IN THE SUPREME COURT OF BELIZE, A.D. 2011

Claim No. 734 of 2011

ATLANTIC BANK LIMITED CLAIMANT

BETWEEN: AND

LARRY FEGER
JOAN FEGER
SUNSET MANOR LIMITED DEFENDANTS

BEFORE: Madam Justice Minnet Hafiz-Bertram

Appearances: Mr. Denys Barrow SC and Liesje Barrow- Chung for the Claimant
Mr. Estevan A. Perera for the Defendant

J u d g m e n t

Introduction

[1] This is a claim for breach of a loan agreement dated 21st December, 2010. The Defendants admitted part of the claim but challenged the claim for attorney fees. The court has to make a determination as to whether the Defendants are liable to pay the sum of $933,711.06 as attorney fees to the Claimant, Bank as they agreed to do by the terms of a promissory note.

[2] On 15th December, 2010, the first Defendant, Larry Feger signed a letter of offer in which he accepted a Loan Offer and the terms and conditions set out therein. Further, on 21st December, 2010, the first and second defendants were granted a mortgage commercial loan which was guaranteed by the third Defendant.

[3] The first and second Defendants, as part of the loan process, duly executed a promissory note on or about 21st December, 2010, which sets out in detail the terms and conditions of the loan and addresses issues as to cost in the event of default.

[4] The promissory note dated 21st December, 2010, which is exhibited as "AS 1" to the witness statement of Aldo Salazar, authorizes the Bank to make the claim for attorney's fees in the event of default. The relevant section states:

> *In the event the bank shall institute any action for the enforcement of collection of the Note, there shall be immediately due from each of the undersigned, in addition to the unpaid principal and interest, all costs and expenses of such action, and an attorney's fee of twenty per cent of the amount then owing and unpaid by the undersigned.*

[5] The Defendants defaulted on their loan and on 18th November, 2011, the Bank issued a claim for the sum of $5,083.537.99, inclusive of interest, as well as customary bank charges, and attorney-at-law collection charges, being the sum due as of the 11th day of November, 2011, in respect of the loan facility. A court fee of $25.00 and legal practitioner's fixed costs on the issue of $ 7,800.00 was also claimed.

[6] The Defendants in their defence denied that they owe the sum of $5,083.537.99 as of 11th November, 2011. They stated that the amount owed is $4,149,826.93 as of the said date. Further, that the sum of $933,711.06 has not been incurred and or paid by the Bank to its attorney and as such is not entitled to claim this amount.

[7] On 9th March, 2012, the Defendants filed an application for summary judgment in respect of that portion of the claim relating to the attorney-at-law charges in the amount of $933,711.06 and for that part of the claim to be struck out.

[8] On 14th March, 2012, at a case management conference, judgment was entered on admission against the Defendants for the sum of $4,259,348.18 together with interest on the outstanding principal sum of $3,710,000.00 at the rate of 13.5 per cent per annum from the 24th January, 2012 until payment and cost in the sum of $7,960.00 being legal practitioner's fixed costs on issue of $7,800.00, legal practitioner's fixed cost on entering judgment of $100.00 together with court fees of $25.00 and court fees on entering judgment of $35.00.

[9] The application for summary judgment in relation to the attorney-at-law charges of $933,711.06 was set down for hearing on 19th April, 2012. When the matter came up for hearing the Defendants abandoned their application for summary judgment and as a result a case management order was made so that the issue of attorney fees can proceed to trial.

[10] The issues raised in written and oral submissions are:

1) Whether the promissory note was properly executed by the first and second Defendants so as to make them aware of the indemnity clause in the loan note.

2) Whether it is a standard practice in Belize for Banks to have indemnity clause in promissory notes for debt collection in the event of default.

3) Whether the indemnity clause in the promissory note for 20% attorney's fee is an unusual and onerous term of contract.

