IN THE SUPREME COURT OF BELIZE, A.D. 2010
(CIVIL)

CLAIM NO. 487 of 2010

BETWEEN:

NELSON TILLETT	**Claimant**
AND	
CHUC'S SERVICE STATION	**1st Defendant**
BELIZE BANK LIMITED	**2nd Defendant**

Before:	**Hon. Madam Justice Shona Griffith**
Date of Hearing:	**3rd February, 2015; 23th February, 2015; 10th July (on written submissions);**
Appearances:	**Mr. Michel Chebat S.C with Mr. Anthony Sylvestre for the Claimant; Ms. Marilyn Williams for the 1st Defendant; Mr. Eamon Courtenay S.C. with Ms. Pricilla Banner for the 2nd Defendant.**

DECISION

Introduction

1. The Claimant, Nelson Tillett brings an action against Chuc's Service Station, (the 1st Defendant) and the Belize Bank Ltd. (the 2nd Defendant) for specific performance of an agreement he alleged was made between himself and Mr. Sergio Chuc, the owner of Chuc's Service Station. The agreement concerned the assumption of liability by Chuc's Service Station, of a loan issued by Belize Bank in favour of the Claimant. The Claimant also seeks damages for breach of contract by the 1st Defendant and a declaration that he was no longer indebted to the Bank under the loan. Both Defendants resist the claim. The 1st Defendant on the basis that there had been no agreement concluded between the Claimant and himself and the 2nd Defendant, on the basis that the Bank was never a party to any agreement between the Claimant and 1st Defendant, with the result that the Claimant's liability to the Bank remained in existence when the agreement between those two parties failed.

The issues for determination are as follows:-

(i) Was there a valid agreement between the Claimant and 1st Defendant?

(ii) If there was such an agreement, did the Defendant breach this agreement?

(iii) If so, what are the Claimant's remedies for the 1st Defendant's breach of agreement?

(iv) Is the Claimant entitled to any relief against the Bank?

Background

2. The Claimant was the owner and operator of a gas station in San Ignacio, Belize in connection with which he had been granted a loan by the Bank several years prior which was then increased in 2004. The loan was secured by mortgage of two properties owned by the Claimant, one being land comprising 98.96 acres in Five Blues Lake Area, Cayo, Belize and the other in Bullet Tree Road, Cayo, Belize, comprising just over 1.56 acres. The gas station was situated on the land at Bullet Tree Road. The Claimant by his own words, fell into difficulties in servicing his loan around 2006. In furtherance of resolving those difficulties, the Claimant made an agreement with Sergio Chuc, of Chuc's Service Station Ltd, for the latter to 'take over his liabilities' with Belize Bank, in exchange for the transfer to Mr. Chuc of the two properties secured by the mortgage.
3. The agreement was supposed to be, that upon transfer of the properties to Mr. Chuc, the Claimant would no longer be liable to the Bank and Mr. Chuc would assume liability for the entire outstanding balance of the loan. Things did not happen quite in that manner and all three parties (the Claimant, Mr. Chuc and the Bank) advanced varying accounts of what transpired with respect to the agreement, namely how it came about and its performance. There were areas of common ground, which are as follows:-

(i) On 28th April, 2006, the Claimant, Sergio Chuc of the 1st Defendant and Mr. Mario Sabido, Manager at the time of the 2nd Defendant were assembled in Mr. Sabido's office at the Bank where the subject discussed was the taking over of the Claimant's loan by Mr. Chuc.

(ii) A short written agreement came into being which provided that in consideration of the Claimant transferring his properties at Bullet Tree Road and Five Blues Lake Area, the 1st Defendant would assume all of the Claimant's liabilities to the Bank related to those properties.

(iii) The agreement did not specify the time by which the transfers was to be effected, nor did it specify the amount of the Claimant's liability to the Bank. The liability owed was in fact just over $975,000.

(iv) The Claimant within short days after the meeting, executed transfers of his properties which the 1st Defendant retained, and the Claimant presumed he was free of the loan.

(v) The 1st Defendant subsequently refused to accept liability for the entire amount of the Claimant's outstanding loan and instead assumed liability for a portion only, which was secured by the gas station property.

