
[6] Judgment (reported at [2017] JMCC Comm 15), para. [19]
[7] Judgment, para. [57]

[11] I will refer to both promissory notes collectively as 'the notes'.

[12] On 15 May 2009, the Rizzas, not satisfied with the continued failure to return their funds to them, commenced action against Cap Sol and Mr Massias. Over a period of close to five years after that, the original claim form and particulars of claim were amended, re-amended and further amended. Finally, in their further amended claim form filed on 18 February 2014, the Rizzas claimed a total of US$931,845.15 against Cap Sol and Mr Massias. This amount comprised US$360,882.63 "relating to Repo and Commercial Paper Investments" and US$570,962.52, "relating to Off-Balance Sheet Accounts". The Rizzas also claimed an additional amount of US$27,623.43 against Cap Sol arising from a separate transaction, but this aspect of the claim was later abandoned.

[13] In the interim, there were various interlocutory applications between the parties. There were also a number of reconciliation exercises, one outcome of which was that, on 10 January 2011, F Williams J (as he then was) entered a consent judgment against Cap Sol in Mr Rizza's favour in the sum of US$35,001.89, with interest ('the consent judgment'). Cap Sol duly paid this amount to the Rizzas.

[14] In its defence to the further amended particulars of claim, Cap Sol asserted that there was a "private and exclusive arrangement" between the Rizzas and Mr Massias for which it had no responsibility; and that Cap Sol therefore had no responsibility for anything arising out of that arrangement. Cap Sol further averred that, by paying the consent judgment sum of US$35,001.89 (receipt of which the Rizzas acknowledged), it

"thereby discharg[ed] all outstanding indebtedness to … [the Rizzas]". Cap Sol accordingly denied any further indebtedness to the Rizzas.

[15] The matter finally came on for trial before Sykes J (as he then was) ('the judge') on 26 May 2014. At the outset of the trial, there was agreement between the parties that, over time, the Rizzas had given Cap Sol a total sum of US$1,370,964.07 for investment. This was therefore the sum for which Cap Sol was obliged to account to the Rizzas.

[16] On the first day of the trial, counsel for Mr Massias (who was separately represented) applied to the judge for an order striking out the claim against him, on the ground that the notes were unenforceable. The judge agreed and struck out the claim accordingly[8]. Mr Massias therefore took no further part in the trial.

[17] The judge heard evidence from Mr Rizza and Mrs Ramsay, who was Mr Massias' successor as the Chief Executive Officer of Cap Sol. Mr Rizza's three witness statements[9] stood as examination-in-chief, as did the two filed on behalf of Mrs Ramsay[10]. As might have been expected, both witnesses were also extensively cross-examined. Mr Rizza, in particular, was cross-examined at great length by Mr Christopher Dunkley, who also appeared for Cap Sol at the trial.

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[8] Judgment, para. [24]

[9] (i) Witness statement of Roberto Rizza filed 11 December 2013; (ii) supplemental witness statement of Roberto Rizza filed 30 December 2013; and (iii) supplemental witness statement of Roberto Rizza filed 15 April 2014

[10] (i) Witness statement of Vanceta Ramsay filed 18 December 2013; and (ii) supplemental witness statement of Vanceta Ramsay filed 10 February 2014

[18] Towards the end of Mr Rizza's cross-examination by Mr Dunkley, Lord Gifford QC, who also appeared for the Rizzas at the trial, rose to say something to the court. He told the judge that, having heard the evidence and taken instructions, he had come to appreciate that the claim for US$570,962.52 included a sum of US$168,860.11 which was also included in the claim for US$360,882.63. Lord Gifford further indicated that, in light of that fact, "… if the first part of the claim succeeds it would be necessary to offset $167,688.71 from the second part of the claim"[11]. Mr Dunkley then resumed his cross-examination of Mr Rizza without any comment on what Lord Gifford had said and the cross-examination ended without further reference to the point.

[19] Much turned at trial on the distinction between what were characterised as 'on-book' and 'off-book' investments. Based on the evidence which he accepted, the judge found that "'on-book' transactions were those invested in repurchase agreements (Repos) and commercial paper transactions (CPTs)"[12]; while 'off-book' investments were "those transactions that arose spontaneously and were taken advantage off [sic] because there was money lying around which was used to participate in those investments"[13]. The judge further explained that:

> "The court was assured that … the distinction lay not in what was legal or illegal. The court was also assured that the primary advantage of the 'off-book' transactions was that they attracted a higher rate of return, generally, than the 'on-book' transactions. The distinction between the two is important to

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[11] Record, Volume IX, page 3
[12] Judgment, para. [3]
[13] Ibid

> Cap Sol's defence to the claim because as far as Cap Sol is concerned 'off-book' transactions were the product of the close personal relationship and friendship between Mr Rizza and Mr Massias and therefore any loss suffered by the Rizzas should not be laid at the door of Cap Sol but should be resolved between the two men."

[20] The claim for US$570,962.52 related to 'off-book' investments[14]. The issue of whether Mr Massias acted as the agent of Cap Sol at all material times therefore assumed great significance at the trial. The judge's conclusion was that (i) the off-book investments were made during Mr Massias' tenure as president and CEO of Cap Sol; (ii) accepting and dealing with these investments on behalf of the Rizzas was within Mr Massias' actual and/or ostensible authority as an agent of Cap Sol; and (iii) Cap Sol was therefore liable to account to the Rizzas for those investments.

[21] In the result, the judge found Cap Sol liable to the Rizzas on their claim in respect of the off-book investments. However, as a result of Lord Gifford's indication that part of the US$570,962.52 was a duplication of sums claimed as part of the on-book investments, the judge reduced the award under this head to US$404,100.41.

[22] The claim for US$360,882.63 related to the Rizzas' on-book investments. In this regard, the judge found, after detailed consideration of a mass of evidence, that Cap Sol had failed to account to them for the sum of US$205,998.11.

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[14] In the further amended particulars of claim, these were referred to as "Off Balance Sheet Accounts", but it was common ground that there was no distinction between the two.

[23] The judge also found that the Rizzas had proved that Cap Sol had failed to account for a further sum of $16,112,305.53 (US$259,858.27), but he declined to include this in the judgment sum on the basis that it did not form part of the claim.

[24] Final judgment was accordingly entered in favour of the Rizzas as follows:

> "1. In respect of the claim for US$570,962.52, judgment for [the Rizzas] in the sum of **US$404,100.41** plus interest thereon at 6% per annum from February 18, 2014 to the date of judgment.
>
> 2. In respect of the claim for US$360,882.63, judgment for [the Rizzas] in the sum of **US$205,998.11** plus interest thereon at 6% per annum from February 18, 2014 to the date of judgment.
>
> 3. Costs to [the Rizzas], to be agreed or taxed, with [the Rizzas] to be treated as if they were a single Claimant and awarded one sum for both."

**The issues on appeal**

[25] Dissatisfied with this result, Cap Sol appealed against the judgment on a total of 19 grounds, some of which overlapped with others[15]. Despite their number, I think that the appellant's grounds may fairly be divided into three main issues. The first issue is whether the judge erred in finding that Cap Sol was bound by, and liable for, Mr Massias' actions in both the pre and post-January 2008 periods with respect to the 'off-book' investments (grounds 3, 5-8, 13 and 15) ('The agency issue'). The second and third issues have to do with whether the judge erred in finding that Cap Sol had failed to account to the Rizzas for, and was therefore liable to pay them the amount of (i) US$404,100.41, in

[15] See notice and grounds of appeal filed on 8 August 2017

respect of the off-book investments (grounds 4, 9-12, 14 and 16) ('The off-book investments issue'); and (ii) US$205,998.11, in respect of the on-book investments (grounds 1, 2, 17-19) ('The on-book investments issue').

[26] For their part, the Rizzas were also unhappy with an aspect of the judge's decision and, in a counter-notice of appeal filed on their behalf[16], they contended that the judge erred in finding that, although they had proved that the sum of $16,112,305.53 (US$259,858.27) was due to them from Cap Sol, they could not recover this amount as there was no claim for it. The question whether the Rizzas are correct in this contention and are therefore entitled to judgment in the further sum of $16,112,305.53 (US$259,858.27) is therefore the fourth issue in this appeal ('The counter-notice of appeal issue').

**The approach of this court**

[27] I think it is pertinent to observe at the outset that, save for the agency issue, the issues which I have identified all relate to the judge's findings of fact. I therefore approach these issues, as I must, on the basis of the long-established principle that, where questions of credibility are involved, this court will not lightly interfere with a trial judge's findings of fact, unless it can be shown that the judge misdirected him or herself in some material respect, or if the conclusion arrived at by the trial judge was plainly wrong. In

[16] See counter-notice of appeal filed 28 September 2017

**Beacon Insurance Company Limited v Maharaj Bookstore Limited**[17], Lord Hodge explained the principle of appellate restraint in this way:

> "It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in *Thomas v Thomas* at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169."

## The agency issue

[28] The grounds of appeal which relate to this issue are as follows:

> "3. The Learned Trial judge erred in holding *[per paragraph 40 of the judgment]* that [Mr Massias] took money from [Mr Rizza] and that [Cap Sol] had those monies, where there was no evidence of this, despite Orders for accounting made by the Court, to which [Cap Sol] complied."
>
> "5. The learned Trial Judge erred in accepting, without question, [Mr Rizza's] assurance to the Court that [Mr

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[17] [2014] UKPC 21, para. 12. See also, **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35 and **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7.

Massias] and [Cap Sol] were licensed to conduct *'off-book transactions'* [*per paragraph 3 of the judgment*] because off book investments are **undocumented** and advice based, whereas only on-book transactions attract liability because the financial institution accepts carriage of the investor's funds, for onward investment.

6. The learned Trial Judge recited the *modus operandi* between the Respondents when it came to making investments [*per paragraph 4 of his judgment],* in that [the Rizzas] would take suggestions as to good investment opportunities to make, yet the case as brought was for recovery of funds and not for poor or negligent advice.

7. The Learned Trial Judge erred in finding [Cap Sol] liable for *'transactions [which] arose spontaneously and were taken advantage of because there was money lying around…'* yet there is not a scintilla of evidence as to any consideration *'lying around'* which was paid over to [Cap Sol], *(or even [Mr Massias]),* to constitute [the Rizzas'] *'investment'* of US$572,960.52.

8. The Learned Trial Judge erred in finding [Cap Sol] liable on the basis of holding out and [sic] ostensible authority when [the Rizzas] failed to meet the evidential burden in any particular, that any *off book* monies came to the hands of [Cap Sol]."

"13. The Learned Trial judge erred in holding [Cap Sol] responsible for liabilities of US$572,960.52 give [sic] that [Mr Massias] unequivocally assumed liability of, and provided security for US$702,754.50 to [Mr Rizza] in his personal and private capacity, and which obligations formed no part of [Cap Sol's] records, and was entirely between those parties, to the exclusion of [Cap Sol]."

"15. The Learned Trial Judge fell into error in holding that transactions which were purely private between two contracting parties could nonetheless create a liability to a third party."

[29] Much turned in the case on the role of Mr Massias, as the president and CEO of Cap Sol and, as the Rizzas contended, their trusted financial adviser. The judge therefore considered[18], I think correctly, that the first legal issue to be determined was "whether Mr Massias was, at all material times, regardless of position held, the agent of Cap Sol, particularly in relation to the 'off-book' items". I will also take this issue first.

[30] The Rizzas' pleaded case was that "[a]t various times [Mr Massias] would advise them of what he would describe as good deals"[19]. Further, that they "would agree for [Cap Sol and Mr Massias] to invest some of their funds in these deals but relied on [Cap Sol and Mr Massias] to make secure and prudent investments on their behalf".