4) Whether the Defendants can rely on Section 34(1) of the Legal Profession Act to argue illegality and enforceability of the contingency fee agreement

5) Whether the court can strike down the contingency fee agreement between the Bank and its attorney as being unfair and unreasonable

6) Whether it is abuse of process and against public policy for the Bank to include the indemnity clause in the promissory note.

Issue 1:

Whether the promissory note was properly executed by the first and second Defendants so as to make them aware of the indemnity clause in the loan note.

The evidence

[11] Mr. Feger and Mrs. Joan Feger, the first and second Defendants gave evidence for the defence. Mr. Aldo Salazar and Mr. Vito Herrera gave evidence for the Claimant, Bank. All the witnesses were cross-examined.

[12] Mr. Feger testified that when he signed the promissory note, the Bank's employee at the time presented to him several documents and told him where to sign. He said that when he questioned the employee about the loan, he simply informed him that all was in order. Further, there was a lot to read and he was offered no opportunity to take the documents home for review or consult with an attorney. He testified that he was

given a lot of papers to sign, he guessed about ten to fifteen papers and as he was given the papers he just kept on signing. He further testified that he did not read the papers and also on that day he did not get a copy of the documents he signed.

[13] In cross-examination of Mr. Feger by learned Senior Counsel, Mr. Barrow, he said that he signed the documents maybe four or five times. Mr. Barrow referred Mr. Feger to the evidence of Mr. Herrera for the Bank which showed that Mr. Feger signed a promissory note on February 1, 2008. This agreement shows that there is a clause for expense and attorney fees for twenty percent of the amount owing in the event the Bank has to institute any action for the sums due under the agreement. Mr. Feger was also showed another promissory note which he signed on June 1st, 2009, which has the same clause. Mr. Feger accepted that he signed the promissory notes.

[14] In further cross-examination, Mr. Feger was referred to the promissory note attached to his witness statement which is the subject of this action and which has the clause for the recovery of attorney's fees of twenty percent for the collection of the debt. Mr. Feger thereafter, accepted that he signed promissory notes on three separate occasions in which he agreed to pay the collection fee to the bank in the event of default.

[15] Mrs. Joan Feger's evidence is that she understood that if they defaulted they would be subjected to the normal charges and expenses afforded to a lender in compliance with the laws of Belize.

[16] Mr. Vito Herrera, witness for the Bank testified that before signing any document, the customer is given an opportunity to read same. Also, everything is explained to them.

Analysis and conclusion of the evidence

[17] I accept the evidence of Mr. Herrera that the practice at the bank is that customers are given a copy of loan documents to read before signing and that everything in the document is explained to them. All of the promissory notes signed by Mr. and Mrs. Feger have the indemnity clause that in the event the Bank has to institute any action for the enforcement of collection of any sums due under the agreement, the Defendants shall pay attorney's fee of twenty percent of the amounts then owing and unpaid. I am satisfied on the evidence that the Defendants were aware of the terms of the agreement which includes the indemnity clause for attorney's fees of twenty percent on the amount owing and unpaid. I find that the promissory note was properly executed by the first and second Defendants and they were aware of the indemnity clause in the said note.

Issue 2:

Whether it is a standard practice in Belize for Banks to have indemnity clause in promissory notes for debt collection in the event of default

[18] This is an issue raised during examination of Mr. Aldo Salazar, attorney-at-law who gave evidence for the Bank. Mr. Salazar is an attorney-at-law since 2001 and worked for several banks over the years, that is, Provident Bank, Heritage Bank, Scotia Bank and presently Atlantic Bank Limited, the Claimant in this case.

[19] In cross-examination he said that when he worked for Heritage Bank and Provident Bank, they charged fifteen percent for debt collection in the event of default. In respect of the sum of $933,711.06, he testified that

this would be the banks' obligation to the law firm when they collected the money. That the bank is obliged to pay the firm based on the contingency fee agreement and that is the reason the promissory note has the indemnity to the bank. See Exhibit "A.S 2" for the contingency fee agreement between the Bank and its attorney-at-law.

