IN THE SUPREME COURT OF BELIZE A.D. 2000

ACTION NO. 189

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| | (VERNE A. STARK | PLAINTIFFS |
| | (RICHARD STARK | |
| | (RIBERT STARK | |
| BETWEEN | (AND | |
| | ( | |
| | (PROGRAMME FOR BELIZE | DEFENDANT |

Mr. Dons Waithe for the plaintiffs.
Mr. Dean Barrow S.C, for the defendant.

AWICH J.

21.1.2005. JUDGMENT

1. Notes: *Tort of deceit; whether false representations were made knowingly in a business plan publication and verbally, and intended to induce the plaintiffs to invest in eco-tourism business; whether the representations induced the plaintiffs to invest resulting in the loss claimed; whether the plaintiffs believed the representations. The standard of proof of fraud; whether changed facts is proof of falsehood.*

*2.* This case presents many noteable events and points, but presents no real difficulty in deciding.

3. Mr. Verne A. Stark and his brothers; Richard Stark and Robert Stark, the plaintiffs, are disappointed investors. They are from the state of California in the United States of America. In October 1996, Verne and Robert visited Belize “to look at an investment ”. They decided not to undertake the

particular investment. They returned to the USA. In early 1997, Mr Anthony Paul Hunt, acting on behalf of Programme for Belize Limited, PFBL, the defendant, sent to them a publication entitled; “Programme for Belize, Business Plan”, dated, February 1997. The plan was to persuade them to invest in the business of “eco-tourism” in Belize. A brief description of the proposed business was stated on the front cover of the publication as a, “proposal for an independent company to be incorporated for the planning, construction and management of new lodging facilities”. A majority equity investor was invited to invest “in the region of US $400,000.00", so as to be able to have a controlling power and operate the business. The total investment portfolio was to be US $1.5 million. The other sources of finance would be smaller investments and sizeable loans from specified entities. The Business Plan publication has been received in the evidence as exhibit P(VS)1.

4. The total investment of US $1.5 million would be raised by the plaintiffs’ majority investment of US $450,000.00, investment of US$200,000.00 from BDFC and smaller investments, and by loans of US $700,000.00 from The Nature Conservancy and, US $200,000.00 from BSSB, the sum was increased to US $300,000.00 in a letter dated, 14.4.1997, from BSSB to Mrs Grant. PFBL was said to have 229,000 acres of land on which the investment business would be carried on. The land would also be made available as security for loans.

5. The publication interested the plaintiffs notwithstanding that they expressed

reservation in a letter dated 5.4.1997, exhibit (AB)12, addressed to Mrs Joy Grant the "Executive Director" of PFBL, about "components of the financial package" of the project. The plaintiffs came to Belize and discussed the Business Plan with officials and agents of PFBL, in particular, Mrs Grant, and Mr Hunt. He was the employee or agent who wrote the Business Plan. Together with representatives of PFBL, the plaintiffs met with the intended smaller investors and the large loan financiers namely, Regent Insurance Company and Belize Development Finance Corporation, BDFC, and The Nature Conservancy and Belize Social Security Board, BSSB. The Nature Conservancy is an international agency in Washington, DC, USA. The plaintiffs met the agency in Washington DC. Discussions with the entities were followed up by Mr. Verne Stark on several occasions.

6. Then the plaintiffs decided that they would invest up to US $450,000.00. On 5.8. 1997, they incorporated a company, the Belize Conservancy Limited. It was to be the vehicle for the intended investment. The plaintiffs proceeded to invest in the company. By 10.7. 2000, when they filed this case, the plaintiffs had invested up to US $250,000.00 (two hundred and fifty thousand). The defendant's learned counsel said at the trial that the sum invested would not be contested. 17,000 shares representing 10 per centum were allotted to PFBL, 30,000 each to Regent Insurance Company and BDFC. What was described as "inagural meeting" was held on the same day, 8.5.1997. Minutes of the meeting is in the evidence, exhibits D(AB)10. The plaintiffs said that verbal representations were made by or on behalf of PFBL at the meeting.

7. By the end of 1997, several transactions had taken place. The plaintiffs had put into the business US $250,000.00. BDFC and Regent Insurance Company had paid smaller sums on the shares allotted to them. Expenses had been incurred in the business especially expenses of capital nature. Roads and other facilities had been built and works were continuing.

