

IN THE SUPREME COURT OF BELIZE A.D. 2020

CLAIM NO. 62 of 2020

BETWEEN

BERNHARD PENNER

CLAIMANT

AND

WAYNE TUCKER

1st DEFENDANT

ERICA TUCKER

2nd DEFENDANT

PIVOT LTD

3rd DEFENDANT

Before: The Hon Westmin R.A. James (Ag)

Date: 7<sup>th</sup> July 2021

Appearances: Mr Anthony Sylvestre for the Claimant

Mr Rodwell Williams and Darinka Munoz for the Defendant

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JUDGMENT

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1. The Claimant by his Amended Claim Form and Statement of Claim has sought against the Defendants the following reliefs:
  1. *As against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Specific Performance for the payment of the sum of BZ\$1,968,343.25 being the balance of the purchase price under an Agreement for Sale dated the 5<sup>th</sup> day of July, 2016 for the sale of Blocks 35, 36, 37, 38, 39, 40, 41 & 42 situate in the More Tomorrow Agricultural Layout, Cayo District, Belize (the properties) and Letter of Guarantee dated the 24<sup>th</sup> day of November, 2016.*
  2. *Specific Performance as against the 3<sup>rd</sup> Defendant for the payment of consideration in the sum of BZ\$1,968,343.25 under Deeds of Conveyances over the properties which were executed by the Claimant in advance of payment in favor of the 3<sup>rd</sup> Defendant at the request of the 1<sup>st</sup> Defendant who, along with the 2<sup>nd</sup> Defendant, were at the material time the beneficial owners of the 3<sup>rd</sup> Defendant.*
  3. *Alternatively, a Declaration by the Court that the 3<sup>rd</sup> Defendant has been unjustly enriched by the transfer of the properties into its name, the Defendants having failed to pay the agreed upon balance of the consideration of BZ\$1,968,343.25.*

4. *An Order as against the 3<sup>rd</sup> Defendant to pay to the Claimant the sum of BZ\$1,968,343.25 together with consequential damages.*
5. *In the alternative, rescission of the Agreement for Sale dated the 5<sup>th</sup> of July, 2016 and the return of the properties to the Claimant.*
6. *Damages for breach of contract*

### **Pleaded case**

2. The Claimant was the owner of Block 35 containing 50 acres, Block 36 containing 48.8 acres, Block 37 containing 55.7 acres, Block 38 containing 59.2 acres, Block 39 containing 49.9 acres, Block 40 containing 49.9 acres, Block 41 containing 50.2 acres and Block 42 containing 62.8 acres, More Tomorrow Agricultural Layout and totaled 425 acres (the properties) along with farming equipment.
3. The Claimant entered into an Agreement for Sale executed by the 1<sup>st</sup> Defendant, but included both the 1<sup>st</sup> and 2<sup>nd</sup> Defendant as parties. As between the parties there is a dispute as to the true Agreement for Sale entered into. The Claimant contends that the true Agreement is one dated 5<sup>th</sup> July 2016, whereas the Defendants contend that the true Agreement for Sale entered into on 30<sup>th</sup> September 2016. Both Agreements speak to the sale of the properties along with the equipment at a total purchase price of BZ\$3,178,500.00 to be paid by way of a down payment of \$1,980,000.00 and a remaining balance of \$1,198,500.00. Both agreements acknowledge receipt of down payment.
4. The 3<sup>rd</sup> Defendant obtained a loan facility from Atlantic Bank dated 3<sup>rd</sup> November 2016 for \$1,500,000.00 to pay off the balance owed on purchase price for the land. The Conditions of the Loan facility indicated that the loan proceeds was to be used to fully repay existing loan facilities in the names of Bernard Penner and Donald Penner, being accounts No 347628506, 347691054, 347691107, 347595140.
5. Deeds of Conveyances over the properties were signed by the Claimant on or around the 24<sup>th</sup> of November, 2016 transferring titles to the properties to the 3<sup>rd</sup> Defendant. In each of the Conveyances the Claimant acknowledges receipt of the full purchase price.
6. A Letter of Guarantee executed by the 1<sup>st</sup> Defendant and stated that WHEREAS, Guarantors have agreed to purchase certain real estate (the "Title Land") from the Creditor in accordance with the terms and conditions of the Agreement to Purchase Real Estate (the "Agreement") dated 31<sup>st</sup> October, 2016 AND WHEREAS, the Agreement provides that a down payment of \$1,980,000.00 was received by

Creditors in consideration of Creditors transferring the Title Land, Guarantors hereby covenant and guarantee to pay the creditors the sum of \$1,968,343.25 on or before the 1<sup>st</sup> July, 2017. This Guarantee was signed on the 24<sup>th</sup> November, 2016.