(vi) The 1st Defendant and the Bank concluded formal arrangements with respect to the former's assumption of liability of the portion of the loan covered by the gas station property, in the sum of $675,000.

(vii) The Bank reverted to the Claimant for the portion of the loan covered by the Five Blues Lake Area property which the Claimant refused to accept that he remained liable for.

4. The areas of contention amongst all or some of the parties included the following:-

(i) At whose behest the agreement came about – the Claimant contended that the Bank's Manager Mr. Sabido initiated the discussion of the transfer of liability; the 1st Defendant contended it was the Claimant; Mr. Sabido contended that the Claimant and 1st Defendant came to him with the agreement already in place;

(ii) Whether the 1st Defendant was aware at the time of signing the agreement that the outstanding liability of the Claimant was over $900,000 as opposed to $675,000. The Claimant contended that the 1st Defendant was aware as to the former amount whilst the 1st Defendant contended that he was led to believe by the Claimant that the latter amount was owed.

(iii) The 1st Defendant discovered several weeks (or months) after the meeting, that the true amount of the outstanding loan was over $900,000, declined to accept liability for that entire amount and communicated this fact to the Claimant. The 1st Defendant thereafter with full knowledge of the Claimant, concluded arrangements to take over only the gas station property.

(iv) At what point in time of the events which followed the initial agreement did the Claimant become aware of the 1st Defendant's refusal to take over the loan in respect of both properties.

(v) Were there assurances made by the Bank to the Claimant that the Claimant's agreement with the 1st Defendant was being carried out?

The Court's findings in relation to the divergent accounts of what transpired will be discussed in the course of its determination of the respective issues.

Issues (i) & (ii) - Was there a valid agreement and if so was the agreement breached by the 1st Defendant?

5. The 1st Defendant contends that the agreement of April 28th, 2006 was not an enforceable agreement but that it was only an agreement in principle given the absence of the specified amount of the Claimant's liability to the Bank. Further, that the agreement in principle was meant to be finalized only upon confirmation of the representation made by the Claimant to the 1st Defendant that the amount of his liability was about $600,000. When the 1st Defendant found out from the Bank a few weeks after signing the agreement (in principle), that the Claimant's liability was $975,000 he declined to conclude the agreement, as he was entitled

to, based upon the Claimant's misrepresentation. Instead, the 1st Defendant says he informed the Claimant that he would not be taking over the entire liability, only the gas station property, the Claimant agreed and he proceeded to finalise his arrangement with the Bank.

6. On the other hand, the Claimant's position is that the amount of his outstanding loan ($975,000) was orally communicated to the 1st Defendant at the meeting on 28th April, 2006. The Claimant denies having represented to the 1st Defendant that his liability was just over $600,000. The Claimant also denies that the 1st Defendant communicated his refusal to take over both properties or that he agreed to the transfer of only the gas station property. It is to be noted that the Bank Manager Mr. Sabido's evidence was that the amount of $975,000 was not communicated at the meeting and that no amount was in fact communicated because on that day the Bank's system was down and he was unable to access that information. Instead, the amount was to be communicated to the 1st Defendant in a few days.

The Court's consideration

7. The first question to be answered in determining this issue of the validity of the agreement is whether on its own, on the face of its terms, the agreement is capable of constituting a valid and enforceable contract. The amount of the liability is not stated, however, this does not render the agreement incomplete or uncertain. The terms of the agreement are clear, between Nelson Tillett and Chuc's Service Station – Nelson Tillett agrees to transfer the two properties (recited in the agreement) and Chuc's Service Station Ltd agrees to assume all liabilities held on these properties by Nelson Tillet at the Belize Bank Ltd. There is no uncertainty in these terms, the amount of the liability is referable to the definitive and ascertainable amount held on the properties by the Bank on that date. There is nothing in the written terms that suggests that the agreement is subject to any condition precedent or is subject to contract. The Court therefore agrees with the submissions of the Claimant that on the face of the agreement, its terms are capable of forming a valid and binding agreement.