8. Unfortunately the two major loans, from The Nature Conservancy and BSSB did not materialize at the critical stage of the business activities. The first plaintiff testified that , “towards the end of 1997, it became clear that the loans were not available”. Mr. Arsenio Burgois, witness for the defendant, said: “The Nature Conservancy needed to establish a joint entity, to partner with Inter-American Development Bank,” and that the loan would be channelled through that entity, unfortunately it took too long for the purposes of the business of Belize Nature Conservancy Ltd. Another difficulty was that BSSB demanded mortgage charge over the entire 229,000 acres of land for the US $300,000.00 it had agreed to lend. That was said by witnesses on both sides. It would leave no security for the other loans which together formed the larger part of the loan finance of Belize Conservancy Ltd. BSSB obviously unreasonably demanded security far in excess of the intended loan sum. Perhaps there had been a change of heart. Because the two major financiers did not make available the loans expected, the business of Belize Nature Conservancy Limited and the investment of the plaintiffs failed. The first plaintiff in his testimony said because the loans were in the end not available, the defendant must be taken to have lied that the loans were available.

9. ***The Plaintiffs' Claim.***

The plaintiffs have filed this case claiming damages, interest on damages and costs of suit. The facts they averred to support their claim were extensive. Briefly they were to the effect that the defendant made certain representations, that is, statements of facts, in the Business Plan published and verbally, to the plaintiffs, intended to induce them to invest in the business proposed, the defendant knew that the representations were not true, further the plaintiffs were induced by the false representations and invested up to US$250,000.00 which they have lost.

10. Although they did not specify, the plaintiffs' case was in the Common Law tort of deceit, traceable back to ***Pasley v Freeman [1789] 3TR. 51.*** The tort of deceit has been analysed in ***Bradford Building Society v Borders [1941] 2 ALL ER 205.*** It was a case in which a building society financier was, on appeal to the House of Lords, not held liable by mere association, for a false statement that the house purchased had been well built, made by a group of builder-developers with whom the society had signed a contract to finance purchases of the land and houses. Viscount Maugham stated the law of deceit on page 211,in the following words:

> *"My Lords, we are dealing here with a common law action of deceit, which requires four things to be established. First, there must be a representation of fact made by words, or , it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not*

*support an action of deceit:* ***Peek v Gurney (1873) LR, 6HL. 377 or 35 Digest 21, at p. 390 per LORD CHELMSFORD, and at p. 403, per LORD CAIRNS, and Arkwright v Newbold (1881) 17 Ch. D. 301, at p. 318.*** *Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true*: ***Derry v. Peek, (1889) 14 App Cas. 337, and Nocton v. Ashburton (Lord)(1914) AC, 932.*** *Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him:* ***Peek v Gurney and Smith v. Chadwick (1884 )9 APP Cas. 187, at p. 201.*** *If however, fraud be established , it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made*: ***Derry v. Peek at p. 374, and Peek v Gurney, at p. 409.*** *Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing:* ***Clarke v Dickson 35 Digest 18, 100.*** *I am not, of course, attempting to make a complete statement of the law of deceit, but only to state the main facts which a plaintiff must establish*."

11. From that we can see that fraud is the central element in the tort of deceit. A judge needs to remind himself that although the standard of proof is still that of a balance of probabilities, fraud must be established by clear evidence within that standard.

12. For the convenience of matching the evidence with the averments made, I set out the material representations averred. They are:

"(a) That the defendant, as sponsor of the project, is generously recognized both by international conservation foundations and by the Government and people of Belize.

(a) The project would be located on 229,000 acres of tropical forest which was protected, well managed and well financed.

(b) The project has imbued the goodwill of development funding agencies.

(c) The majority equity investor will find a level of financial packaging already in place, which has already been negotiated by the defendant.

(d) The defendant has already negotiated the necessary financial packaging for the project and funding has become available.

(e) The financial package is as follows:

| | US $ |
|---|---|
| Soft loan (subject to 12% Annual interest) researched By Defendant, up to | 700,000.00 |
| Social Security Board loan to Defendant, up to | 200,000.00 |
| Development Finance | |

| | |
|---|---|
| Corporation Investment Division | |
| Equity contribution, up to | 200,000.00 |
| New investor equity | |
| Participation | 400,000.00 |
| | (US $) 1,500.000.00 |

(f) Additional contribution from investors are available.

(g) That the ability of the Defendant to assemble both the special institutional equity and loan commitments required for the project had been fundamental to the preparation of the business plan".

13. ***The Defence Case.***

The defendant in its memorandum of defence, admitted that it prepared the Business Plan, but denied that it made any verbal representations. It went on to deny that what were stated in the Business Plan were representations, or if they were, that they were false, or that they were intended to induce the plaintiffs to invest in the business, or that they induced the plaintiffs, and further, the defendant denied that it caused the plaintiffs to suffer the losses for which they claimed damages.