[31] In his first witness statement[20], Mr Rizza stated that:

> "2. The business relationship between the [Rizzas] and the Defendants began very soon after [Cap Sol] opened for business in 1998. I also had a personal friendship with [Mr Massias] and this led me to repose trust in his handling of my financial affairs. He was in control of at least 85% of [Cap Sol] when our investment with that defendant began and was the person in charge of our portfolio.
>
> 3. I would communicate with [Mr Massias] regularly about our accounts and he would make suggestions and tell us of investment opportunities from which we would get better yields than Government of Jamaica Repurchase Agreements (Repos) could provide. He would call these 'off-book' investments but we both understood that they were under the management of [Cap Sol] nevertheless."

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[18] Judgment, para. [26]
[19] Further amended particulars of claim, para. 6
[20] Filed 11 December 2013

[32] There was no challenge to Mr Rizza's account of his relationship with Mr Massias and his reliance on his financial advice. However, Cap Sol averred in its defence that, in addition to the Rizzas' investments in its carriage, Mr Rizza and Mr Massias "were also joint venture partners in their personal capacities in several investment endeavours"[21]. This statement was echoed by Mrs Ramsay[22], whose evidence was that –

> "I am also aware that [Mr Rizza] and [Mr Massias] had various business interests between them which were outside of [the Rizzas'] commercial paper investments previously held with [Cap Sol], which were entirely independent of [Cap Sol], apparently now the subject of the claim against [Mr Massias]."

[33] Under cross-examination by Lord Gifford [23], Mrs Ramsay described Mr Massias as "the founding officer, main shareholder" at the formation of Cap Sol in 1998 and that he remained president and CEO of the company until January 2008.

[34] There was therefore no question that, up to January 2008, Mr Massias was the agent, and indeed the principal voice, of Cap Sol. As the judge put it[24], "having regard to the fact that Mr Massias was at one point president and CEO of Cap Sol, it means that what he thought and did were in fact what Cap Sol thought and did".

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[21] First defendant's defence to reamended particulars of claim, para. 4
[22] Witness statement dated 18 December 2013, para. 5
[23] Record of Appeal, Volume IX, page 48A
[24] Judgment, para. [37]

[35] But the question of his continuing relationship, if any, with Cap Sol assumed especial importance in the period following January 2008. Mrs Ramsay's evidence was that Mr Massias ceased to be managing director of Cap Sol in that month and that, as of February 2008, the chairman of the company was one Mr Troy Brennon[25].

[36] Under further cross-examination, Mrs Ramsay maintained her position that Mr Massias ceased to be president and CEO of Cap Sol in January 2008 and, after that date, had no authority to speak for or represent the company. But, although she insisted that she was "pretty sure" that by February 2008 Mr Rizza would have been aware that Mr Massias was no longer president and CEO, she ultimately acknowledged that Cap Sol did not send him a letter advising him of this development[26].

[37] Lord Gifford invited us to test Mrs Ramsay's evidence against the contemporaneous correspondence between Mr Massias, the Rizzas and others in the post-January 2008 period. Among the items of correspondence were several electronic mail ('email') exchanges between Mr Massias and Mr Rizza, as well as with other persons within Cap Sol (including an email to Mrs Ramsay dated 29 January 2008[27]). The correspondence revealed that, between 28 January 2008 and 10 April 2008, Mr Massias continued to describe himself as the "President & CEO" of Cap Sol[28]. It is only necessary to mention a few of them.

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[25] Record of Appeal, Volume IX, page 49
[26] Record of Appeal, Volume IX, pages 51
[27] Record of Appeal, Volume X, page 75
[28] Record of Appeal, Volume X, pages 71-110

[38] In an email to Mr Massias dated 7 February 2008, Mr Rizza conveyed Mrs Rizza's concerns about the status of her account with Cap Sol[29]:

> "Hello William
>
> My mother has been getting Nemours [sic] calls that I have lost 1.8M with Ricky which I have told her is erroneous. She has mentioned on many occasion [sic] that William has promised her statement of her account. She called the other day very concerned on why I have not been able to show her anything to date on a Capsol letter of how much money she has with your company. Please see attach [sic] the last statement I have send [sic] her showing the money you have for her. Could you be so kind in putting her mind to rest and send her a statement on your letter head showing her the amount of money she has?"

[39] The statement attached to this email was dated 31 January 2008 and showed a total of US$1,601,350.69 under management by Cap Sol[30].

[40] Mr Massias responded by email to Mr Rizza later on 7 February 2008 in the following terms[31]:

> "Roberto,
>
> We need to go over this schedule before I can put this on Capsol letter head.
>
> Once we have agreed on the figures (reconciling amounts that is [sic] on the books and off the books) then we can send the statement to her.

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[29] Record of Appeal, Volume X, page 76
[30] Record of Appeal, Volume X, page 77
[31] Supplemental Record of Appeal, Volume XI, page 8

…"

[41] Finally, after further email correspondence between Mr Rizza and Mr Massias, in which Mr Rizza reiterated Mrs Rizza's anxiety, Mr Massias produced the Valentine's Day letter on Cap Sol's letterhead[32]:

"2008 February 14

Mrs. Marietta Rizza
c/o Continental Garage Limited
6-8 Lismore Avenue
Kingston 5

**Re: Update on Investment Accounts**

Dear Mrs. Rizza;

We write regarding subject matter and to outline your investments in a detail [sic] manner.

| Name | Cert numbers | Account Balance | Interest Rate | Maturity | Security |
|---|---|---|---|---|---|
| Marietta Rizza | 6068-44 | US$392,000.00 | 07.00% | 04/04/08 | Bond2012 |
| Marietta Rizza | 2288-44 | US$130,583.75 | 10.00% | 06/03/08 | Real Estate |
| Marietta Rizza | 5325-44 | US$113,523.54 | 09.00% | 31/03/08 | Real Estate |
| Marietta Rizza | 1749-44 | US$220,746.19 | 08.50% | 25/01/09 | Real Estate |
| Marietta Rizza | 5023-44 | US$21,744.00 | 08.50% | 25/01/09 | LRS |
| **Off Balance Sheet Accounts** | | | | | |
| Marietta Rizza | 001 | US$343,289.89 | 10.00% | 04/30/09 | Island Net. |

[32] Supplemental Record of Appeal, Volume XI, pages 11-12. The judge referred to this letter as "the Valentine's Day letter" – Judgment, para. [10]

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|---|---|---|---|---|
| Marietta Rizza – 002 | US$ 56,418.92 | 08.50% | 04/30/09 | Capsol RE |
| Marietta Rizza – 003 | US$303,045.69(*) | 08.50% | 01/30/09 | Capsol RE |
| **Total** | **US$1,581,351.98** | | | |

**(*) Note: $19,800.00 was paid to M. Rizza and WAMU in January 2008**

**Summary**

The economy has started to move slightly upward and the general mood of the business community is to be cautiously optimistic. The Bruce Golding led JLP government won the general elections and the Prime Minister is very pro business and the business community is very supportive of his administration.

The alternative (unregulated) investment schemes otherwise known as Foreign Exchange Trading (FX) has [sic] provided a new gateway for the Jamaican investors to invest their funds. While historically some well known firms like **Olint** and **Worldwise** has [sic] been paying high monthly returns to the investing public there also has been the failure of a few firms like **Cash Plus** and **Ricky Azan**.

We still maintain that while we do not endorse the unregulated investment schemes it still can be a vehicle for investing a small part of your overall portfolio. Another [sic] words, if you are compelled to invest in high risk investments, only invest what you can afford to loose [sic], which if its [sic] lost, will not alter your current lifestyle.

I apologize for not being able to get this letter out to you sooner due to my excessive traveling around the Caribbean and the United States. I would like to take this opportunity in thanking you for your business and if at anytime there are any concerns or questions regarding your investments or just general information, please don't hesitate in contacting me.

With warm regards;

**CAPITAL SOLUTIONS LIMITED**

**William Massias**
**President & CEO**"

[42] In an email dated 18 February 2008[33], Mr Rizza directed Mr Massias to realise US$95,384.73 from two named investments. His instructions were "to split [the] money in half and put with Olint Corp and World Wise".

[43] In an email dated 21 February 2008, Mr Massias advised Mr Rizza as follows[34]:

> "Roberto,
>
> I have the 100k for you. Is it in cash or cheque?
>
> I will complete the transfer from your off book Account, to Olint by next week thru, as I just got the signed commitment to move funds on feb 28. So we can start with the funds in olint and world wise by march 1st respectively. If [t]hat is the cast [sic] move all the funds that I have requested to Olint and in a few month [sic] I will move monies over to World Wise.
>
> When are you going to put back the funds that were taken out of mom's Capsol account?
>
> …"

[44] In an email to Mr Massias dated 18 July 2008, Mr Rizza listed four sums totalling US$788,220.29 as "all the unsecure investments I have with you". This elicited a response from Mr Massias in an email dated 21 July 2008[35], in which he informed Mr Rizza that, for the period 14 July 2008-14 August 2008, he had gotten two of the four sums listed in Mr Rizza's previous email, totalling US$476,231.80, "into the off balance sheet agreement", at 2.5% per month[36]. The email ended with the statement that, "[t]he others

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[33] Record of Appeal, Volume X, page 83
[34] Record of Appeal, Volume X, page 85
[35] At para. [12] of the judgment, the judge mistakenly stated the date of this email as 21 June 2008.
[36] Supplemental Record of Appeal, Volume XI, page 15

remain the same". At the foot of this email, Mr Massias described himself as 'William Massias, Capital Solutions Limited'.

[45] In an email to Mr Massias dated 22 July 2008, Mr Rizza sought confirmation of the balances on their off-book investments. He stated that, by his calculation, the amounts outstanding as at 14 July 2008 amounted to US$572,121.26[37]. Mr Massias' response by email dated 25 July 2008 (again signing off as 'William Massias, Capital Solutions Limited') was, "Ok, I have adjusted the account as per your request with the interest"[38].

[46] By late August 2008, it appeared that Mrs Rizza was again becoming anxious about the funds under management by Cap Sol. For instance, in an email to Mr Massias dated 19 August 2008, Mr Rizza stated that "my mother is getting very pissed off re her funds that should have been sent off from last week Friday"[39].

[47] In a letter dated 4 September 2008, Mrs Ramsay, writing in the capacity of acting CEO of Cap Sol, sought to allay Mr Rizza's concerns[40]:

> "September 4, 2008
>
> Mr Robert Rizza
> c/o Continental Garage Limited
> 6-8 Lismore Avenue
> Kingston 6
>
> Dear Roberto,

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[37] Supplemental Record of Appeal, Vol XI, page 18
[38] Ibid
[39] Record of Appeal, Volume X, page 141
[40] Supplemental Record of Appeal, Volume XI, pages 22-23

**Re: Your correspondences to Capital Solutions Ltd.**

We refer to your correspondences dated August 19th 2008 and September 3, 2008 which were addressed to Director William Massias, and our subsequent telephone conversations.

Firstly we do apologize for the delayed response however as we mentioned in our telephone conversations your requests have brought about the need for further detailed investigations into your portfolio here at Capital Solutions Limited and became a matter for the Board's attention.

We do acknowledge that your portfolio is made up as follows;

1) Repurchase agreements (Repo US$) # 06068-44 US$264,816.23

2) Repurchase agreements (Repo US$) # 06518-46 US$ 21,715.01

3) Commercial Paper Transactions #07149-44 US$31,269.90

   Commercial Paper Transaction # 02288-44 US$131,583.75

   Commercial Paper Transaction # 05333-44 US$66,434.06

These commercial paper transactions were represented in our letter dated April 2006 to Black Brothers Inc. Ltd. As we discussed in our telephone conversation Black Brothers Inc. Limited has become a delinquent client and Capital Solutions Limited has now taken legal action to recover all monies due. We are confident that this company and its Principal are in a financial position to settle the debt from its assets held. We also recognize your concerns in this venture. To this end our Board of Directors is prepared to further secure your interest and have asked me to convey these options.

On the matter of a duplication of withdrawals from your account we are conducting a detailed investigation into this matter and ask that you allow us a few more days to complete this investigation.