8. A further question arises however, whether the written terms amount to the entire agreement between the parties or whether there are factors outside the written agreement which add to or further define the agreement. In this case, there is raised by both the Claimant and 1st Defendant, a further definition of one of the terms of the agreement by parol evidence. If the Court accepts the evidence of the Claimant, the 1st Defendant agreed to take over the two properties for the sum of $975,000 and subsequently reneged. If the Court accepts the evidence of the 1st Defendant, the Claimant represented to him that his liability was about $600,000 and he entered into the agreement based upon this representation which turned out to be untrue.
9. The Court must come to a conclusion of which of these conflicting assertions is true. One thing the Court does not accept is that the agreement proceeded on the basis of being an agreement in principle only, to be concluded upon confirmation of the exact amount of the Claimant's liability to the Bank. The Court makes this finding based upon the conduct of the parties immediately upon conclusion of the agreement, according to the evidence. In relation to the evidence, it must be stated that the Court found there to be credibility issues in respect of all three parties. All three parties (Mr. Tillett, Mr. Chuc and Mr. Sabido for the Bank) gave evidence which was unlikely and evidence under cross examination which conflicted with their evidence in chief or other evidence in the case. That being said, the Court is entitled to accept those aspects of a witness' evidence which it finds credible or otherwise properly supported.
10. Upon executing the agreement on 28th April, 2006 both Mr. Tillett and Mr. Chuc proceeded together to arrange for the preparation of the transfers and executed them two days after. This evidence was independently confirmed by the persons who prepared the transfers and before whom they were executed. Additionally, Mr. Tillett handed over the key for the service station to Mr. Chuc who proceeded to take possession of same and under cross examination Mr. Chuc accepted that he had been in possession of the service station when according to him, he was

told the true figure of the liabilities by the Bank. This handing over of the key and taking of possession was not disputed or otherwise contradicted by Mr. Chuc. In the circumstances, the Court is unable to find that Mr. Chuc intended for the agreement he executed merely to be an agreement in principle.

11. Now on to the question of whether the 1st Defendant knew of the amount of the Claimant's liability or whether the Claimant misrepresented that amount to the 1st Defendant. The conduct of the parties is most relevant. As stated before, the Court found that the 3 main witnesses for each of the 3 parties lacked credibility in part. The Claimant's version of how the agreement came about was that he was called by Bank Manager Mr. Sabido on the very day the agreement was made and signed and that was his first involvement in the transaction. That this was his very first involvement the Court does not believe.
12. It is found that the 1st Defendant's account of having had discussions with the Claimant prior to that meeting on the possibility of his taking over the gas station is more plausible. That this first approach happened on the 28th April, 2006 (the day the agreement was signed) however, is clearly incorrect but the Court attributes this inconsistency by the 1st Defendant to an error. Notwithstanding, the Court also accepts based upon the evidence of the Bank Manager Mr. Sabido, that Mr. Chuc enquired from him prior to the signing of the agreement of the sale of the gas station. In that context, the Court also believes that Mr. Sabido then called Mr. Tillett to introduce the meeting with Mr. Chuc, which is an acceptance at least in part, of the Claimant's version of the meeting.
13. Even if Mr. Tillett were to have represented to Mr. Chuc previously that his liability to the Bank was $675,000, at that meeting, it is found to be highly implausible that the actual amount owed was not discussed. Mr. Tillett claims that Mr. Sabido scribbled the amount on a piece of paper and showed it to Mr. Chuc. Mr. Chuc claims no mention was made of the true amount and he had been told $600,000 plus by Mr. Tillett. Mr. Sabido claimed (the gentlemen having presented themselves to his office that day with a signed agreement), that the systems were

down and he was unable to retrieve the total amount owed and promised to provide same for Mr. Chuc in a few days. Mr. Sabido's evidence in chief was materially contradicted by his cross examination, insofar as it alleged that Mr. Tillett and Mr. Chuc attended his office with the agreement already prepared by the Claimant.