[20] Mr. Salazar's evidence shows that it is a standard practice for banks in Belize to have indemnity clause in promissory notes which is as a result of contingency fee agreements on debt collection with the Banks and its attorneys-at law. As such, I find that it is a standard practice in Belize for banks to have indemnity clause in promissory notes for debt collection in the event of default.

Issue 3:

Whether the indemnity clause in the promissory note for 20% attorney's fee is an unusual and onerous term of contract.

[21] Learned Counsel, Mr. Perrera submitted that it is very unusual for a promissory note or any loan agreement to contain a clause in it stating that an additional sum of twenty percent will be automatically added to the outstanding balance if there is default. As such, the Bank should have made it clear to the parties that they had a very onerous clause and bring it sufficiently to the attention of their client. Mr. Perrera relied on the cases of **Parker v The South Eastern Railway Company (1876-77) L.R.2 C.P.D 416 and Spurling Ltd. v Bradshaw (1956) 1 W.L.R. 461.**

[22] Learned Counsel for the Bank in response submitted that the cases of **Parker v The South Eastern Railway Company** and **Spurling Ltd. v Bradshaw** are not applicable to the matter before the court as the

evidence before the court clearly shows that the Defendants were sufficiently aware of the indemnity clause in the promissory note.

[23] I agree with Learned Counsel for the Bank that the cases of **Parker** and **Spurling** are distinguishable from the case before the court. In both cases, the Defendants sought to rely on unsigned documents. In the case at hand, it has been determined above that the Defendants were fully aware of the indemnity clause in the promissory note.

[24] The court respectfully disagrees with Mr. Perrera that the clause in the promissory note is an unusal and onerous term of contract. Mr. Salazar's evidence, as shown above, which I find to be credible is that other Banks in Belize do debt collection by contingency fee agreements with their attorney at law and that Heritage Bank and Provident Bank for which he worked previously, set the fees at fifteen percent. Accordingly, I find that the indemnity clause in the promissory note for twenty percent attorney's fee is not an unusual and onerous term of contract.

Issue 4

Whether the Defendants can rely on Section 34(1) of the Legal Profession Act to argue illegality and enforceability of the contingency fee agreement

[25] Mr. Perrera submitted that the contingency fee arrangement made between the Attorney for the Bank and the Bank is illegal and void since it is unreasonable and in breach of the laws of Belize. Learned Counsel relied on **Section 34(1) of the Legal Profession Act** which sets out the process by which an attorney is entitled to collect his legal fees. Section 34 (1) states:

An attorney may not commence any suit for the recovery from his client of any fees for any legal business done by him until the expiration of one month after he has served on the client a bill of those fees, the bill either being signed by the attorney (or in the case of a partnership by any one of the partners either in his own name or in the name of the partnership) or being enclosed in or accompanied by a letter signed in like manner referring to the bill, but if there is reasonable cause for believing that the client is about to leave Belize, or to become bankrupt, or to do any other act which would tend to prevent or delay the attorney from obtaining payment, the court may, on the application of an attorney-at-law, authorise him to commence or proceed with an action to recover his fees.

(2) If in any proceedings before a court-
(a) the amount set out in the bill of fees is-
(i) sought to be recovered, or
(ii) disputed; and
(b) the bill or part thereof relates to matters in respect of which no scale of fees is prescribed,

the court shall decide whether the fees set out in respect of those matters are fair and reasonable having regard to the work done or are excessive and shall allow or reduce them accordingly.

[26]. Learned Senior Counsel, Mr. Denys Barrow, in response submitted that under **Section 34 (1)** of the **Legal Profession Act** a bill of cost for a sum which is greater than what the court considers reasonable is not illegal. The court taxes the bill of cost and will allow it or reduce it depending on whether it is reasonable or not. As such, an unreasonable fee does not produce an illegal agreement. Further, Learned Senior Counsel submitted that **Section 34** speaks to a condition precedent to a lawyer bringing a claim in court to recover his fees, therefore, this provision is not applicable to this case.