14. At the trial no attempts were made by Mr. Dean Barrow, S.C., learned counsel for the defendant, by crossexamination or by leading evidence to resist the averment that the statements identified were in the Business Plan publication, and that they were representations. He however, carried out

much direct critical crossexamination aimed at disproving that the representations were false, and at negating the averment that verbal representations were made at the meeting on 5.8.1997. Evidence was then later led for the defendant, as to what were said and discussed at the meeting and about positive responses from investors and lenders regarding the financing of the business.

15. By the close of the defence case, it had emerged that the main heads of defence were really that the defendant accepted that it had made the representations in the Business Plan, but that the representations were true, not false, and that the representations never, as a matter of fact, did induce the plaintiffs to invest in the business publicised by the defendant. The verbal representation was flatly denied.

16. ***Determination.***

From my appraisal of the evidence I concluded that the verbal representation which the plaintiffs said was made at the meeting on 8.5.1997, remained merely an averment in the further particulars supplied by the plaintiffs' attorney. There has been no evidence to prove it. Even the first plaintiff was, in his testimony, non-committal about it. The defendant had minutes of the meeting produced. They proved that no verbal representation was made by the defendant in particular, about finance, relationship with government and agencies and about 229,000 acres of land. I am able to say confidently that there has been no evidence at all to prove any verbal representation made by the defendant. The plaintiffs' case based on verbal representations or misrepresentations said to have been made by the defendant fails.

***17.*** I have to say that the written statements of facts averred by the plaintiffs to have been made by the defendant in the Business Plan, which statements I have quoted above, were indeed made in the Business Plan published by the defendant. Specifically: (1) the statements averred at (a) regarding relationship with international conservation agencies and the government are in the sixth paragraph on page 2-2, the fifth paragraph on page 2-3, the fifth paragraph on page 2-4 and the fifth paragraph on page 4; (2) the statements in the averment at (b) that the proposed project would be located on 229,000 acres of tropical forest which was protected appear on pages 2-1 and 2-4 and ; (3) the statements in the averment at (c) (d) (e) (f) (g) (h) about other investors and lenders and that PFBL had developed relationship with them and had negotiated investment monies and loans, appear all through the publication, for examples on pages 2-1, 2-2, 2-3, 2-4 and 7-1. These statements are no doubt statements of facts and are therefore representations. It is a different issue as to whether the statements were false.

18. I note that Mr. D. Waithe, learned counsel for the plaintiffs, argued that the statements, the representations, about investment finance and loans meant that the investment monies and the loans had been negotiated, concluded and ready for investing or disbursement, whereas Mr. Barrow argued that the representations meant the investment monies and loans had been negotiated, but not necessarily concluded and ready for disbursement. My decisions are as follows:

19. In regard to the loan of US $700,000.00 from The Nature Conservancy it was clearly stated in the second paragraph on page 7-1 that it was, a "*soft loan researched by Programme for Belize (further details on request*)". That could never be interpreted to mean that the loan had been negotiated, obtained and ready for disbursement. In regard to that loan I straightaway reject the meaning urged by the plaintiffs to found their case in deceit, which meaning was that the defendant made false representations that the loan from The Nature Conservancy had been obtained ready for disbursement.

20. I accept that some of the statements about the smaller investments and loans, taken alone out of the context of the Business Plan could, on a balance of probabilities, convey the meaning that the investments or the loans had been negotiated, obtained and ready for disbursement. Examples of such statements are: (1) that, "*funding has become available for the envisioned sustainable tourism lodging activity*"; (2) that " the combination of location, the opportunity of a special relationship with the land owner (Programme for Belize) *and the availability of financial package introducing equity and loan participants constitute distinct advantages creating a special opportunity*"; (3) that "*key factors include Belize institutional equity and loan commitments"; and (4) that "the investor sought as principal will find a level of financing package already in place"*.

21. Those representations seemingly conveying the meaning urged in the submission of the plaintiffs lead to two crucial questions, namely: (1) whether two statements incorrectly termed "disclaimers" in the

memorandum of defence, which statements were included in the Business Plan, had any effect on the meaning of the representations made and (2) whether the plaintiffs believed the representations about the availability and readiness of the other investment monies and the loans and acted on the belief so that they may say the statements induced them.

22. About the two statements incorrectly termed disclaimers, I have the following to say. First I would describe them as *"exclusion statements*" akin to, but not the same as exclusion clauses in contract. The representations in the Business Plan were made in the context that included, among other items of information, the two exclusion statements, one on the front cover and the other on the first page, of the Business Plan. The exclusion statement on the front cover stated:

> "This is a business plan. It does not imply an offering of securities".