14. This was not supported by Mr. Chuc and largely discredited in cross examination by the Claimant's attorney where Mr. Sabido accepted that the agreement had been prepared on the 28th April by his secretary whilst the gentlemen were in his office. Additionally, for reasons which will be explained, the Court finds that the evidence of Mr. Sabido is to be treated with some reserve because his actions reveal that he was less than arms length in his dealings with the 1st Defendant vis-à-vis the Claimant and the Bank. Another fact which the Court takes into consideration in relation to the alleged non reveal of the true extent of the Claimant's liability at time the agreement was signed, is that just 10 days before on the 18th April, 2006, the Bank's attorneys at the time had written to Mr. Tillett demanding a total sum in excess of $850,000 from him following his default on his account with the Bank.

15. The attorneys could only have written upon the instructions of the Bank, thus the fact that the total was well above $600,000 was therefore at the fingertips of the Bank. Short of sinister circumstances, it is implausible that a Bank Manager would facilitate a transaction involving the transfer of a loan account without being seized of or communicating the extent of the liability. Further, it is also implausible that a seasoned businessman (as the 1st Defendant acknowledged himself to be), would fail to confirm from a bank what his intended liability was to be, prior to signing an agreement to take over a loan and immediately thereafter acting upon the agreement by going to have the transfers executed and taking possession of one of the properties. In the circumstances the Court accepts the evidence of the Claimant that the 1st Defendant had been aware of the extent of his liability at the time the agreement was signed.

16. Further, even if the Court were to accept that the 1st Defendant was of the belief that the liability he was taking over was $600,000, after the 1st Defendant made the decision not to proceed with the purchase of both, the evidence supports that he communicated his refusal to the Bank and not to the Claimant and thereafter proceeded to go through with at least part of the very agreement he was supposedly rescinding, by purchasing the gas station property. Therefore the Court finds that the 1st Defendant did not rescind the agreement as he claims he was entitled to by reason of the Claimant's alleged misrepresentation, but rather the 1st Defendant proceeded to partially perform the agreement by going on to purchase the gas station property. If the 1st Defendant's claim is to be accepted, meaning that there was no agreement of the 28th April, 2006 – by what means exactly, did he acquire the gas station property? There was certainly no power of sale exercised by the Bank. There was no variation of the agreement or new agreement made with the concurrence of the Claimant. Short of the Bank and the 1st Defendant engaging in some impropriety, there was no basis for the 1st Defendant concluding his acquisition of the gas station property other than pursuant to the very agreement the 1st Defendant is seeking to deny.
17. In more detail, the 1st Defendant's evidence in chief was that after he found out the true amount of the Claimant's loan he told the bank that he could not go through with it as it was too much. The 1st Defendant then says that *'Mr. Sabido of the second defendant and I then negotiated for about six months thereafter until we arrived at an agreement for me to take over the property with the fuel station business at a value of $675,000 and the second defendant said that they would find a buyer for the other property. I there and then signed a promissory note with the second defendant for $675,000*.' This promissory note is dated December 19th, 2006. Belatedly then in his evidence in chief the 1st Defendant states that before he signed the loan note he told the Claimant sometime in San Ignacio town that he was only taking over the gas station property and the Claimant agreed.

18. In cross examination the 1st Defendant answered that Mr. Tillett was not aware of his negotiations with the Bank but implied that Mr. Tillett was aware of what was happening having been with him in Mr. Sabido's office on at least 2 occasions. Mr. Sabido's evidence in chief (which he contradicted in cross examination) was that the purchase price for the gas station had been agreed between the Claimant and 1st Defendant as $675,000 (this is in direct conflict with the 1st Defendant's evidence); and that a dispute subsequently arose between the two and he was contacted by the Claimant and informed that the 1st Defendant was refusing to purchase the 2nd property (again contradicted by his own cross examination); and that both the Claimant and 1st Defendant thereafter attended his office indicating that they had resolved their dispute and it was agreed that the 1st Defendant would purchase only the gas station for $675,000 and it was in those circumstances the promissory note for the said amount was executed in December, 2006.