7. The Claimant contends that the sum of BZ \$1,968,343.25, the balance of the purchase price under an Agreement for Sale and the subject of the guarantee dated 24<sup>th</sup> November 2016 was never paid and remains outstanding.
8. The Defendants contend that they complied with the full terms of the Agreement for Sale and so there was no purported breach of the Agreement for Sale and/or Letter of Guarantee.
9. None of the facts as presented made much logical sense to the Court for the following reasons:

- a. The Pledged Case:

Neither in the Amended Statement of Claim or Reply did the Claimant indicate that the sum owed was the deposit amount and not the remainder of the purchase price. The Claimant further denies that the amounts were paid to Atlantic Bank Ltd and required that the Defendant show proof of the said payments. This is contrary to the evidence of the Claimant who in testimony and the witness summary indicated that it was the down payment that was owed and confirmed that the proceeds of the loan did in fact pay off the Atlantic Bank Ltd debts of the Claimant and his son.

- b. The Dates of the Agreement for Sale:

The Claimant claim that the Agreement 5<sup>th</sup> July 2016 was the true agreement for sale while the 30<sup>th</sup> September 2016 was a forgery however the letter of Guarantee refers to the Agreement for Purchase of Real Estate dated 31<sup>st</sup> October 2016.

- c. The Parties:

The parties of the Agreement were the Claimant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant but the property was transferred to the 3<sup>rd</sup> Defendant who was not a part of any document.

d. The Deposit:

The deposit was acknowledged as having been received in both agreements, and the letter of Guarantee being relied on by the Claimant.

e. Signatures:

The Agreement and the Letter of Guarantee was only signed by the 1<sup>st</sup> Defendant not the 2<sup>nd</sup> Defendant and no indication that it was being signed on behalf of the 3<sup>rd</sup> Defendant.

f. The Amounts in the Letter of Guarantee:

The amount in the Letter of Guarantee as the balance of the purchase price is different from the Agreement.

g. The Parties to the Guarantee:

The Guarantee names the 1<sup>st</sup> and 2<sup>nd</sup> Defendant as 'Sponsors' not Guarantors and name the Claimant and Sonny Sell as 'Creditors.' Sonny Sell was not a part of any transaction for the land but now is owed the remainder of the purchase price.

10. The factual scenario at first outlined in the pleadings and evidence did not make sense to the Court at first. It was after some questions posed by the Court to the 1<sup>st</sup> Defendant did it emerge what really happened between the parties. The Defendant's evidence was that "*there was never really a sale of this property.*" rather it was an arrangement between the Claimant and the Defendant "*to refinance and save the farm.*"

11. The 1<sup>st</sup> Defendant testified that Bernhard's brother and friend, Otto Penner and David Reimer sought out the 1<sup>st</sup> Defendant to assist the Claimant in refinancing the Claimant's farm. When the Claimant's brother came to him and said the Claimant needed to refinance the farm and if they couldn't they would lose it and that the arrangement was the only way to save the farm. First the Claimant's brother/agent wanted the 1<sup>st</sup> Defendant to finance the full thing but there was no way the farm could carry that debt. The 1<sup>st</sup> Defendant was then told that the rent for the property would bring in around \$100,000-\$150,000 a year minimum but it didn't and he never recovered any money for rent from the Claimants.

12. The need to refinance came about because the Claimant and his son, Donald Penner, were indebted to many creditors. One of the creditors was Atlantic Bank Ltd, that was ripe to foreclose on the Property. Another creditor was Sonny Sell a businessman from the area. Throughout the transactions, 1<sup>st</sup> Defendant was assured that *“Sonny Sell would take over the loan or pay it off and take over the Property because they owed him so much money.”*
13. In the context of the Bank’s looming foreclosure, the Claimant and the Defendant entered into this Agreement. The Agreement even though named the Claimant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was designed for 3<sup>rd</sup> Defendant to assume the responsibility of the Atlantic Bank loans (**Loans**) to stop the Bank’s foreclosure.
14. Throughout these transactions, the 1<sup>st</sup> Defendant only dealt with Bernhard’s agents, Otto and David who never came to give evidence for the Claimant. The Claimant never had any dealings with Erica Tucker at all regarding the subject of these proceedings.
15. The parties’ main intent was that the loans with the Bank were satisfied and the Defendant get a mortgage to satisfy that debt. Thus, the parties included a Receipt Clause in the Agreement. This clause confirms that the Claimant acknowledged receipt of the down payment. What emerged was that there was in actuality no down payment made. As an added bonus, if the Defendant received the Property, the Claimant’s sons would have been able to farm on the land. Indeed, there was a subsequent lease arrangement with Donald and Jesse Penner to lease the Property.
16. The 1<sup>st</sup> Defendant through the 3<sup>rd</sup> Defendant obtained the loan from Atlantic Ltd. for *“BZ\$ 1,500,000.00 to pay off the balance owed on the purchase price.”* Pursuant to that loan agreement the Pivot’s loan funds were used to pay off Bernhard’s and Donald Penner’s loans with Account No. 347628506, 347691054, 347691107 and 347595150 in the sum of BZ\$1,219, 771.38, then the rest in bank fees, taxes and \$90,000.00 was used for interest on the loan until the farm was refinanced. totaling what was due to Bernhard and about BZ\$21,271.38 more than the agreed BZ\$1,198,500.00 per the Agreement. The Claimant admits this.
17. On 24<sup>th</sup> November, 2016, the 1<sup>st</sup> Defendant, having obtained financing provided a Letter of Guarantee to the Claimant. What of this letter? It was the evidence that the Claimant owed Sunny Sell over BZ\$1.5 million. The Claimant as he admitted used the property as collateral for that loan but never formally registered same.