Your queries also led us to research an item of **US$105,000.00** which was transferred from your account

on November 25, 2005 under instructions of Mr. William Massias. He has also acknowledged this item and although this item is removed from our books we are prepared to recognize this contingent liability as an off book transaction owed to you whilst our research takes place.

We are able to acknowledge your equity investment of **US$113,000.00** into a land acquisition project in Mandeville. We have taken the responsibility to obtain your share certificate representing your investments into **Mandeville Venture Partners Limited** and will have the certificate sent to you as soon as we receive it.

Roberto despite these recent issues rest assured that Capital Solutions is fully committed to your wealth preservation and protection.

Yours Sincerely
**Capital Solutions Limited.**

Vanceta Ramsay (Mrs).
**Chief Executive Officer (Acting)**"

[48] Mr Massias was described at the foot of the front page of this letter as managing director of Cap Sol. In this regard, the following exchange between Lord Gifford and Mrs Ramsay is of interest[41]:

"Q. September 24th, this letter was signed by you as Chief Executive Officer, acting care of William Massias, director, is that right?

A. Yes.

Q. A letter dated 24th September, 2008?

A. Yes, sir.

[41] Record of Appeal, Vol IX, pages 56-57

Q. And at the foot of the letter it describes William Massias as managing director. So, is it right that William Massias was still a director in September 2008?

A. Yes, sir indirectly, yes.

Q. He was a director?

A. Yes.

Q. You sent this letter copied to him as director of the company?

A. Yes.

Q. So he was authorized to represent Capital Solutions at that time, was he not?

A. I would answer that with a clarification. We were discussing with him matters that are still trailing on the hand over of the companies, information and records and so he was involved in our discussions. It was clearly -- it was made clear to him that he had no authority to represent himself as a director outside or internal communications."

[49] Later in 2008, in several items of email correspondence with persons within Cap Sol, Mr Massias continued to describe himself as 'William Massias, Capital Solutions Limited'[42].

[50] By November 2008, the amount outstanding was US$572,960.52 and that formed the basis of the first promissory note which was issued by Mr Massias to the Rizzas on 15 November 2008.

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[42] See various emails from William Massias to Debbie Horne, who was a treasury officer, and Vanceta Ramsay between October and December 2008 - Record of Appeal, Volume X, pages 157-175

[51] The judge divided his findings in relation to Mr Massias' status vis-à-vis Cap Sol between the pre and post-January 2008 period. As regards the first period, the judge had no difficulty finding that[43]:

> "[39] … when Mr Massias was president and CEO, his thoughts and actions were the very thoughts and actions of Cap Sol. What he thought and did do not require any analysis in order to decide whether his actions and thoughts should be attributed to the company but rather it is the case that from he thought and did it, the company automatically thought and did it.
>
> [40] This court is saying that if it is the case that Mr Massias, when he was president and CEO of Cap Sol, took money from the Rizzas and decided to invest them in 'off-book' schemes then those actions were the very actions of Cap Sol without further analysis … because Mr Massias in those capacities would be the head, heart and brain of Cap Sol … From the context and circumstances leading up to the Valentine's Day letter it is reasonable to conclude that the 'off-book' investments were made during the time Mr Massias was president and CEO of Cap Sol. The evidence, despites [sic] its lack of clarity, points in the direction of, and the court so concludes, that the 'off-book investments were made before January 2008."

[52] As regards the post-January 2008 period, having reviewed this court's decision in **ASE Metal NV v Exclusive Holiday of Elegance Limited**[44] ('**ASE Metal NV**'), and the decision of the Court of Appeal of England and Wales in **Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd and another**[45] ('**Freeman &**

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[43] Judgment, paras. [39]- [40]
[44] [2013] JMCA Civ 37
[45] [1964] 1 All ER 630

**Lockyer**'), the judge also concluded that Cap Sol remained liable for any representations made by Mr Massias in that period. This is how the judge put it[46]:

> "[49] Even if were to be said that Mr Massias was not the default brain of the company, it is quite clear that Mr Massias was not prevented from representing himself as the president and CEO of Cap So [sic] even after January 2008. As Diplock LJ explained in **Freeman**, when the company allowed Mr Massias to represent to clients that he had the authority to invest their fund [sic], the company was in fact exercising acts of management by not telling Mr Rizza or Mrs Rizza that Mr Massias no longer had the authority he had before. Therefore, it matters not whether Mr Massias in fact had the authority. Once Cap Sol permitted him to make the representations that he did then by that act of management, namely omitting to correct the client's impression, the company in fact represented that Mr Massias had the authority to do what he did. The crucial point is that before January 2008, he had the authority to advise and invest client's fund and when that changed internally in Cap Sol, Mr Rizza and his mother were never told of the changed position and therefore were entitled to believe that he still had the authority that he previously had. Thus Mrs Ramsay's evidence that Mr Massias did not in fact have authority to do what he did is entirely beside the point. By not saying anything Cap Sol was in fact telling Mr Rizza that it was alright to deal with Mr Massias. The 'off-book' transaction in this context was simply another way of Mr Massias carrying out his job and the business of the company. As Mrs Ramsay said, the business of Cap Sol was 'matching borrowing and lending clients as well as organising their participation in a commercial paper investment and also to facilitate 'introductions with borrowers whose business portfolio aligned with that of [Mr Rizza's] investment objectives.'"

[46] Judgment, paras [49]

[53] In his challenge to the judge's decision, Mr Dunkley relied on three sets of written submissions[47], in addition to his oral submissions. I trust that I do these submissions no disservice by summarising them in this way. Even if the judge was assured that off-book transactions were not illegal, "what he did not appreciate was the distinction between a regulated and unregulated investment. One was permissible to the company, and the other, the responsibility of the investor"[48]. The mind and will of Mr Massias as CEO of the appellant was bound to the terms of the licence issued by the FSC. Accordingly, it was a "manifest injustice" for Cap Sol to be held liable for monies invested outside of its regulatory remit. Although it could be said that, as president and CEO of the company prior to 2008, Cap Sol made a representation as to Mr Massias' authority, "[s]everal aspects of the dealings between [Mr Rizza] and [Mr Massias] lacked transparency and accountability, and were more suggestive of private opportunities that were not intended to be recorded on the books of [Cap Sol], or to be subject to its license under the Securities Act"[49]. While **Freeman & Lockyer** is good law, it was distinguishable on its facts. In this case, even if Mr Massias was the "directing mind and will of [Cap Sol]", as the judge put it, he was subject to the conditions and restrictions of the licences governing himself and Cap Sol. The judge therefore erred in failing to differentiate between transactions that were attributable to Cap Sol (on-book transaction) from those that were

[47] Appellant's submissions, filed 9 October 2018; appellant's speaking notes to respondent's Submissions, dated 22 October 2018; and appellant's submissions in reference to its grounds of appeal (undated), handed up in court on 24 October 2018.
[48] Appellant's submissions in reference to its grounds of appeal, para. 39
[49] Appellant's submissions in reference to its grounds of appeal, para. 58

attributable to Mr Massias in accordance with the express intention of Mr Rizza (off-book transactions).

[54] Lord Gifford submitted that the agency issue was at the heart of the case and that the resolution of the majority of the grounds of appeal depended on the accuracy of the judge's findings of fact and law on this issue. Pointing out that Mr Massias had actual authority as president and CEO of Cap Sol up to early 2008, Lord Gifford submitted that, after that, Mr Massias had apparent or ostensible authority well into 2009. During this latter period, Cap Sol held out Mr Massias as a representative of the company and was therefore deemed to know and have done whatever he did. Based on the facts and on the authorities, the finding of agency was irresistible and the judge was therefore correct for the reasons which he gave. The distinction between on-book and off-book transactions was of no moment, since it was clear from the evidence that Cap Sol accepted responsibility for both and there was no separate and private arrangement between the Rizzas and Mr Massias in relation to them.

[55] In considering these submissions, I must first make mention of the leading authority of **Freeman & Lockyer**. In that case, the articles of association of the defendant company contained power to appoint a managing director but none was appointed. The plaintiffs, a firm of architects, were instructed by a director of the company to carry out an assignment on behalf of the company and the plaintiffs did the work. A dispute arose as to who should pay the plaintiffs' fees and the judge of the county court held that the company was obliged to pay them. The Court of Appeal held that the director had no actual authority to employ the plaintiffs, but had ostensible authority to

do, as he acted throughout as managing director to the knowledge of the board. The director's act in engaging the plaintiffs was within the ordinary ambit of the authority of a managing director and the plaintiffs did not have to inquire whether he was properly appointed: it was sufficient for them that under the articles of association there was in fact power to appoint him as such and accordingly the defendant company were liable for the plaintiffs' fees.

[56] **Freeman & Lockyer** is best known for Diplock LJ's celebrated analysis of the law relating to the authority of officers and/or servants of a corporation to enter into contracts on its behalf. First, distinguishing between actual authority and apparent or ostensible authority, Diplock LJ said this[50]:

> "An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor."

[57] Next, as regards apparent or ostensible authority, Diplock LJ went on to add this[51]:

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[50] At page 644
[51] At page 644

"An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the 'actual' authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either on the representation of the principal, ie, apparent authority, or on the representation of the agent, ie, warranty of authority. The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, ie, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has normally 'actual' authority to enter into."

[58] And, lastly from **Freeman & Lockyer**, I will mention a passage quoted by the judge in his judgment in this case, in which Diplock LJ said this[52]:

> "The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, viz, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do normally enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the 'actual' authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance on such 'apparent' authority that the agent had authority to contract on behalf of the company."

[59] Diplock LJ's analysis was applied by the Privy Council, in **New Falmouth Resorts v International Hotels Ltd**[53] (a case on appeal from a decision of this court), in which Sir Alan Ward observed that "[t]he judgment of Diplock LJ in *Freeman & Lockyer* has stood the test of time". It was also applied by this court in **ASE Metals NV**[54].

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[52] At pages 645-646
[53] [2013] UKPC 11, para. 23,
[54] See the judgment of Brooks JA at paras [25]-[29]

[60] These cases therefore make it clear that the agent's actual authority derives from the terms of his or her contract with the principal. The principal is therefore liable for anything done by the agent within his or her actual authority. But the agent's apparent or ostensible authority is based on his or her authority as it is made to appear to third parties by the principal, whether by words or conduct. Accordingly, in any case in which a third party enters into a contract with the agent in reliance on his or her apparent or ostensible authority, the principal is estopped from denying the agent's authority to enter into such a contract, irrespective of what the agent's actual authority to enter into that contract might have been.

[61] It is clear that, up to January 2008, Mr Massias had actual authority as president and CEO of Cap Sol to further the business of the company. As Mrs Ramsay said in evidence, this included "matching borrowing and lending clients as well as organizing their participation in a Commercial Paper Investment"[55]. There is therefore no question that in pursuit of these objectives, Mr Massias was authorised to deal with and advise customers, including the Rizzas, on matters of investment and wealth preservation. As a general proposition, Mr Dunkley did not seriously contend otherwise. However, he maintained that, while Mr Massias' authority over Cap Sol as its president and CEO was not disputed, the Rizzas clearly understood that funds that were invested 'on-book' were

[55] Witness statement of Vanceta Ramsay dated 17 December 2013, para. 1.

invested with Cap Sol, but that the higher-risk investments were 'off-book' and therefore "outside [Capsol]"[56].

[62] In my respectful view, this is a hopeless submission. The uncontradicted evidence was that Mr Massias was the officer of Cap Sol with whom the Rizzas dealt directly. So any evidence contrary to theirs as to what was the understanding between them, unless contained in contemporaneous documentation, would have had to come from Mr Massias himself. While it is clear that the distinction between on-book and off-book investments was well established in the dealings between the Rizzas and Cap Sol, there was absolutely no evidence to suggest that the latter's contractual obligation to the former was conditional on this distinction. Indeed, such evidence as there was, as it seems to me, was plainly to the contrary. Mr Massias' Valentine's Day letter to Mrs Rizza, which was written in response to her repeated and increasingly urgent requests for a statement of her account with Cap Sol, was written on Cap Sol's letterhead and clearly included both types of investments in the update on investment accounts under management by the company. And, as the judge found[57], the context and circumstances leading up to that letter made it "reasonable to conclude that the 'off-book' investments were made during the time Mr Massias was president and CEO of Cap Sol".