19. Again, this evidence is starkly contradicted by the 1st Defendant's evidence of negotiating with the Bank for that price without the involvement of the Claimant and Mr. Sabido's own admission in cross examination that Mr. Tillett was not aware of the negotiations Chuc held with the Bank after the agreement was signed. Finally, it is noted that after the Bank had its attorneys prepare proper conveyances to effect the transaction (which indisputably was in March, 2007) the Bank sent the conveyances for <u>both</u> properties to Mr. Tillett to be executed. If as has been alleged, in differing permutations by the 1st Defendant and the Bank, the Claimant had been aware and agreed to the purchase by the 1st Defendant of only the gas station property, as evidenced by the 1st Defendant's execution of the promissory note in December, 2006 – why in March, 2007, were conveyances for both properties prepared and given to the Claimant to sign? According to them, by that time the Claimant already would have been party to an orally varied agreement for the 1st Defendant to purchase only the gas station property.

20. On the question raised by this fact (conveyances for both properties being sent to the Claimant in March, 2007), along with the admissions that the Claimant had not been party to the negotiations by the 1st Defendant to proceed only with the purchase of the gas station property, also with the Court's rejection of the belated and vague assertion by the 1st Defendant that 'sometime before he signed the promissory note' he told the Claimant that he was only purchasing the gas station property, further, the unsupported evidence (by the persons who were supposedly there) of Mr. Sabido regarding the dispute and resolution between the Claimant and 1st Defendant of the latter's purchase of only the gas station property, and the Claimant's affirmation of the agreement of April, 2006 by an unanswered attorney's letter in October, 2006 – the Court finds that the sum total of all this evidence, is that in March, 2007, the agreement of April, 2006 was held out by the Defendants, still to be in force and to be performed.
21. In the circumstances, either on acceptance of the Claimant's evidence that the 1st Defendant was aware of the amount of his liability, the refusal of the 1st Defendant to purchase both properties is clearly a breach of the agreement. Alternatively, on the basis that the 1st Defendant failed to rescind but instead proceeded to partially perform that contract, there was a breach of the agreement by the purchase of only one instead of the two properties.

Issue (iii) - Liability of the Bank

22. The Claimant asserts that he entered into the agreement with the 1st Defendant as a result of the Bank's representations to him that his liabilities would cease upon transfer of his properties to the 1st Defendant. The Bank was not a party to the agreement between the Claimant and 1st Defendant, thus no relief is claimed arising out of the 1st Defendant's breach of that agreement. Instead, the claim against the Bank is based on promissory estoppel. Citing Halsbury's Laws of England[1], the law on promissory estoppel is stated by Counsel for the Claimant, as

[1] 4th Ed. Vol 16(2) para 1082

arising (my paraphrasing) where a party, by words or conduct makes a clear and unequivocal promise intended to affect legal relations between them and the other party acts on that promise, the promisor is in effect bound by his promise.

23. The application urged in relation to this case is that the Bank promised the Claimant that his liability under the loan would cease once he transferred his properties to the 1st Defendant. The Claimant having acting on this promise and executed the transfers for his properties and also handed over the keys to the service station, he was entitled to be released of his liabilities by the Bank.

The Court's consideration

24. Usually referred to as the 'High Trees doctrine', taken from ***Central London Property Trust v High Trees House***[2]**,** the law of promissory estoppel arises in relation to a concession made by a party to a contract, to resile from his legal rights under that contract and that promise is enforced in circumstances where the other party has acted on the promise to his detriment and it would be inequitable for the original legal position to be enforced. In order to establish estoppel arising out of a promise it must be shown that (i) there was an unambiguous representation of intention; (ii) there was reliance upon that representation; and (iii) it would be inequitable for the promisor to resile from his representation.

25. With respect to the unequivocal representation as to the intention of the promisor, the Court finds the judgment of Hafiz JA in **Cahal Pech Limited, Rene Villanueva Sr & Rene Villanueva Jr v Development Finance Corporation** [3], affirming the High Court judgment of Legall J., to be directly applicable to the case at bar. From paragraph 67 of the Judgment, Hafiz JA considered the Judge's application of the law on promissory estoppel to the facts of that case which were not dissimilar to the facts of the instant case. Those facts were that the appellants were owners of the Cahal Pech Resort, which was mortgaged to the Respondent

[2] [1947] KB 130

[3] Belize Civil Appeal No. 27 of 2012

DFC and the appellants were unable to service the mortgage. A sale was agreed between the appellants and a third party for purchase of the hotel and assumption of the loan, whereupon the appellants would be released from their loan obligations. There was no formal agreement among all three parties as to their respective obligations nor between the third party and DFC that the former was assuming liability under the mortgage.