[27] The court agrees with Mr. Barrow that an unreasonable fee does not produce an illegal agreement. Further, that **Section 34(1)** is not applicable in this case. **Section 34** speaks to a situation separate from a

contingency fee arrangement which cannot be taxed by the court. In this case, the court is to review the promissory note between the Bank and the Defendants and make a determination as to whether the Bank is entitled to the twenty percent attorney's fee pursuant to that agreement. Accordingly, I find that the Defendants cannot rely on **Section 34(1)** of the **Legal Profession Act** to argue illegality and enforceability of the contingency fee agreement.

Issue 5

Whether the court can strike down the contingency fee agreement between the Bank and its attorney as being unfair and unreasonable

[28] Learned Counsel, Mr. Perrera submitted that attorneys fees must be fair and reasonable and if the court decides that the contingency fee agreement is unfair and unreasonable, it may order that the agreement be cancelled or that amount payable thereon be reduced. That once this is considered by the court then the Bank is unable to enforce through a separate agreement, that is, the illegal fee agreement. Learned Counsel relied on **Re Eastmond (Harold) (1991) 50 WIR 85** in which the court held that remuneration of $29,100 in respect of a settlement of $73,100. was unreasonable and contravened the Legal Profession Code of Ethics. See also the text, **Legal Profession in the English Speaking Caribbean, Karen Nunez Teshiera.** Learned Counsel further relied on **section 33(6) of the Legal Profession Act** and **Rules 60(2)** and **61(1)** and **(2)** of the **Legal Profession (Code of Conduct) Rules** of Belize.

[29] Learned Senior Counsel for the Bank, Mr. Barrow, accepted the position that where cost and charges are unreasonable it ought to be disallowed. He further submitted that in the case at bar, relying on the evidence of Mr. Salazar, twenty percent is not unreasonable in commercial claims in Belize.

[30] Learned Senior Counsel further submitted that the rules relied on by Mr. Perrera is not applicable to this case. Learned Senior Counsel also submitted that before 1999, England had regarded contingency fee as against public policy but now contingency fee is permitted in litigation before the courts. As such, case law before 1999 when conditional fees were not permitted must be read subject to that fact.

[31] Learned Senior Counsel referred the court to **UK: Government Implementation of Jackson Reforms on the Costs and Funding of Litigation. Introduction of Contingency fees and increased Mediation** which shows that the UK Government is seeking to implement the Jackson Reforms on cost on litigation where general damages will rise by 10% and success fees in personal injury cases capped at twenty five percent. I must point out however, that there is no evidence before the court as to whether legislation has been introduced to give effect to these reforms. However, what is certain is that there is consideration to cap personal injury cases at twenty five percent.

Section 33(6) of the Legal Profession Act

[32] **Section 33(6) provides:**

> *(6) Subject to this section, an agreement under this section may be sued and recovered on or set aside in like manner and on like grounds as an agreement not relating to the remuneration of an attorney-at-law, but if in any suit commenced for the recovery of fees the agreement appears to the court to be unfair and unconscionable the court may order that the agreement be cancelled or the amount payable thereunder be reduced and may give such consequential directions as it thinks fit.*

[33] The agreement referred to in **section 33(6)** includes contingency fee agreements. The contingency fee agreement is between the Bank and its attorneys at law. The Bank has not challenged this contingency fee agreement with its attorneys which is a general agreement and is not one made specifically for the collection of the Feger's debt. I therefore, respectfully disagree with Mr. Perrera that the court can strike down or reduce the contingency fee agreement between the bank and its attorneys pursuant to section 33(6) of the Legal Profession Act.