[63] In the post-January 2008 period, as has been seen, Mr Massias continued to describe himself for a few months as president and CEO and, for several months after

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[56] Para. 56 of appellant's submissions in reference to its grounds of appeal
[57] Judgment, para. [40]

that, as a director of Cap Sol. The company's letterhead also continued to describe him as managing director. As Mrs Ramsay was reluctantly obliged to concede, Cap Sol did not advise the Rizzas that Mr Massias' status had changed. On this state of the evidence, it seems to me that the judge's conclusion[58] that "Cap Sol was in fact telling Mr Rizza that it was alright to deal with Mr Massias", cannot be faulted. By representing to the Rizzas that Mr Massias' actual authority to deal with them as customers of the company continued unchanged in the post-January 2008 period, Cap Sol was estopped from denying his authority to bind the company.

[64] I also consider that the distinction between on-book and off-book transactions is of no significance from the standpoint of Cap Sol's legal responsibility in the post-January 2008 period. In this regard, I need only refer to, firstly, Mr Massias' statement in his email to Mr Rizza dated 21 July 2008 that he had gotten two sums totalling US$476,231.80 "into the off balance sheet agreement", at 2.5% per month[59]; and, secondly, Mrs Ramsay's statement in her letter to Mr Rizza dated 4 September 2008 that Cap Sol was prepared to accept an amount of US$105,000.00 transferred from his (Mr Rizza's) account on Mr Massias' instructions on 25 November 2005, "as an off book transaction owed to you"[60].

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[58] Judgment, para. [49]
[59] See para. [43] above
[60] See para. [47] above

[65] This evidence, in my view, amply validates the judge's conclusion that "[t]he 'off-book' transaction in this context was simply another way of Mr Massias carrying out his job and the business of the company"[61].

[66] I therefore conclude that Cap Sol's appeal fails on the agency issue. Accordingly, the judge was entirely correct to hold it liable to the Rizzas on the basis of Mr Massias' actual authority in the pre-January 2008 period, and his apparent or ostensible authority in the post-January 2008 period.

**The off-book investments issue**

[67] The grounds of appeal which relate to this issue are as follows:

> "4.On the face of his Judgment, the Learned Trial Judge erred in finding the Appellant liable for 'transactions *[he was assured] arose spontaneously and were taken advantage of because there was money lying around which was used to participate in those investments' [per paragraph 3 of the judgment]* because off book transactions are unreported to the regulators, seeking high returns to its investors, whereas the Appellant's licence under the Securities Act strictly prohibits such activity for being unreported high risk activity seeking high returns."
>
> "9. Although the Learned Trial Judge noted [*per paragraph 5 of his judgment]* that the story began with news of the cause of the 2nd Respondents' [sic] loss, he fails to pursue any enquiry of the only parties with knowledge of, or privity to these *off book* investments and losses with Ricky Azan, namely the 1st and 3rd Respondents.
>
> 10. The Learned Trial judge failed to appreciate [sic] or at all, the dual legal effect of the promissory notes issued by the 3rd Respondent, and the Court's absolute discharge of their

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[61] Judgment, para. [49]

enforceability, [*per paragraph 24 of his judgment],* as an absolute bar to the Learned Judge's *ex post facto* conversion of those promissory notes to '*off book investments'.*

11. The Learned Trial Judge's finding that the *'off book' transactions*, the subject of the Claim, raised no alarm at the Appellant company is at odds with the evidence.

12. The Learned Trial Judge's inference that the Appellant represented that William Massias could engage in off book transactions is in conflict with the evidence that the information relating to any such 'transactions' passed and remained entirely between the 1st and 3rd Respondents to the exclusion of the Appellant and formed no part of its records."

"14. The Learned Judge's unilateral determination that the promissory notes executed by the 3rd Respondent in favour of the 2nd Respondent along with the March 31, 2009 correspondence between those two parties were really off book transactions for which he has gone on to hold the Appellant liable is in direct conflict with the contemporaneous documentary evidence to which the Appellant is neither contractually nor factually privy."

"16. The Learned Trial Judge erred in finding that the Appellant has failed to account for **US$404,100.40** of US$572,960.52, where there is no evidence that the Appellant ever had **US$572,960.52** in its carriage nor is there any evidence of any named investment identified by the 1st and 2nd Respondents for which the Appellant has now found liable."

[68] I have already considered, and rejected, a significant aspect of Mr Dunkley's argument with regard to the off-book investments, which was that the judge ought not to have ordered Cap Sol to account for transactions (i) that were in breach of its licence from the FSC; and (ii) for which, by signing the notes, Mr Massias had accepted personal liability. All that remains for consideration, therefore, is whether the judge came to the right conclusion on the evidence in relation to these investments.

[69] The Rizzas' pleaded case in respect of the off-book investments was as follows:

> "18. The [Rizzas] had jointly deposited money with [Cap Sol] for [Mr Massias] to invest personally as their account officer. By a letter dated February 14, 2008 [Cap Sol] acknowledged that it had invested the amount for US$702,754.50 on behalf of [Mrs Rizza] in 'Off Balance Sheet Accounts'. The sum of US$572,960.52 which the [Rizzas] now claim was part of the said amount of US$702,754.50.
>
> 19. [Cap Sol] has failed and refused despite demands to pay the said sum of US$572,960.53 [sic] or any part of it to the [Rizzas].
>
> 20. By a promissory note dated the 1st April 2009 [Mr Massias] promised to pay the sum by May 1, 2009. The said promissory note was issued to replace an earlier note which was issued on November 18, 2008 for the same amount and which matured on January 15, 2009.
>
> 21. The consideration for the first promissory note was the agreement of the [Rizzas] not to pursue legal remedies against [Cap Sol] and not to continue to press for payment of the funds which had been invested with [Cap Sol]. With respect to the second promissory note there was the further consideration of the [Rizzas'] forbearance in not suing [Mr Massias] when he failed to honour the first promissory note.
>
> 22. [Mr Massias] has failed to pay the said sum or any part of it."

[70] In its defence to the further amended particulars of claim, Cap Sol denied paragraphs 18-21 above and, after referring to earlier iterations of the Rizzas' particulars of claim and its defences in relation to them, repeated its denial of liability in respect of "… a 'Note' it has consistently denied knowledge of, or responsibility for, as a licensed

Securities, Asset and Investment Manager …"[62]. In this regard, Cap Sol referred in particular to Mr Rizza's letter to Mr Massias dated 31 March 2009[63].

[71] I have already noted that, having accepted a submission that the notes were unenforceable, the judge dismissed Mr Massias from the action. The claim for recovery of the amount of US$572,960.52 therefore proceeded against Cap Sol alone.

[72] The starting point in the evidence was the Valentine Day's letter, in which Cap Sol acknowledged having invested US$702,754.50 on behalf of the Rizzas. The lesser amount of US$572,960.52 claimed by the Rizzas was based on balances confirmed by Cap Sol through a series of email correspondence between Mr Massias and Mr Rizza, the contents of which I have already described[64].

[73] On the basis of this evidence, once the judge accepted Mr Rizza's evidence, and found that Mr Massias was acting as an authorised agent of Cap Sol at all material times, he had no difficulty holding Cap Sol liable for the off-book transactions. As the judge explained[65], after quoting from Mrs Ramsay's letter to Mr Rizza dated 4 September 2008:

> "The point is the question of 'off-book' transactions or recognition of liability in respect of 'off-book' transactions did not appear to be strange even to Mrs Ramsay. There is therefore no reason to accept Cap Sol's view that 'off-book' transactions were beyond the pale as far as it concerns its business practices. This court accepts and finds that when Mr Massias wrote to Mrs Rizza in his Valentine's Day letter that

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[62] Defence to further amended particulars of claim, para. 13
[63] See para. [9] above
[64] See paras [42]-[44] above
[65] Judgment, para. [45]

> Cap Sol had over US$702,754.50 for her in its 'off-book' accounts it was quite legitimate as far as Cap Sol's operations are concerned. Thus when Mrs Ramsay told Lord Gifford in cross examination that there is no such thing as 'off-balance sheet' in the company, she was not quite accurate given that she herself had used an expression – 'off-book' transaction – which means the same thing ..."

[74] It accordingly seems to me that, based on the evidence, the judge's finding that Cap Sol was liable for the amount of US$572,960.52 on account of the off-book investments was inevitable. Before leaving this issue, however, I must make specific mention of three other issues, two of which arise from the grounds of appeal, and one of which arose at the hearing before us.

[75] The first relates to the notes. In essence, Cap Sol's complaint in grounds 10, 13 and 15 is that the judge erred in holding it responsible for off-book investments of US$572,960.52, given Mr Massias' unequivocal assumption of liability. In other words, as I understand the point, the judge's decision that the notes were unenforceable as against Mr Massias was "an absolute bar"[66] to his later finding that the same amount for which they were issued related to off-book transactions for which Cap Sol was liable.

[76] The claim for recovery of the US$572,960.52 primarily derived from Cap Sol's clear admissions made in the Valentine's Day letter in relation to the off-book transactions, while the claim for recovery of the same amount from Mr Massias was entirely based on

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[66] See ground of appeal 10, Record of Appeal, Vol I, page 4

the notes. Although obviously related, the bases of the alleged liability of Cap Sol and Mr Massias were therefore clearly distinct and the claims against them were made jointly and severally. In these circumstances, it cannot possibly follow, in my view, that the dismissal of the claim against Mr Massias, on the ground that the notes were unenforceable, must necessarily have operated as an automatic release of Cap Sol from the consequences of its own admissions.

[77] The second matter arises from Mr Dunkley's oft-repeated point that, because Mr Massias and Cap Sol were bound by the terms of the licence issued by the FSC, it would be unjust for Cap Sol to be held liable for monies invested outside of its regulatory remit.

[78] Despite the fact that the Rizzas' further amended particulars of claim made specific reference to "Off Balance Sheet Accounts", Cap Sol took no specific point in its defence as to whether such accounts or investments were permitted under the terms of its licence from the FSC. This no doubt explains why neither side adduced any evidence of the terms of either Cap Sol's or Mr Massias' licences. It is against this background that the judge observed, as I have already noted, that "[t]he court was assured that … the distinction [between on-book and off-book transactions] lay not in what was legal or illegal"[67]. It is therefore clear that this is the basis on which the trial was conducted.

[79] Nonetheless, Cap Sol felt able to complain in grounds 4 and 5 that (i) the judge erred in finding it liable for off-book transactions "seeking high returns to its investors,

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[67] Judgment, para. [3] – see para. [19] above

whereas the Appellant's licence under the Securities Act strictly prohibits such activity …"; and (ii) the judge "erred in accepting, without question, [Mr Rizza's] assurance to the Court that [Mr Massias] and [Cap Sol] were licensed to conduct *'off-book transactions'"*.

[80] In my view, these grounds represent an attempt by Cap Sol to raise an issue which it failed to do in the court below. If, as Cap Sol now seeks to argue, the assurances given to the judge with regard to the legality of off-book transactions were disputed, this was plainly a point that it ought to have been distinctly raised and supported by evidence adduced at the trial. As it happens, the only evidence in the case with even a vague bearing on the issue tended to reinforce the assurances which the judge was given. In this regard, I have in mind a letter to Mr Rizza from the FSC dated 2 December 2011, in which the FSC referred to "off the book" transactions conducted by Cap Sol without any suggestion that they were in breach of its licence in any way[68].