26. The third party refused to assume the loan as agreed and DFC sued the appellants to recover the outstanding amounts owed on the loan. In answer to the plea of estoppel by the appellants, Legall J found that there was no unequivocal representation by DFC to form the basis of an estoppel, as the representation to release the appellants from their loan liability was made on the condition that the third party would take over the loan obligations. For reason that the fulfillment of the promise to release the appellants from their liability was dependent upon the assumption of the loan by the third party, the Judgment of Legall J. was affirmed on appeal.

27. In applying this judgment to the instant case, the Court finds much the same situation as in ***Cahal Pech***. The release of the Claimant from his liability to Belize Bank was directly linked to the assumption of the loan by the 1st Defendant. The 1st Defendant failed to perform his entire obligation thus to the extent that the agreement was not performed, the promise by the Bank failed. In applying the Court of Appeal's affirmation of the court in the ***Cahal Pech*** case, it cannot be said that the Bank's promise was unequivocal. In light of this determination by the Court, it is found unnecessary to delve any further into the other definitive elements of the doctrine of promissory estoppel, as identified above. In the circumstances the Claimant has failed to establish his claim for a declaration that he is no longer indebted to the Bank under the remainder of his loan.

Issue (iv) - The Claimant's remedies.

28. The Court having found that the 1st Defendant breached the agreement with the Claimant, the question of relief to be granted arises. The Claimant has sought the equitable relief of specific performance of the agreement. The Claimant has also sought damages for breach of contract. They were not pleaded in the alternative. The claim for damages was for the outstanding balance of the Claimant's loan at the Bank. The Claimant submitted that he sought to mitigate his losses as required, by taking all reasonable steps to do so within the circumstances of the case. The steps taken were that through his attorney in October, 2006 he wrote to affirm the agreement and having received no reply to the contrary assumed the agreement was in order.
29. Thereafter, in November, 2008 he was formally notified that his loan account with the Bank still remained active and the amount owed at that time was $417,734.80. The Claimant then through his attorneys, wrote to the 1st Defendant demanding completion; sought to negotiate with the Bank to resolve the matter and continued corresponding until February, 2010 and in July, 2010 as a last resort the Claimant filed this claim. The Claimant submits that his actions were reasonable in attempting to mitigate his loss as it was not feasible for him to pay off the balance of the loan as by that time the 1st Defendant was the owner of and in possession of his source of income, the gas station. The claim for damages is submitted as the principal, interests and penalties to date, from the 28th April, 2006 until the balance of his loan is paid in full.
30. The 1st Defendant on the other hand, asserts that the Claimant was put on notice by the Bank since October, 2006 that the 1st Defendant was no longer upholding the agreement and from that time should have sought to mitigate his losses. Upon his failure to do so, the 1st Defendant should be liable only in the sum of $5000.

The Court's consideration

31. Firstly, with respect to the claims for specific performance and damages for breach of contract, whilst the Claimant was entitled to bring an action for either in the alternative, at the trial, the Claimant ought to have elected which remedy he intended to pursue - **Johnson v Agnew**[4] per Lord Wilberforce @ 392. Clearly the Claimant could not at once seek to enforce the agreement and claim damages for its breach. The Court in any event found that as damages would be adequate compensation and therefore the appropriate remedy no question of an award of specific performance need be entertained.
32. The question for determination therefore was the measure of damages for the 1st Defendant's breach of the agreement of April 28th, 2006. Considering the general principle that damages are compensatory in nature and the aim is to place the injured party in as close a position that he would have been had it not been for the breach, the first question to be answered in applying this principle is to ascertain when the breach of the agreement took place. According to the evidence the Court finds that the breach took place on December 19th, 2006 when the 1st Defendant executed the promissory note with the Bank in respect of just the gas station property.
33. Thereafter, the second question for determination arises in relation to the Claimant's accepted duty to mitigate his losses, ie, to use his resources to put himself in as good a position as possible or to minimize his losses as a result of the breach of contract - **British Westinghouse Electic v Underground Electric Railways Co of London Ltd**.[5] per Viscount Haldane LC. A claimant would run afoul of this duty to mitigate by either unreasonable action or unreasonable inaction. In this case, the time from which the Claimant's duty to mitigate arose is considered to be November 4th, 2008 when he received formal communication from the Bank as to his loan account still being active. This date is as opposed to October 2006