Rules 60(2) and 61(1), (2) of the **Legal Profession (Code of Conduct) Rules of Belize**

[34] **Rule 60(2) states**:

> *An attorney shall not enter into an agreement or charge or collect a fee, in contravention of these Rules, the Act or any other law.*

Rule 61 (1) and (2) states:

> *(1) An attorney shall not charge fees that are unfair or unreasonable.*
>
> *(2) In determining the fairness and reasonableness of a fee the following factors may be taken into account-*
>
> *(a) the time and labour required, the novelty and difficulty of the questions involved and the skill required to perform the legal service properly;*
>
> *(b) the likelihood that the acceptance of the particular employment will preclude other employment by the attorney;*

(c) the fee customarily charged in the locality for similar legal services;

(d) the amount involved (if any) or the value of the subject matter;

(e) the time limitations imposed by the client or by the circumstances;

(f) the nature and length of the professional relationship with the client;

(g) the experience, reputation and ability of the attorney concerned.

[35] In my view, **Rules 60(2)** is not applicable to the case at hand**.** As stated above, the contingency fee agreement is not being challenged by the Bank. The agreement before the court for which the twenty percent is claimed is the promissory note between the Bank and the Defendants. The attorney is not a party to that agreement.

[36] Likewise, **Rules 61(1)** and **(2)** are applicable to attorney and client. The attorneys have not entered into any agreement with the Defendants. The Defendants are not the clients of Barrow & Company. The Bank is the client of Barrow and Company and they are not challenging the general contingency fee agreement which they have with that firm. Therefore, the Defendants cannot avail themselves to this section.

Legal Profession in the English Speaking Caribbean, Karen Nunez Teshiera

[37] The court accepts the position taken by the learned author of this text that attorney's fees must be fair and reasonable. However, there is no

evidence in the case at bar that there has been a breach of the **Legal Profession Act** and **Rules** by the attorneys at law representing the Bank.

Re Eastmond (Harold) (1995)

[38] Mr. Perrera submitted that in the **Eastmond case** the court held that remuneration of $29,100 in respect of a settlement of $73,100. was unreasonable and contravened the Legal Profession Code of Ethics. Learned Senior Counsel, Mr. Barrow in response submitted that the Re **Eastmond case** is a 1995 decision and it was a situation in which the agreement was for a fifty/fifty split between the client and the lawyer. Further, the attorney entered into a business transaction with his 73 year old client without advising him to seek independent legal advice. As such, it was a situation of undue influence. Learned Senior Counsel, Mr. Barrow, contended that there is no undue influence in the case at bar.

[39] The court agrees with Learned Senior Counsel, Mr. Barrow, that there is no undue influence in the case at bar. Further, undue influence was not pleaded in this case. The evidence proves that the first and second Defendants were aware of the indemnity clause in the promissory note. In the **Eastmond case** the court found the agreement to be unreasonable. In fact, the court relying on the Legal Profession Act stated that $29,100. paid by a client cannot be regarded as reasonable remuneration for legal services in a settlement of $73,100. when an appropriate fee of $7,310 had already been paid.

[40] In the case at bar, the situation is different as the attorney did not enter into an agreement with the Defendants. It was not a client/ attorney relationship. This was a loan agreement between the Bank and its client, the Defendants. The court in the **Re Eastmond** relied on the Legal Profession Act and found the fee to be unreasonable. In the case at bar, similar rules in the Legal Profession Act and the Rules of Belize are not

applicable to this case since it was not an attorney/ client relationship. It should be noted that the arrangement in **Eastman case** between attorney and client in which there was a challenge was for a fifty/fifty split. In this case at bar, the fee is twenty percent on outstanding debts and here the attorney has no relationship with the Defendants. The attorney has a relationship with the Claimant for twenty percent fee and this contingency agreement has not been challenged by the Bank.

Conclusion

[41] The court has no power to cancel or reduce the percentage on the contingency fee agreement as that agreement has not been challenged by the Bank. Further, **Section 33(6) of the Legal Profession Act** and **Rules 60(2) and 61(1), (2)** of the **Legal Profession (Code of Conduct) Rules of Belize** are not applicable to this case. In any event, the evidence of Mr. Salazar proves that the contingency fee agreement between the Bank and its attorney is not unfair and unreasonable.