[81] The final issue arose at the very end of the hearing of the appeal. The background to it was Lord Gifford's quite proper indication to the court during the trial that he had come to the realise that the claim for US$572,960.52 under the head of off-book investments included an amount which also formed part of the sum of US$360,882.63 claimed in respect of on-book investments[69]. Mr Dunkley made no comment on this and at the end of the day the judge, having found Cap Sol liable to account for the full amount

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[68] See Record of Appeal, Volume XI, pages 42-43
[69] See para. [18] above

claimed on account of the off-book investments, made the necessary deduction and awarded the reduced amount of US$404,100.41[70].

[82] On 24 October 2018, while the hearing of the appeal was in progress, Lord Gifford referred the court to this development by way of explanation of why the final judgment amount in respect of the off-book investments was significantly less than the amount claimed. On 25 October 2018, after the appeal had been fully argued on both sides, Mr Dunkley handed up to the court a document indicating Cap Sol's intention to seek leave to argue an additional ground of appeal, "based on a material admission of [the Rizzas] in the Appeal on October 24, 2018"[71].

[83] The "material admission" referred to in this document was Lord Gifford's statement to the court on the previous day that Cap Sol was entitled to "a US$168 credit", as reflected in the judgment in the court below. On this basis, Mr Dunkley's document launched into what appeared to be a whole new argument in support of Cap Sol's position that it was not indebted to the Rizzas for any amount. Lord Gifford sought and obtained the court's permission to respond to this application within 14 days and, subject to that issue, the court reserved its judgment on the appeal.

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[70] See para. [21] above
[71] Notice of intention to argue new ground, dated and filed 25 October 2018

[84] On 2 November 2018, Mr Dunkley filed a further document, headed 'Submissions in support of Appellant's new ground & computation'[72]. This was followed on 7 November 2018 by written submissions from Lord Gifford and Mr Mellish opposing the application.

[85] I have no doubt that this application must be refused. In the first place, despite the extensive submissions which it generated, Mr Dunkley nowhere formulated with any precision the additional ground which he wished to argue. Secondly, when Lord Gifford advised the judge that there was a duplication in the amount claimed, Mr Dunkley, who was then embarked on his cross-examination of Mr Rizza's at the trial, said nothing at all about it. But further, and perhaps of even greater significance, he opted not to ask Mr Rizza anything about it when the cross-examination resumed. In these circumstances, I think it would be wholly unfair to allow Mr Dunkley to voice his objection at this late stage, not least of all because Mr Rizza will have had no opportunity comment on the so-called concession.

[86] I therefore conclude that the challenge to the judge's findings in respect of the off-book transactions must be rejected.

**The on-book investments issue**

[87] The grounds of appeal which relate to this issue are as follows:

> "1. The Judgment against [Cap Sol] is at odds with the agreed facts at paragraph 3 of the same judgment that the 1st and

[72] This document was a full 60 paragraphs in length.

> 2nd Respondents '*handed over US$1,370,965.07 to Capsol to be invested',* which, on the evidence, was all returned.
>
> 2. The learned Trial Judge erred in a material particular, *[per paragraph 74 of the judgment]* in failing to appreciate the Appellant's case that [Mr Rizza's] investment assets were at all material times, illiquid throughout the course of their receipt of monies from [Cap Sol] hence the unconventional repayment process, the subject of much of the judgment's criticism of the Appellant."
>
> "17. The Learned Trial Judge erred in paying insufficient attention or at all, to the interlocutory affidavit evidence he accepted as part of [Cap Sol's] Evidence In Chief, which explained in detail the case at bar, and which led to multiple amendments downwards of the [Rizzas'] Claim.
>
> 18. The Learned Trial Judge thereafter erred in finding liability to [Cap Sol] for **US$205,998.11** where the empirical evidence clearly discharged that liability to the [Rizzas] in full.
>
> 19. The judgment is at odds with the evidence as elicited and captured in the contemporaneous transcript at trial and therefore amounting to a perverse outcome."
>
> (Emphases as in the original)

[88] In essence, Cap Sol's complaint is that the judge's finding that it is liable to pay the Rizzas US$205,998.11 in respect of the on-book investments was against the weight of the evidence.

[89] The starting point on this issue is the agreement between the parties that, between 2000 and 2003, the Rizzas entrusted Cap Sol with a total amount of US$1,370,964.07 for investment in on-book transactions[73]. As the judge observed more than once, this case

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[73] See affidavit of Vennecia Scott sworn to on 23 February 2010, para. 5 (Table 1) – Record of Appeal, Vol III, page 339. The judge records the agreement at para. [3] of the judgment.

was about repayment of principal, since it was common ground that the Rizzas were in receipt of payments for interest as and when due over the relevant period. Of this amount, the Rizzas claimed that there was an outstanding balance of US$360,882.63 due to them, while Cap Sol contended that all the amounts due to the Rizzas on its books had been repaid to them in full.

[90] The claim arose out of what the judge described as the "Mayberry share purchase and resale transaction and the Cane River CPT"[74]. In order to gain a better understanding of the claim, it is necessary to give a brief summary of that transaction, and the account which follows is based on the now undisputed facts recorded in the judgment.

[91] In or around February 2005, Mr Rizza was offered 9,590,000 shares by way of a private placement in Mayberry Investments Limited ('Mayberry') at a price of $4.38 per share. The total amount needed to purchase the shares was $42,000,000.00[75]. Mr Rizza, who was only willing to purchase 50% of the shares, invited Mr Massias to join him in the venture by purchasing the remaining 50%. Mr Massias agreed. Mr Rizza then instructed Mr Massias to take his (Mr Rizza's) portion of $21,000,000.00 from his account with Cap Sol.

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[74] Judgment, para. [59]

[75] Although this was the figure given by Mr Rizza in evidence, the correct amount was actually $42,004,200.00 (and not $42,003,200.00 as the judge stated at para. [61] of the judgment). Nothing turns on this and, as the judge did, I will use the round figure of $42,000,000.00 for the purposes of this judgment.

[92] On 23 February 2005, Cap Sol issued a cheque in favour of Mayberry in the total amount of $42,000,000.00. Mr Rizza's account with Cap Sol, which was denominated in United States dollars, was debited for US$782,289.56. This was the equivalent of $42,000,000.00 at an exchange rate of J$53.69 to US$1.00. Cap Sol subsequently accepted that this was the wrong rate of exchange and that the correct rate was J$61.65 to US$1.00. On that basis, the total amount which ought to have been debited from Mr Rizza's account was US$681,265.20 (a difference of US$101,024.36).

[93] Mr Rizza subsequently sold the Mayberry shares for $44,437,822.00. As a result, Mr Rizza received four cheques totalling $38,094,299.70 (US$620,546.71) (nothing turns on the difference of $6,343,522.30, as Mr Rizza's evidence was that it was earmarked for another purpose). The four cheques were made up as follows: $24,159,973.83 (US$396,065.14); $6,668,213.55 (US$108,074.77); $531,615.41 (US$8,517.23) and $6,734,467.21 (US$107,889.57). Mr Rizza was still operating under the belief that he had only contributed 50% of the amount used to purchase the Mayberry shares, and that 50% of the proceeds of the resale therefore belonged to either Mr Massias or Cap Sol. On this basis, he endorsed the four cheques and gave them to Mr Massias. In due course, three of the cheques, totalling $13,934,325.87 (US$224,481.57), were lodged to one account[76], while the fourth cheque for $24,159,973.83 (US$396,065.14) was lodged to another[77]. Both accounts were held by Mr Massias in his name alone. So, despite the fact

[76] Account number 01037301-45
[77] Account number 010362101-45

that the entire purchase price of the Mayberry shares came from Mr Rizza's account, the proceeds of the resale went into Mr Massias' accounts at Cap Sol.

[94] By coincidence, an opportunity arose at about the same time that the proceeds of the Mayberry share sale were received for an investment to be made on Mr Rizza's behalf, by way of a CPT, in Cane River Pictures Limited ('Cane River'). The amount required to make this investment, which was $22,001,995.00 (US$360,688.44), was taken from the same internal account to which the Mayberry share sale proceeds of $24,159,973.83 had been deposited. This left a balance in that account of $2,157,978.83 (US$35,003.71).

[95] In mounting their claim for US$360,882.63 in the further amended particulars of claim, the Rizzas took as their opening balance the sum of US$561,382.15. Despite the fact that the figure is out by US$10.00, it is clear from Mr Rizza's evidence[78] that this figure was intended to reflect the affidavit evidence given by Ms Vennecia Scott, then Cap Sol's vice president for strategic planning, in earlier interlocutory proceedings. (In Table 5 of that affidavit, Ms Scott fixed the balance due to the Rizzas at the corresponding point in time at US$561,392.15[79]. I will return to Table 5 in due course.) In their revised claim, the Rizzas also credited Cap Sol with US$33,000.00, representing a loan balance which was acknowledged as being owed to Cap Sol, and US$35,001.89, representing the

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[78] See para. 2 of the supplemental witness statement of Roberto Rizza dated 30 December 2013 (Record of Appeal, Vol II, pages 184-185); and para. 15 of the affidavit of Roberto Rizza in response to affidavit of Vanceta Ramsay filed 17.03.11, sworn to on 15 September 2011 (Record of Appeal, Vol II, pages 186-189).

[79] See Table 5 contained in the affidavit of Vennecia Scott sworn to on 23 February 2010 (Record of Appeal, Vol III, pages 339-344)

proceeds (which had been paid by Cap Sol) of the consent judgment entered by F Williams J in their favour[80].

[96] As set out at paragraph 17 of the further amended particulars of claim, the full claim was therefore as follows:

| | |
|---|---|
| "Credit: Balance as per account | US$561,382.15 |
| Debit: Mayberry investment | (US$681,265.20) |
| Credit: Payments on Mayberry investment | US$620,546.71 |
| Debit: Investment in Cane River | (US$360,688.44) |
| Credit: balance from Cane River | US$288,899.30 |
| **Total** | **US$428,874.52** |
| Less loan balance as per account | (US$33,000.00) |
| Less paid on consent judgment | (US$35,001.89) |
| **Balance due** | **US$360,882.63**" |

[97] In its defence to the further amended particulars of claim, Cap Sol denied owing any sums to the Rizzas. Cap Sol relied in particular on the tables set out in Ms Scott's affidavit of 23 February 2010 and Mrs Ramsay's supplemental witness statement filed on 10 February 2014. Cap Sol's position was that "[t]heir evidence accounts for all [the Rizzas'] repo agreements and commercial paper transactions, per Tables 5 & 8)"[81].

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[80] See para. [13] above
[81] First defendant's defence to further reamended particulars of claim, para. 7

[98] Ms Scott did not give oral evidence at the trial. However, both sides referred to and relied on different aspects of the tables set out in of her affidavit in support of their respective positions. Table 1 confirmed that, as at the end of 2003, the total sum under management by Cap Sol in respect of Repos and CPTs, was US$1,370,984.07. Table 2 showed the balance as at September 2009 as US$532,594.48. Table 3 listed eight debits to the account on the Rizzas' instructions over the period 2004-2009, totalling US$809,591.92. Table 4 gave details of the Cane River CPT, opening with the US$360,688.44 paid out of Mr Rizza's account to establish the facility and, after deducting payments made to the Rizzas over the period January 2006 to November 2008 (US$155,207.50), showed a balance of US$288,899.20 in favour of the Rizzas. And Table 5 summarised the position as follows:

**Table 5**

| **Table 1** | **Repo Agreements & CPTs 2003** | | |
|---|---|---|---|
| Total Repo Holdings | 1,139,827.43 | | |
| Total CPT Holdings | 231,156.64 | | |
| Total Portfolio | **1,370,984.07** | | |
| | | | |
| **Table 3** | **Payouts Dec. 2004 – Sept 2009** | | |

| | | | |
|---|---|---|---|
| | | | |
| Total payouts 2004-2009 | (809,591.92) | | |
| | **561,392.15** | | |
| | | **Extraordinary item (Mayberry)** | |
| | | (782,289.56) | |
| **Table 4** | | **Balance from later participation 2005** | |
| | | 288,899.30 | |
| Amount outstanding to Claimants | | | 68,001.89 |
| | | | |
| Loan Balance as at January 31, 2010 | | | (33,000.00) |
| | | | |
| **Net balance outstanding** | | | **35,001.89** |

[99] I note in passing that the net balance of US$35,001.89 shown as outstanding to the Rizzas in Table 5 was the basis of the consent judgment.