That on the first inside page stated:

> "This numbered confidential business plan has been prepared for Programme for Belize in its contact with prospective investors considering participating in the project described herein. The information contained in this report has been compiled from informed sources, but no representation or warranty is made as to its accuracy and completeness.... All investments have a level of risk and the prospective investor is expected to conduct their own due diligence before making an investment decision".

23. By those exclusion statements the defendant clearly warned readers such as the plaintiffs that though the defendant believed the accuracy of the representations in the Business Plan, the representations might turn out to be inaccurate or incomplete. The reader-investor was invited to cross-check the material facts in the Business Plan. Although on the evidence, I would accept anyway that the defendant honestly believed the statements it made about the finances, the two exclusion statements were in my view, added evidence of the honesty of the defendant, evidence of their desire to avoid loss that might be occasioned from any undiscovered inaccuracy, and evidence of absence of fraud. By the exclusion statements, the defendant called upon investors to cross-check the material statements made. I do not regard the exclusion statements to operate in the same way "exclusion clauses" operate in contracts. Responsibilities and rights in the law of tort are imposed by law and cannot be excluded unilaterally, and sometimes not at all. Duties responsibilities and rights in contract are imposed by agreement and can be excluded by agreement. In my view exclusion statements such as those two, in the law of tort of deceit should be regarded as operating to negate any knowledge on the part of the maker of a representation that the representation is false, in other words, to negate fraud. It is my decision that in the context of the two exclusion statements it cannot be said that the representations in the Business Plan were made by the defendant knowing them to be false.

24. About whether the plaintiffs believed the representation about the availability of finances, I have this to say. As far as the statements

concerned investments from other investors, Mr. Barrow argued that the statements were true. He pointed out that a letter dated 14.11.1996, exhibit D(AB) 14, was proof that an investment of US $100,000.00 had been negotiated and obtained from BDFC. He also pointed out that the first plaintiff in his testimony said that BDFC and Regent Insurance Company each paid about US $30,000.00 on shares allotted. I accept Mr. Barrow's submission that as far as investments from other investors were concerned, the representations to the effect that the investments were available were true. The statements about other investments being available cannot be part of the plaintiffs' cause of action in deceit. The Court is left with the question of the meaning of the representations in regard to the loan from BSSB, the loan from The Nature Conservancy having been decided upon.

25. About the investment monies and loans generally, and about the loan from BSSB in particular, it must be noted that the plaintiffs, in fact, recognized at a very early stage, the possibility that some of the statements about the sources of funds might turn out to be untrue or inaccurate or incomplete. They must have taken the warning in the exclusion statements and used their own prudance which led them to an early discussion with Mr. Hunt. That led to the first plaintiff writing the letter dated, 5.4.1997, to Mrs Grant of PFBL in which the plaintiffs expressed their reservation about the financing of the project in these words:

> "In further discussion with Paul about the financing of the project it was brought to light that components of the financial package as

envisaged and indicated may be in question or incomplete. Security Mutual Asset Company [agent of the plaintiffs] is prepared to proceed with this project, if the financing can be firmed up and details relating to the sites".

26. Given the above contents of the letter written by the first plaintiff, I can say that even if the statements about the other investments and loans were false, which they were not, it is plain that the plaintiffs right from the start did not believe that the finances generally, and the loan from BSSB in particular, were in place ready for disbursement. They formed that view from further discussion with Paul. Mr. Paul Hunt was the author of the Business Plan, and was an agent of the defendant. So, whatever mistaken view might have been formed from the Business Plan, Mr. Hunt, acting for the defendant, must have corrected it timely.

27. Following the letter, the plaintiffs came to Belize and had discussions with PFBL and with the entities from which other funds for the business would be obtained. They also went to The Nature Conservancy in Washington DC, USA. Only then did the plaintiffs decide to invest on or about 8.5.1997. What caused them to invest was, in my view, what they believed as the result of their own investigations. The representations about the availability of other smaller investment monies and loans made in the Business Plan did not induce the plaintiffs to invest in Belize Conservancy Limited, notwithstanding that the statements were largely true. The representations made by the defendant in the Business Plan merely created in the plaintiffs interest in the intended eco-tourism business and the possible sources of

monies.

28. There is no need to consider losses to the plaintiffs. Their claim in deceit is dismissed with costs to be paid to the defendant.

29. An observation that I make is that if the plaintiffs' claim was brought in contract, and misrepresentations were alleged, and the evidence remained the same, their claim would have failed.

30. Pronounced this Friday the 28th day of January 2004.

At the Supreme Court,

Belize City.

Sam Lungole Awich

Judge

Supreme Court.