Issue 6

Whether it is abuse of process and against public policy for the Bank to include the indemnity clause in the promissory note

[42] Mr. Perrera argued that it is an abuse of process for the Bank to try and collect twice from the Defendants for attorney fees or for their attorney to try to collect twice through its client. He submitted that the Bank had already claimed legal fees in its Claim Form under the section listed as "Legal Practitioner's fixed costs on issue" in the sum of BZ $7,800.00 as allowed by the **Belize Supreme Court (Civil Procedure) Rules 2005**

(CPR) to which an order has been made. Learned Counsel relied on **Part 64** of the CPR which provides for cost.

[43] Learned Counsel further submitted that pursuant to **section 60 (2)** of the **Legal Profession Act** an attorney shall not enter into an agreement, or charge or collect a fee, in contravention of these Rules, the Act, or any other law.

[44] Mr. Perrera, relying on **Chitty on Contracts** also contended that the enforcement of contractual claims is in certain circumstances against public policy. That there are generally five grounds upon which public policy issues arise and the pertinent grounds are:

a) Objects which are illegal by common law or by legislation;
b) Objects which interfere with the proper working of the machinery of justice;
c) Objects economically against the public interest.

[45] Learned Counsel submitted that the additional and onerous payment of BZ $933,711.06 is contrary to the grounds listed above. That in respect to paragraphs "a" and "b" Belize laws clearly provide for the amounts which may be charged by attorneys for default judgments and any attempt whether by contract through third parties or otherwise interferes with the established machinery of justice, which is the Belize CPR 2005.

[46] Mr. Perrera further submitted that the ability for a bank to have its clients pay twice for legal fees is economically against the public interest and the society. That if the bank is allowed to insert this onerous clause with the assistance of their attorney into their promissory agreements wherein all of its clients would be saddled with an additional 20% increase in their loan

upon default, the other financial institutions in the country of Belize will no doubt follow suit. Also, that attorneys will encourage the use of these clauses which will allow them to circumvent opportunities of taxation and the ceilings placed on their fees in the CPR. Further, the fact that the payment goes contrary to the CPR and the Legal Profession Act suggest that it is contrary to public policy.

[47] Learned Counsel further argued that it is against public policy for the Bank to enter into agreements which entitles law firms or attorneys to circumvent provisions found in the CPR which regulate the amounts to be paid to attorneys in respect of fees on specified claims. That this would be disastrous to the society if creditors were allowed to add unprecedented amounts in their contracts in the form of an unusual term to enable attorneys to collect exorbitant fees which circumvent those enshrined in the laws.

The Banks arguments in response

[48] Learned Counsel for the Bank argued that the evidence shows that the provision for borrowers to indemnify against payment of attorney fees is standard for other banks in Belize. As such, this fact eliminates the footing for the public policy argument. It also underpins the difference between public policy in England, as it used to be, and public policy in Belize, as it has existed for some time. In England contingency fee arrangements were illegal, as against public policy. It was not until 1999 that they were permitted to do so on a trial basis. See **European Justice Forum UK to introduce Contingency fees.**

[49] The Bank further submitted that there is no provision in the CPR 2005 which addresses what remuneration can be agreed to be paid to an attorney and the contractual obligation upon default to indemnify the

creditor against payment of the agreed remuneration. That the CPR address costs associated with bringing a claim which is entirely separate and distinct from any contractual obligation to pay monies whether as an "attorney fees" or otherwise claimed as of right by virtue of a binding promise to pay.

[50] Learned Counsel for the Bank referred the court to **CPR Rule 63.5** which provides how cost can be recovered and this includes 'by agreement between the parties.' Further, learned Counsel argued that the award of litigation costs is a matter for the courts. That payment of "costs and expenses" as well as attorney's fees in the agreed percentage is a matter of contract. Learned Counsel submitted that in England contractually recoverable costs and fees, called in the English practice "indemnity costs," may be recovered by court order as a standard option for assessing costs contained in the English CPR. See CPR 44.4 Thus, in ***Gomba Holdings (U.K.) Ltd. and Others v Minories Finance Ltd. and Others*** it was held that the Defendants were contractually entitled to recover or retain their costs, charges and expenses on an indemnity basis and that the court's discretion as to the basis of taxation of a mortgagee's costs, charges, and expenses should normally be exercised so as to correspond with the contractual entitlement.