[100] In her supplemental witness statement filed on 10 February 2014, Mrs Ramsay accepted ("unreservedly") that the figure of US$782,289.56 shown in Table 5 as the cost of the Mayberry shares was wrong and that, applying the correct exchange rate, it ought to have been US$680,265.20[82]. Then, after referring to the sum of US$288,899.20 shown in Ms Scott's Table 4 as the balance due to the Rizzas on account of the Cane River CPT as of November 2008, Mrs Ramsay stated that Cap Sol had "since identified additional recoveries of the Cane River participation which [Mr Rizza] received, and ought to have admitted to [the court]"[83]. On this basis, Mrs Ramsay produced Tables 7 and 8, in order to make what she described as "the appropriate adjustments to Tables 4 and 5 respectively"[84].

[101] Table 7, after repeating the various payments totalling US$155,207.50 listed in Table 4, identified an additional amount of US$118,922.62, made up of several relatively small amounts, not exceeding US$9,900.00 each, under the heading "Additional payments from CSL". Table 8 updated Table 5 by (i) correcting the exchange rate error; (ii) taking into account the US$118,922.62 identified in Table 7; and (iii) adjusting the

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[82] Supplemental witness statement of Vanceta Ramsay, para. 2 – Record of Appeal, Vol III, page 390
[83] Para. 12
[84] Para. 13

amounts paid for interest. The result of this exercise was a credit in Cap Sol's favour of US$58,441.23.

[102] When asked about Table 7 in examination-in-chief, Mr Rizza acknowledged receiving eight sums of US$9,900.00. He said that these were part payments of monthly interest due to Mrs Rizza on account of the off-book investments. His evidence was that although the monthly interest was in the region of "14,000 and change", the amount of each remittance was US$9,900.00, because Mrs Rizza lived in Miami and "anything over 10,000 have [sic] to be cleared in the States, so 9,900 was always used"[85]. In re-examination[86], Mr Rizza specifically identified a number of items as payments of interest rather than principal. So, to that extent, the aggregate of those sums should not be treated as repayment of principal[87]. However, the record reflected the Rizzas' acknowledgment that, of the US$118,922.62 shown in Table 7, some US$34,696.04 was attributable to repayment of principal to them[88].

[103] But there was to be a yet further development at an advanced stage of the trial. In a third affidavit filed on 29 September 2014, Mrs Ramsay did two things. First, she acknowledged that seven of the individual payments of US$9,900.00 each to Mrs Rizza shown in Table 7, totalling US$69,300.00, were in fact duplications of a payment to Mrs

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[85] Record of Appeal, Vol V, pages 17A-!8A
[86] Record of Appeal, Vol VIII, pages 5B, 19A, 28B, 43B, 48A and 52A
[87] See Record of Appeal, Vol VI, pages 8A-11B, where, with the help of the judge, M Rizza's stance on the issue was clarified.
[88] Written submissions on behalf of the claimants filed on 9 June 2016 in the court below at paras. 22-23 (see index to appellant's and respondents' submissions and hand-ups at appeal filed 9 November 2018)

Rizza in that very amount already captured in Table 3. Second, Mrs Ramsay produced a new Table 3A, which now included a further sum of US$113,628.23 as representing additional amounts allegedly received by the Rizzas[89]. On this basis, Mrs Ramsay presented a new Table 9, which, after correcting the duplication of US$69,300.00, inputting the additional amounts of US$118,922.62 (Table 7) and US$113,628.23 (Table 3A), and crediting Cap Sol with the consent judgment payment (US$35,001.89) and the Rizzas' outstanding debt (US$33,000.00), showed a net balance of US$103,097.94 in Cap Sol's favour[90].

[104] In further examination-in-chief on 25 November 2014, Mrs Ramsay produced (at the judge's request) a table setting out, in chronological order, the credits and debits to the Rizzas' account listed in the various tables. This table was admitted in evidence as exhibit 4[91].

[105] Under further cross-examination, Mrs Ramsay confirmed that the proceeds of sale of the Mayberry shares were not accounted for in Table 9[92]; and that what the table captured were "payments paid out to the Rizzas"[93]. Mrs Ramsay's evidence on this point also drew some questions from the judge[94]:

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[89] 3rd affidavit on Vanceta Ramsay sworn to on 26 September 2014 and filed on 29 September 2014, para. 6. This affidavit, which was not included in the Record of Appeal, was handed up to the court by Mr Dunkley during the hearing of the appeal (see index to appellant's and respondents' submissions and hand-ups at appeal filed 9 November 2018).
[90] Para. 9
[91] Record of Appeal, Vol IX, page 66
[92] Record of Appeal, Vol IX, page 114
[93] Record of Appeal, Vol IX, page 115
[94] Record of Appeal, Vol IX, pages 119-120

"HIS LORDSHIP: So what you are saying is that you are starting from the standpoint of these are the sums we have for the Rizzas. Yes?

THE WITNESS: Yes.

HIS LORDSHIP: Whenever sums are paid out, whether it come from Caneriver [sic] or Repo, you adjust the balance accordingly?

THE WITNESS: Yes, sir.

HIS LORDSHIP: And you are saying now as far as you are concerned you have paid out all that is in, whether it is Caneriver [sic], Repo or whatever, as far as you understand it

THE WITNESS: Yes, sir.

HIS LORDSHIP: In fact, you have overpaid.

THE WITNESS: Yes, Sir.

HIS LORDSHIP: Right. And you are saying now that separate and apart from this table here, you have also found other payments going to the Rizza's [sic] not included here but amounting to –

THE WITNESS: 211,000 U.S. dollars.

HIS LORDSHIP: There we are."

[106] During Mrs Ramsay's cross-examination, Cap Sol's position was further clarified by the following exchange in which both Mr Dunkley and the judge also got involved[95]:

"HIS LORDSHIP: So you are saying that in Exhibit 1 what you have recorded there is the record of cheques in the documents before the Court?

[95] Record of Appeal, Vol IX, pages 146-149

THE WITNESS: In that document Mr. Massias is showing that he has made payments to Mr. Rizza from varying accounts and Mr. Massias, therefore, putting his account statements. When you look at those account statements you will see the monies being moved from Mr. Massias.

HIS LORDSHIP: So this is already information before the Court?

THE WITNESS: Yes, sir, it is information before the Court.

HIS LORDSHIP: Not anything that you have done otherwise already here?

THE WITNESS: Yes, I verified it to see it pass through our records on our system.

HIS LORDSHIP: I see.

MR. DUNKLEY: As an institution, operating as the institution now, not settling indebtedness now, but acting as a financial institution for the purposes of a private citizen, as you will say, to another private citizen.

HIS LORDSHIP: Yes, Lord Gifford.

LORD GIFFORD: I haven't seen it. (Document shown to the Defence.)

HIS LORDSHIP: That can be the subject of verification, but what she is saying—what she is saying is that this, as you would have heard, what she has compiled here is from information already before the Court. So it's not anything new. That is what she is saying.

MR. DUNKLEY: This is not the exercise you sent us on, which is why it wasn't attached to it. But what we have done, and your Lordship will recall, I questioned Mr. Rizza in the box to establish that monies in excess of $16 million – we don't really care about, and we are not saying that--

HIS LORDSHIP: I understand, because what you are saying is that he has been repaid whether from the company or other sources, that he got back everything.

> MR. DUNKLEY: Correct. But what we are also saying, My Lord, and let it not be misunderstood, [Cap Sol] is not accounting for the 16 million, because it is not liable for it. But what we are saying is—
>
> HIS LORDSHIP: But, in any event, you have suffered no loss.
>
> MR. DUNKLEY: Correct. But in any event, Mr. Massias has brought - -
>
> HIS LORDSHIP: That's how I understood the thrust of the question, even though you are saying your case is these are not our monies as [Cap Sol], but nonetheless you have suffered no loss, because you have in fact received the money, whomever you got it from, you got it.
>
> MR. DUNKLEY: Yes. So even the private activities between these two people, because we are a financial institution it passes through our records, and that is why we have this information. So we have not found the information - - if we had seen the information here where there is something from Scotia to NCB, we would have also include [sic] it, because it wouldn't pass through us, but we see it. But as in terms of this information for which we, acting as an institution now, had access to this information."

[107] And finally, towards the end of her evidence, Mrs Ramsay produced another new document, which also detailed payments made to the Rizzas out of Cap Sol's accounts. In response to the judge's enquiry whether the document should be marked as exhibit 5, the following exchange ensued[96]:

> "LORD GIFFORD: Yes, My Lord.
>
> MR. DUNKLEY: My Lord the thing about it, it's not our case. This was a courtesy --

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[96] Record of Appeal, Vol IX, pages 150-152

HIS LORDSHIP: What I am saying is that if it is in the context -- in other words, if it is that Ms. Ramsay is saying that based on the documents in court she has looked at them and she can say that she saw other payments, and she has prepared a table to that effect, which we are now admitting as an exhibit. We understand that your case is that you are not saying that this is monies handled and managed by [Cap Sol] in that capacity, but what you are saying is that your records show that these funds passed through your accounts and to that extent --

MR. DUNKLEY: You see, the only caution that I would have, My Lord, is because we have extended ourselves, I don't know that I am assisted by that to be taken to be an Exhibit 5, that's the point. I have done – an exercise was done from the records of [Mr Massias], and we have said it, we have put it to Mr. Rizza in cross-examination.

HIS LORDSHIP: But from what you have explained, all that she has done is accumulated – rather than have us turn to page 166, she has just isolated it.

MR. DUNKLEY: She has accumulated it. That will be my only caution, My Lord.

HIS LORDSHIP: Yes.

BY LORD GIFFORD:

Q. Subject to verification, does this include various debit items from Mr. Massias' account, is that right?

A: Yes.

Q: What is not here there may be a reason for it, but what is not here is any assets, any funds held 'privately' by Mr. Massias or Mr. Rizza?

A: You would be correct to say that, because all I am showing is that he moved funds. He Massias moved funds back to Rizza."

[108] The judge was therefore obliged to consider a large body of evidence, contained in several witness statements, affidavits and tables prepared by the parties over the five years that had passed since the filing of the action.

[109] The judge first considered the history of the Mayberry/Cane River transaction. He was critical of the fact that, although exhibit 4 showed the amount paid out on account of the Mayberry share purchase (US$681,285.20) as a debit to the Rizzas' account, it did not credit them with the share sale proceeds of $38,094,299.70 (US$620,546.71)[97]. His conclusion was that, at the end of the Mayberry/Cane River CPT transaction, "there was J$16,112,305.53 (US$259,858.27) that was not used to do anything which is to be accounted for"[98]. However, at the end of the day, despite this conclusion, the judge made no award in respect of the outstanding amount, on the ground that "it did not form part of the claim"[99]. It is this aspect of the judgment which the Rizzas have challenged in the counter-notice of appeal.

[110] The judge then revisited Mrs Scott's affidavit and Mrs Ramsay's evidence, again in considerable detail, before coming to the conclusion that, on a balance of probabilities, there was an outstanding balance of US$205,998.11 due from Cap Sol to the Rizzas in respect of the on-book transactions.

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[97] Judgment, paras [79]-[80]
[98] Judgment, para. [69](p)
[99] Judgment, para. [100]

[111] Although the judge's path to this conclusion is not entirely easy to follow, I think it may be fairly summarised in this way. Taking as his starting point the agreed opening balance of US$1,370,984.07, the judge debited the Rizzas' account with three amounts: the US$809,591.92 shown in Mrs Scott's Table 3 as the total amount paid out by Cap Sol on the instructions of the Rizzas between 2004 and 2009; the US$681,265.20 (as adjusted to allow for the admitted exchange rate error) paid out by Cap Sol in respect of the Mayberry share purchase; and the US$35,001.89 paid by Cap Sol to the Rizzas in settlement of the consent judgment. He then credited the Rizzas with the US$360,688.44 invested in the Cane River CPT.