The Guarantee was therefore to hold off another one of the Claimant's creditors Sunny Sell for another 7 months. Both the Claimant the Defendant knew that the Defendants did not owe the Claimant any such money. As indicated by the 1<sup>st</sup> Defendant after questioning from the Court the agreement was that Sunny Sell would take over the loan or pay it off and take over the property because they owed him so much money.

18. Having regard to the above, it became clear to this Court that this was not a genuine sale of land.
19. The Courts of Equity were developed to dispense justice in accordance with a body of rules and/or principles which form, according to Snell *"an appendage to the general rules of law or a gloss upon them"* (see *P.V. Baker and P.St. Langan. Snell's Principles of Equity. P. 5, Sweet & Maxwell. 28th ed. (1982)*) in order to fulfil a guiding role in the application of equity in any given situation. There are twelve such maxims including he who seeks equity must do equity; and he who comes to equity must come with clean hands.
20. According to Snell's Equity: *"The Claimant not only must be prepared now to do what is right and fair, but must also show that his past record in the transaction is clean ...."* (see: *John, McGhee Q.C, Snell's Equity, Trust, Wills and Probate. 31st Ed., Sweet & Maxwell 2005. Page 98, paragraph 5-15* quoting the case of *Jones v Lenthal (1669) 1 Ch. Cas. 154*)
21. Whilst equity does not require its advocates to be entirely blameless, a claim shall be barred where their tainted hands have an immediate and necessary relation to the equity sued for. In my opinion, while the Claimant is seeking equitable reliefs his actions has clearly demonstrated that his hands are unclean since his own conduct can be characterized at the highest fraudulent or criminal in nature and at the lowest an attempt to mislead financial institutions and creditors in order to obtain financing that he may not have otherwise been able to obtain. The Claimant knew that the down payment was not paid but signed a document saying it was and allowed same to be submitted to the bank that it was paid. This was participating in obtaining money from a financial institution on a false pretense. The Claimant has not come to this Court of Equity with clean hands and therefore is not entitled to any equitable reliefs.
22. Likewise unjust enrichment is an equitable remedy and those who seek to rely on it must come to court with clean hands. Further having looked at all the evidence the Claimant has engaged in wrongdoing tantamount to fraud which should bar

him from relief under this head. Further, the property being mortgaged to Atlantic Bank Ltd, there has been a change of position for which restitution is not available.

23. In the event that I am wrong on the above the Claimant has satisfied this Court on a balance of probabilities has not proven his case. The uncontroverted evidence on the documents was that the Claimant was paid the down payment under the contract of BZ\$1,980,000.00. Whichever contract is the right contract both provided that the remaining balance was BZ\$1,198,500.00 and that was to be paid to Atlantic Bank Ltd, to satisfy the Vendor's loan with Atlantic Bank. The Letter of Guarantee itself states that the down payment was made to the Claimant. Both contracts provides that the Purchaser was to apply for a loan from Atlantic Bank Ltd, the proceeds of which will be used to repay the outstanding balance of Vendor's loan. The evidence was that the Defendants did apply for a loan with Atlantic Bank and that loan document in evidence shows that the proceeds of the loan was used to pay off the loans of the Claimant. As a result, from the documentary evidence that is provided to the Court the terms of the contract were complied with.
24. The Letter of Guarantee has no legal effect in these proceedings since the premise of the Guarantee based on an agreement dated 31<sup>st</sup> October 2016, is not in this matter and it not signed by the parties required to be charged by this Guarantee.
25. Accordingly I hold that the claim be dismissed and due to the fact that the Defendant themselves was a part of this scheme I would order that each party bear their own costs.

/s/Wjames  
Westmin R.A. James  
Justice of the Supreme Court (Ag)