[51] As such, the Bank submitted that the requirement that the Defendants pay the twenty percent attorney's fee in accordance with the terms of the promissory note is not abusive, unreasonable, unfair nor does it go against public policy as advanced by the Defendants.

Conclusion

Public Policy

[52] The court has determined above that it is a standard practice for Banks in Belize to include an indemnity clause in the promissory notes which covers attorney fees in the event of default. Accordingly, I agree with learned Counsel for the Bank that this eliminates the public policy argument. Further, it is without doubt that contingency fee agreements in Belize is legal. **Section 33(1)** of the **Legal Profession Act** provides as follows:

> *33.-(1) Subject to this section, any attorney and his client may make agreement as to the amount and manner of payment of remuneration for the whole or part of any legal business done or to be done by the attorney.*
>
> *(2) An agreement under this section may-*
>
> *(a) provide for the remuneration of the attorney by a gross sum, percentage, commission, retainer,* ***contingency fee*** *or otherwise at a greater or lesser rate than that at which he would otherwise have been entitled to charge;*

[53] The indemnity clause therefore, does not go against public policy as commercial enterprises such as Banks whose business is to lend, enter into these contingency fee agreements for debt collection.

Abuse of process

[54] There is no dispute that since the claim was for a specified sum of money which exceeded $500,000. the fixed cost was $7,500.00. See **CPR, Part 64, Appendix A**. When judgment was entered this sum was included in the order. As such, Mr. Perrera submitted that the Bank is not entitled to $933,711.06 from the Defendants under the indemnity clause as they already received costs pursuant to Part 64 of the CPR. The Bank submitted that there in nothing in the CPR which address what remuneration can be agreed to be paid to an attorney. That the Rules address cost associated with bringing a claim which is separate and distinct from any contractual obligation to pay legal fees by virtue of a binding promise to pay.

[55] The question for the court is whether this contractual obligation is an abuse of process since the Bank already received fixed cost of $7,500.00 pursuant to CPR 2005. As submitted by the Bank, the CPR recognizes three ways in which cost can be recovered. **Rule 63.5** provides:

> *A person may not recover the costs of proceedings from any other party or person except by virtue of –*
>
> *(a) an order of the court;*
>
> *(b) a provision of these Rules; or*
>
> *(c) an agreement between the parties.*

[56] In my view, Rule 63.5 (c) is applicable to the case at hand since the parties, the Bank and the Defendants have a binding agreement. The promissory note states that *in the event the bank shall institute any action for the enforcement of collection of the Note, there shall be*

immediately due from each of the undersigned, ... an attorney's fee of twenty per cent of the amount then owing and unpaid by the undersigned.

[57] The Defendants are contractually liable to pay legal fees as stated in the promissory note. Further, the evidence shows that the twenty percent fee is reasonable in Belize for debt collection which is in keeping with the ***Gomba Holdings* case** that fees must not be unreasonable. As such, I find that it is not an abuse of process and against public policy to include the indemnity clause in the promissory note.

[58] However, it is my view that since the cost has been agreed between the parties and the Defendants are liable to pay $933,711.06, the Defendants are not entitled to the fixed costs of $7,500.00. As such, the court awards to the Bank the sum of $933,711.06 less $7,500.00. The Bank is therefore, entitled to the sum of $926,211.06. Accordingly, I find that Bank is entitled to the sum of $926,211.06. as legal fees pursuant to the indemnity clause in the promissory note dated 21st December, 2010.

[59] **Order**

The Claimant, Atlantic Bank Limited is awarded the sum of $926,211.06 as legal fees which is to be paid by the Defendants.

Dated this 19th day of July, 2012

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Minnet Hafiz-Bertram

Supreme Court Judge