[112] The total arrived at by this process is US$240,813.50, that is, US$184.61 less than the judge's figure of US$205,998.11. The difference is accounted for by the fact that, after calculating the amount outstanding to the Rizzas as US$240,815.39, the judge rounded this figure up to US$241,000.00, from which he then deducted US$31,001.89 to give Cap Sol credit for the amount paid in satisfaction of the consent judgment.[100]. Nothing turns on this and neither side took any point about it in the appeal.

[113] The judge then considered Cap Sol's reliance on the additional payments of US$118,922.62 and US$113,028.88, with a view to reducing the amount which it owed to the Rizzas.

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[100] Judgment, paras. [89]-[90]

[114] As regards the US$118,922.62, the judge referred to Mr Rizza's evidence that, of this amount, US$34,696.04 related to principal while the balance of $84,226.58 related to interest. However, despite referring to a lengthy passage from Mr Rizza's cross-examination on the point, the judge does not appear to have made a specific finding on this aspect of the matter.

[115] Next, having also considered Cap Sol's claim to recover the sum of US$113,028.88, the judge rejected both claims. This is how he explained his position[101]:

> "[93] … At the eleventh hour, Mrs Ramsay found yet additional payments made to Mr Rizza totalling US$113,026.88. Cap Sol adopted a curious approach to this issue. It said that while it was not claiming these as its repayment, the fact is, Cap Sol said, Mr Rizza got them and thus exhaust [sic] all sum [sic] owed to Mr Rizza including the J$16,112,305.53 (US$259,858.27), the balance from the Mayberry share sale. If Cap Sol is not claiming that these payments were part of its repayment to Mr Rizza why should the court recognise them as part of payment Cap Sol is making to Mr Rizza? The source of the payments is not known. In this age of proceeds of crime legislation and terrorism financing it is indeed quite extraordinary that a licenced financial institution can say that it made a payment but was actually doing so as a conduit for some unidentified third party.
>
> [94] The court declines to recognise these alleged additional payments and they will not form part of the court's computation of repayment of the principal sum to Mr Rizza. Cap Sol is saying that it is functioning like a courier who has no property in the money except in so far as the courier can maintain an action for trespass or against a thief if he is robbed but the courier has no legal or equitable title to the money. This is how the court understands Cap Sol's position.

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[101] Judgment, paras [93]-[97]

Cap Sol is saying that it has no property rights in the money paid over and was simply passing it on from an undisclosed third party to Mr Rizza. In this state of affairs Cap Sol has not paid over money owing to Mr Rizza.

[95] In the normal course of things Anglo-Jamaica [sic] law recognises good title, until the contrary is proved, from the fact of possession. Anglo-Jamaican law has no concept of absolute title to chattels. What it knows is relative title and so if the court decides as between two claimants that one has a better title than the other, that is not a declaration that the winner of that context [sic] necessarily has a better title than a third claimant who may be able to show that he has a better title. This is the explanation for not questioning title when money is paid over: the person is possession is prima facie the legal and equitable owner. However, in this case, Cap Sol has disclaimed any legal or equitable title to the US$113,028.88 it claims to have handed over to Mr Rizza. If it has not legal or equitable title and is a mere conduit or courier on what legal basis can it be claiming credit for the payment of US$113,028.88?

[96] If nothing else this last minute discovery of additional payments proves the point made earlier that it is indeed remarkable that a licenced financial institution is struggling to prove that it has repaid money to a client. Cap Sol has been making 'new discoveries' as the case has progressed. While the court accepts that Mr Rizza should have kept better records but surely there cannot be the same latitude for a licenced financial institution not being able to unearth all of its records in eight years of litigation. The Proceeds of Crimes Act Regulations requires licenced financial institutions to keep all records for at least six years from the date of the last transaction. This dispute arose well within that time period and it speaks volumes that Cap Sol has only produced some evidence of payouts during the cross examination of its sole witness.

[97] The reasons given for not accepting the US$113,028.88 applies equally to the non-recognition of the payment of US$118,922.62. To this court it is incomprehensible that a licenced financial institution faced with a significant claim for over US$300,000.00 dollars responds by saying that it paid out over US$200,000.00 but is not claiming that it paid out those funds from its own

> resources thereby giving Mr Rizza a safe title to the money and immune from any possible claim down the road from a third party who may wish to use constructive trust or unjust enrichment principles to lay a proprietary claim to the money in Mr Rizza's hands. Cap Sol is really saying that it is not giving any warranty of any kind that the money received by Mr Rizza cannot be claimed by a third party. As it presently stands this is the risk to which Mr Rizza is exposed because Cap Sol is not standing behind the payments and saying these are from its resources. Cap Sol is saying it is simply a conduit through which the money flowed. In this court's mind this is not proper accounting and despite the fact that Mr Rizza received these sums they are not really Cap Sol's money."

[116] And finally, as regards the additional payments totalling US$155,207.50 referred to in Mrs Ramsay's Table 4[102], the judge said the following[103]:

> "[98] … The court's understanding of the evidence is that this US$155,207.50 was already part of the larger figure of US$809,591.92 which was the total payout between December 2004 and September 2009. In other words, based on the court's calculation above this US$155,207.50 was already taken into account which the court deducted the US$809,591.92."

[117] In the final result, the judge's conclusion[104] was that -

> "… Cap Sol has not accounted for US$205,998.11 of the 'on-book' investments and neither has it accounted for the J$16,112,305.53 (US$259,858.27). This latter figure did not form part of the claim but the evidence in the case is that this sum is still outstanding."

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[102] See para. [98] above
[103] Judgment, para. [98]
[104] Judgment, para. [100]

[118] Mr Dunkley's principal complaints on this issue were as follows. First, the judge erred in refusing to recognise and accept the payments of US$118,922.62 and US$113,028.88 as repayments by Cap Sol on account of principal. Indeed, as regards the former, the judge did not even give Cap Sol credit for the US$34,696.04 which Mr Rizza admitted receiving on account of principal. Mr Dunkley submitted that the judge ought to have given Cap Sol credit for these amounts, and that the result of their exclusion was that the Rizzas were given "free rein to over Two Hundred and Thirty Thousand United States Dollars whilst imposing his Judgment on [Cap Sol][105]".

[119] Mr Dunkley's second complaint was that judge's exclusion of the sum of US$155,207.50 sprang from his misunderstanding of the evidence and that there was in fact no double-counting of this amount, as the judge found.

[120] And third, Mr Dunkley submitted that Cap Sol had no further liability to the Rizzas on the Mayberry transaction and that any further lability to the Rizzas on this amount rested with Mr Massias.

[121] More generally, Mr Dunkley complained that the judge failed to consider and give effect to the role of Mr Massias and the impact of the special relationship which he and Mr Rizza enjoyed with each other.

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[105] Appellant's submissions in reference to its grounds of appeal, para. 83

[122] Lord Gifford submitted that the judge's analysis was generally correct and, save for the amount covered by the counter-notice of appeal, should not be disturbed. As regards the alleged repayments to the Rizzas of amounts beyond those shown in Tables 1-4, which were agreed, Cap Sol's inability to demonstrate that these funds were repayments of principal showed that the judge was correct to exclude them entirely. It was clear from Mr Rizza's evidence that regular interest payments were made to him over the relevant period and Cap Sol had done nothing to rebut Mr Rizza's evidence that, by and large, this is what the various payments additional payments shown in Mrs Ramsay's two lists represented. Mr Massias was the only person who might have been able to clarify what these payments were for and Cap Sol did not call him as a witness.

[123] Lord Gifford summarised the Rizzas' pleaded claim of US$360,882.63 as follows:

| | |
|---|---|
| Consent judgment | 35,001.89 |
| Exchange rate error adjustment | 101,024.36 |
| Balance on Mayberry transaction | 259,858.27 |
| Sub-total | 395,884.52 |
| Less consent judgment payment | 35,001.89 |
| | **US$360,882.63** |

[124] As regards the balance allegedly due on Mayberry transaction (which is the subject of the counter-notice of appeal), Lord Gifford pointed out that, had the judge awarded the amount of US$259,858.27, in addition to the US$205,998.11 which he actually ordered Cap Sol to pay, the total due to the Rizzas would in fact have been substantially

greater than US$360,882.63. However, he indicated, the Rizzas were prepared to "stick by" the claim as pleaded.

[125] I will first consider whether Cap Sol has shown any basis upon which to disturb the judge's conclusion that the Rizzas are entitled to US$205,998.11. As I have indicated at paragraph [110] above, the judge arrived at this total by way of figures provided by Mrs Scott in Tables 1-4. These figures were in the end all agreed between the parties. On the one hand, as amounts standing to the Rizzas' credit, the US$1,370,984.07 as the total of the on-book investments and the US$360,688.44 invested in the Cane River CPT were both uncontroversial. Equally uncontroversial, on the other hand, as amounts to be debited in Cap Sol's favour, were the US$809,591.92 and the US$681,265.20, paid out by Cap Sol on the instructions of the Rizzas and the Mayberry share purchase respectively, and the US$35,001.89 paid by Cap Sol to the Rizzas in settlement of the consent judgment.

[126] However, the judge did not give Cap Sol credit for the sum of US$33,000.00 which, as the parties were also agreed, was owed to Cap Sol. In their further amended particulars of claim, the Rizzas had in fact acknowledged that this amount was due to Cap Sol[106]; and it was also included in Table 5 as a debit to the Rizzas' account. Save for this, as it seems to me, the process by which the judge arrived at US$205,998.11 as the amount due to the Rizzas cannot be faulted.

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[106] See para. [98] above

[127] So the only questions that remain are whether Cap Sol is also entitled to credit for (i) the US$118,922.62 and US$113,028.88, shown in Mrs Ramsay's Tables 7 and 3A respectively; and (ii) the US$155,207.50, shown in Mrs Scott's Table 4.

The US$118,922.62 and the US$113,028.88

[128] As has been seen, neither of these payments formed part of Cap Sol's defence as originally pleaded. Nor did Mrs Scott's detailed review of the Rizzas' accounts reveal any hint of them. They began to appear, first, after Mrs Ramsay's further review of the account in the run-up to the trial (the US$118,922.62); and, second, during the trial itself, as a result of what the judge described as Mrs Ramsay's "eleventh hour" discovery (the US$113,028.88). As regards the latter amount in particular, Mr Dunkley was careful – indeed anxious - to distance Cap Sol from these payments. This is clearly demonstrated by the following exchange with the judge[107]:

> "HIS LORDSHIP: … even though you are saying your case is these are not our monies as [Cap Sol], but nonetheless you have suffered no loss, because you have in fact received the money, whomever you got it from, you got it.
>
> MR. DUNKLEY: Yes. So even the private activities between these two people, because we are a financial institution it passes through our records, and that is why we have this information ..."

[129] In these circumstances, I find it impossible to gainsay the judge's view that Cap Sol's approach to these amounts was "curious". I say this, not only because of the seemingly adventitious method of their discovery, but even more so because of Cap Sol's

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[107] Record of Appeal, Vol IX, pages 148-149

position that, while the amounts were not to be treated as repayment of principal by the company, Cap Sol was nevertheless entitled to rely on them as settling all amounts owed to the Rizzas, including the outstanding balance on the Mayberry share sale.