[4] [1980] AC 367
[5] [1912] AC 673

when the Court finds that the breach was not yet occasioned, also as opposed to March, 2007 when the Bank provided the Claimant with transfers for both properties for him to execute indicating to the Claimant that the agreement was still in force.

34. Having been under a duty to mitigate his losses from November 4th, 2008, how does the Court assess the Claimant's actions? The Claimant was faced with a liability in excess of $400,000 and the source of income previously used to service the loan was no longer in his possession. Short of writing letters and attempting to negotiate the loan away, there is no evidence that the Claimant took any steps to actually deal with the payment of what was a legal liability (whether wrongly or rightly) in existence against him that would continue to accumulate. It is considered, that a reasonable step, would have been to utilize the resource still in his possession – the Five Blues Lake property which consisted of just over 98 acres of land – to assist with the payment of the loan. There is no evidence that the Claimant attempted to sell this property, its value has not even been placed before the Court. It is considered that reasonable action to mitigate loss when faced with a liability of over $400,000 and being in possession of at least one asset, would have been to attempt to liquidate that asset in order to pay towards the debt. For the Claimant to have shown even failed efforts to secure an alternative purchaser for the Five Blues Lake property would have been reasonable attempts to mitigate.

35. It is also considered that reasonable action would have been to recommence some payments towards the debt whilst awaiting determination of one's legal rights in relation to the liability. The Claimant did nothing of the sort and short of it being accepted that the Claimant could not previously manage the payments he could have made when he was operating the gas station, there was no evidence submitted to establish that the Claimant was otherwise impecunious. It appears to the Court that the Claimant was content to bury his head in the sand and unreasonably ignore the fact that the charges and interest on his loan would

continue to accumulate.

36. In this regard therefore the Claimant is to be restricted in his recovery of a portion of the charges associated on the loan as it has not been established that they were unavoidable losses. Additionally, the damages awarded must be less the value of the land retained by the Claimant as a result of the breach of the agreement. The Claimant is thus entitled as follows:

    (i) The principal together with interest and penalties on the outstanding balance of his loan with the Bank from the 19th December, 2006;

    (ii) For failure to mitigate his losses from November 4th, 2008 to present, 25% of the interest and other charges applied to the loan is to be deducted;

    (iii) The value of the Claimant's Five Blues Lake property is to be ascertained at the expense of the Claimant and deducted from the outstanding balance of the Claimant's loan.

37. **The Court's final disposition is as follows**:-

    (i) The agreement of 28th April, 2006 between the Claimant and 1st Defendant is a valid agreement;

    (ii) The 1st Defendant breached the agreement by refusing to assume the Claimant's liabilities held against the two properties specified in the agreement;

    (iii) The Claimant is entitled to damages for the 1st Defendant's breach of the agreement in the total sum of **$425,289.45**;

    (iv) The damages at paragraph (iii) are calculated as follows:

        (a) The amount of the principal together with interest and penalties on the outstanding balance of the loan from the 19th December, 2006 in the sum of 576,748.50;

        (b) Less a deduction of 25% of interest and charges accumulated on the loan since November 4th, 2008 in the sum of 100,609.05;

(c) Less a deduction of the value of the Claimant's Five Blues Lake property in the sum of $50,000;

(d) Less the cost of the valuation for the Five Blues Lake property in the sum of $850.00

(v) Post judgment interest only at 6% per annum of the sum of **$425,289.45** from the date of judgment until payment;

(vi) The Claim against the 2nd Defendant is dismissed with costs to be assessed if not agreed; and

(vii) The Claimant is awarded costs against the 1st Defendant to be assessed if not agreed.

Dated this 20th day of July, 2015.

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Shona O. Griffith
Supreme Court Judge