[130] Mr Rizza's evidence, which the judge obviously accepted on this point, was that a large number of the items included in both lists related to interest payments. If that was so, then Cap Sol could obviously not rely on them as reducing the amount being held by it as principal. But it also seems to me that in any event, as Lord Gifford submitted, the judge was plainly right in thinking that, since Cap Sol was unable to state the rationale for which these payments were made, it ought not to be permitted to take the benefit of them in what was supposed to be an accounting exercise in respect of the principal moneys being held for the Rizzas. As the judge asked rhetorically[108]:

> "[93] … If [Cap Sol] is not claiming that these payments were part of its repayment to Mr Rizza why should the court recognise them as part of payment [Cap Sol] is making to Mr Rizza?"

[131] It is clear from Mrs Ramsay's evidence that the judge erred in describing these payments[109] as having come "from an undisclosed third party to Mr Rizza", since there can be no doubt that what she was saying was that they came from Mr Massias. But I do

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[108] Judgment, para. [93]
[109] Judgment, para. [94]

not see how this can possibly alter the validity of the judge's point that, "[i]n this state of affairs Cap Sol has not paid over money owing to Mr Rizza".

[132] However, I think that the judge erred – and it may have been no more than an oversight – in not giving Cap Sol credit for the US$34,696.04, the part of the US$118,922.62 which Mr Rizza accepted as having been paid to him on account of principal[110]. I will return to the impact of this omission (as well as the earlier failure to credit Cap Sol with the US$33,000.00) in due course.

The US$155,207.50

[133] The judge's view, as will be recalled, was that the US$155,207.50 "was already part of the larger figure of US$809,591.92 which was the total payout between December 2004 and September 2009" [111].

[134] But, as an examination of Mrs Scott's Tables 3 and 4 indicates, the underlying bases of both amounts were in fact discrete. Table 3 set out the total sums paid out of the Repo/CPT account by Cap Sol to, or on the instructions of, the Rizzas between 2005 and 2008 as follows:

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[110] See para. [102] above
[111] Judgment, para. [98] – see para. [116] above

**Table 3**

| **Date** | **Details** | **USD** |
|---|---|---|
| Dec-04 | Island Network Ltd | 250,000.00 |
| Nov-05 | Kingsland Development | 100,000.00 |
| Feb-07 | Money Express | 140,000.00 |
| Feb-07 | Money Express | 27,531.91 |
| Apr-08 | Royden Riettie | 39,000.00 |
| Apr-08 | Marietta Rizza | 69,300.00 |
| Sep-08 | Marietta &/or Roberto Rizza | 150,000.00 |
| Sep-09 | Giovanni Rizza (Loan Offset) | 33,760.01 |
| **Total** | | **809,591.92** |

[135] Table 4, on the other hand, gave details of the Cane River CPT, opening with the US$360,688.44 used to establish the account and deducting payments of US$155,207.50 to the Rizzas between 2006 and 2008. I will also reproduce Table 4 below for ease of comparison:

**Table 4**

| Date | Details | USD | JMD | Principal | Interest |
|---|---|---|---|---|---|
| Apr-05 | Later Participation | 360,688.44 | | | 18,775.10 |
| | **Less payments made** | | | | |
| Jan-06 | Roberto Rizza | **7,575.76** | (500000.00) | 371,887.78 | 6,343.86 |
| Apr-06 | Roberto Rizza | **7,575.76** | (500000.00) | 370,655.88 | 2,095.74 |
| May-06 | Supply Expeditors Inc. | **5,000.00** | | 367,751.62 | 6.273.30 |
| Aug - 06 | Continental Garage (Roberto Rizza) | **23,300.00** | | 350,724.92 | 1,983.05 |
| Sep-06 | Roberto Rizza | **4,000.00** | | 348,707.97 | 9,970.34 |
| Feb-07 | Roberto Rizza | **15,385.85** | (1,015,466.38) | 343,292.46 | 5,856.06 |
| May-07 | Roberto Rizza | **62,571.65** | | 286,576.87 | 11,536.65 |
| Dec-07 | Roberto Rizza | **9,900.00** | | 288,213.52 | 1,629.60 |

| | | | | | |
|---|---|---|---|---|---|
| Dec-07 | Roberto Rizza | **9,900.00** | | 279,943.13 | 1,582.84 |
| Nov-08 | Roberto Rizza | **10,000.00** | | 271,525.96 | 17,373.34 |
| | **Balance** | 205,479.42 | | | 83,419.88 |
| | Balance Due to the Rizzas | 288,899.30 | | | |

(Highlighting in US$ column mine)

[136] As will be seen, the payments to, or on the instructions of, the Rizzas shown in Table 4 (as highlighted above) are not the same as those listed in Table 3. They are related to different things. I therefore think that the judge fell into error by treating the lesser amount shown in Table 4[112] as part of the larger figure of US$809,591.92 shown in Table 3.[113]

[137] My conclusions on the on-book investments issue are therefore that the judge's findings that Cap Sol is liable to account to the Rizzas for the sum of US$205,998.11 is a finding which he was fully entitled to make on the evidence and no basis has been shown to disturb it. Save in one respect, so too are his findings that Cap Sol could not rely on

[112] The actual total of the figures highlighted in Table 4 is US$155,209.02, but the parties – and the judge – referred to it throughout as US$155,207.50. Nothing turns on the difference of US$1.52.
[113] It may well be that, as Mr Dunkley submitted, the judge mistook this item for the admitted duplication of the payments totalling US$69,300.00 to Mrs Rizza, as shown in Tables 3 and 7 – see para. [103] above.

the payments totalling US$118,922.62 and US$113,028.88. However, in relation to the former amount, the judge erred in not allowing Cap Sol credit for the sum of US$34,696.04 which Mr Rizza admitted receiving as repayments of principal rather than interest. The judge also erred in his conclusion that Cap Sol could not rely on the payments totalling US$155,207.50 on the ground that this sum was a duplication of an amount already accounted for.

[138] Cap Sol's appeal against the judge's decision in this regard must therefore succeed in part. Accordingly, an adjustment will need to be made to the award to reflect Cap Sol's success in relation to the sums of US$34,696.04 and US$155,207.50 omitted by the judge. But I must first address the counter-notice of appeal before arriving at a final position on this aspect of the appeal.

**The counter-notice of appeal**

[139] As has been seen, the judge found that, although Cap Sol had failed to account to the Rizzas for the balance of $16,112,305.53 (US$259,858.27) remaining on the Mayberry transaction, he would make no award in respect of this sum since the Rizzas did not claim it.

[140] In this regard, Lord Gifford referred us to paragraph 16 of the further amended particulars of claim. In that paragraph, after referring to the various transactions on their Repo/commercial paper account with Cap Sol, the Rizzas averred that[114]:

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[114] Record of Appeal, Vol II, page 91

> "[Cap Sol] owes to [the Rizzas] the balance which should have been represented in the said account if (a) the correct exchange rate had been used; and (b) **credit had been given for the payments made by [the Rizzas] to [Cap Sol] and not used to make the Cane River investment**." (Emphasis mine)

[141] In my respectful view, taken in its context, there can be no doubt that this was a specific reference to the balance due on the Mayberry share sale transaction. The judge therefore erred in saying that the Rizzas did not claim this amount.

[142] In so far as the actual balance is concerned, nothing has been shown on appeal to disturb the judge's finding that the amount outstanding to the Rizzas on the Mayberry transaction was $16,112,305.53 or US$259,858.27. Indeed, Cap Sol has not seriously contended otherwise, although it maintained that, when all things were taken into account, all amounts due to the Rizzas have been fully repaid. I have already dealt with and rejected that submission.

[143] I therefore think that the counter-notice of appeal must succeed and that the Rizzas are therefore entitled to receive judgment for the additional sum of US$259,858.27.

**Conclusion and disposal**

[144] I therefore conclude that the appeal must be dismissed on the agency and the off-book investments issues. In so far as the latter issue is concerned, Cap Sol is to pay the Rizzas the sum of US$404,100.41 which the judge ordered it to pay.

[145] As far as the on-book investments issue is concerned, the appeal fails in respect of the challenge to the judge's conclusion that Cap Sol has failed to account for and therefore owes the Rizzas US$205,998.11. However, the appeal succeeds in part as a result of the judge's failure to give Cap Sol credit for (i) the outstanding loan of US$33,000.00; (ii) the amount of US$34,696.04 which Mr Rizza admitted receiving as repayment of principal; and (iii) the amount of US$155,207.50, which the judge excluded on the mistaken basis that it was a duplication.

[146] The counter-notice of appeal succeeds, on the basis that (i) the Rizzas made a claim for the balance due in their favour on the Mayberry/Cane River transaction; and (ii) proved to the judge's satisfaction that the amount due to them is $16,112,305.53 or US$259,858.27.

[147] Subject to the deductions to which Cap Sol is entitled, the total amount due to the Rizzas is therefore US$869,956.79 (being the total of (i) the judge's awards of US$404,100.41 for the off-book transactions, and US$205,998.11 for the on-book transactions; and (ii) the US$259,858.27 due as a result of the successful counter-notice of appeal).

[148] On the other hand, Cap Sol is entitled to a credit of US$222,903.54 (being the total of (i) the agreed loan balance of US$33,000.00; (ii) the US$34,696.04 which Mr Rizza admitted receiving as repayment of principal; and (iii) the US$155,207.50 which the judge wrongly excluded).

[149] In the result, Cap Sol is to pay the Rizzas the sum of US$647,053.25 (being the difference between the amount of US$869,956.79 due to the Rizzas, and the credit of US$222,903.54 to which Cap Sol is entitled).

[150] In keeping with the judge's order, the sum of US$647,053.25 is to bear interest at 6% per annum from 18 February 2014 to the date of judgment, *viz*, 18 June 2017.

[151] As regards the costs of the appeal, I would order that the parties are to file brief written submissions on the question within 14 days of the date of this judgment. Upon receipt of the respective submissions, I would propose that the court render its ruling on costs, also in writing, within a further period of 14 days.

[152] I cannot leave the matter without acknowledging and profusely apologising for the long delay in delivery of this judgment. Though regrettable, the delay was unfortunately unavoidable in all the circumstances.

**BROOKS JA**

[153] I have had the privilege of reading, in draft, the carefully crafted judgment of Morrison P. I am in full agreement with his reasoning and conclusion.

**P WILLIAMS JA**

[154] I too have read the draft judgment of Morrison P. I agree with his reasoning and conclusion and have nothing to add.

**MORRISON P**

**ORDER**

1. The appeal is dismissed in relation to the agency and the off-book investments issues.

2. In relation to the off-book investments issue, Cap Sol is ordered to pay the Rizzas the sum of US$404,100.41.

3. In relation to the on-book investments issue:

    a. the appeal is dismissed in respect of the challenge to the judge's conclusion that Cap Sol has failed to account for and therefore owes the Rizzas US$205,998.11; and

    b. the appeal is allowed in part as a result of the judge's failure to give Cap Sol credit for (i) the outstanding loan of US$33,000.00; (ii) the amount of US$34,696.04 which Mr Rizza admitted receiving as repayment of principal; and (iii) the amount of US$155,207.50, which the judge excluded on the mistaken basis that it was a duplication.

4. The counter-notice of appeal is allowed.

5. Cap Sol is ordered to pay the Rizzas the sum of US$647,053.16, made up as follows:

The sum of US$869,956.79 to which the Rizzas are entitled (being the total of (i) the judge's awards of US$404,100.41 for the off-book transactions, and US$205,998.11 for the on-book transactions; and (ii) the US$259,858.27 due as a result of the successful counter-notice of appeal)

LESS the sum of US$222,903.54 to which Cap Sol is entitled (being the total of (i) the agreed loan balance of US$33,000.00; (ii) the US$34,696.04 which Mr Rizza admitted receiving as repayment of principal; and (iii) the US$155,207.50 which the judge wrongly excluded).

6. Cap Sol is to pay interest on the said sum of US$647,053.25 at the rate of 6% per annum from 18 February 2014 to the date of judgment, *viz*, 18 June 2017.

7. The parties are to file brief written submissions on the question of costs within 14 days of the date of this judgment. Upon receipt of the respective submissions, the court will render its ruling on costs, also in writing, within a further period of 14 days.