**IN THE SUPREME COURT OF BELIZE, A.D. 2012**

**CLAIM NO. 151 of 2011**

**KENNETH HADUBIAK** **CLAIMANTS**
**JEANNE HADUBIAK**

**AND**

**RENITA DELLACCA** **DEFENDANTS**
**CYNTHIA REINERT**
**SOUTHWIND PROPERTIES LIMITED**

Hearings
2012
28th February
23rd March
30th May
17th July
28th September
15th November

Mr. Estevan Perera for the claimants.
Ms. Pricilla Banner for the first and second defendants.
Mrs. Samira Musa-Pott for the third defendant.

LEGALL J.

**JUDGMENT**

1. This claim by the claimants is for the sum of US$150,000 which they paid to the first and second defendants, through the defendants' agent,

the third defendant, as a deposit on the purchase price of US$699,000 for property at San Pedro, Belize, on the ground that there was no valid agreement for the purchase and sale of the property. There is also a counterclaim by the defendants that there was a valid agreement of sale for the property, and that the claimants breached or repudiated that valid agreement by not complying with its terms, including not making a subsidiary agreement giving the terms of payment for the property (the Ancillary Agreement), resulting, according to the No. 1 and 2 defendants, in loss and damage to them for which they are entitled to forfeit the deposit, and damages against the claimants for breach of the agreement. If there was no contract or agreement for the sale of the property to the claimants, the claimants are entitled to have the deposit of $US150,000 paid back to them: see ***Ellis v. Goulthon 1893 1 QB 350 at p. 252***. If there was a valid agreement, and it is established that the claimants breached or repudiated that agreement, the No. 1 and 2 defendants are entitled to succeed in damages in the counterclaim for such breach, and to forfeit the deposit, once it does not amount to a penalty. An examination of the facts and the evidence is therefore important in order to decide some main issues in this case. One is whether there was a written agreement signed by the parties. Secondly, whether the evidence establishes the existence of an oral contract of sale; and whether such contract, assuming it exists, is evidenced by a note or memorandum in writing signed by the party to be charged – the claimants. The court must first look at the evidence to see whether it amounts to acts of sufficient performance to prove that there must have been a contract, and it is only if that evidence does so prove, that the court can bring in the oral contract.

2. The evidence is that the claimants, husband and wife, are Canadian citizens who owned property in Canada, but who wanted to remove from the cold weather there, to live and reside in the sunshine in Belize, and carry on a business. Around March 2010, they received information that a guest house providing meals and lodging, called "Changes in Latitudes" located on land situate at 36 Coconut Drive, section 7 lot 608, San Pedro, Ambergris Caye Belize, (the property) was for sale. The claimants in April 2010 visited Belize and met the No. 1 and 2 defendants who were business women, managing and carrying on the guest house or "BB" as it was called. The claimants, after this initial meeting, returned to Canada, from where there was a regular exchange of emails between the said defendants and the claimants, in which the said defendants promoted the guest house as a lot of fun, and that the claimants "had the best minds, energy and dreams to take the BB to the next level," and that the claimants would "love it." The claimants also by e-mails exhibited an interest in purchasing the guest house.

3. On 24th August, 2010 the claimants, even though at that time there was no signed written agreement by the parties for the sale of the property, wired US$150,000 to the account of the third defendant, intended as a deposit on the purchase price of the property. This amount was eventually paid to one Lori Reed, with whom the first and second defendants had, previously, an agreement for the sale of the property to them for US$278,000; and the US$150,000 was paid to Lori Reed by the third defendant on behalf of the Nos. 1 and 2 defendants as part of the purchase price of the property from Lori

Reed. In August, 2010, when the claimants made the deposit, the Nos. 1 and 2 defendants did not have title to the property in their names, as the full purchase price of the property was not, at that time, paid by them to Lori Reed. The No. 1 and 2 defendants, however, did not inform the claimants prior to the payment of the deposit, that they did not have title to the property in their names. The evidence shows that documents to transfer title for the property from Lori Reed to the first and second defendants were filed on 7th January, 2011, and title for the property was issued in the names of the said defendants jointly in late January 2011, even though the title itself is wrongly dated 7th January, 2010. There is evidence by the first defendant in an email dated 6th January, 2011 to the claimants that "the documents transferring the title to the property are on their way to Belmopan and will be filed tomorrow and I will have a receipt showing us as the legal owners."

4. Having wired the deposit to the first and second defendants, through the third defendant, the claimants, who had wired the deposit while in Canada, and had sold their assets, except their home, in Canada, came to Belize on 25th August, 2010. Up to this date, there was no signed agreement by the parties for the sale of the property, though the first and second defendants had sent two draft agreements to the claimants who did not sign them because, according to the claimants, they were not acceptable. The purpose of the visit by the claimants on 25th August, 2010, was to see the guest house, gather information as to its finances, and to meet the representative of the 1st and 2nd defendants, Claudio Azueta, a representative of the third defendant, to whose

account the deposit was sent. Financial statements of the guest house seem to be important to the claimants, because as early as May 2010, the first claimant was enquiring about the financial statement of the business; for he wrote an email of 27th May, 2010 to the defendants thus: "has your accountant finished your 2009 year end information so we can see what the B&B did last year." The first and second defendants swore that during this visit, the claimants and them, on 2nd September, 2010, signed a written agreement for the sale of the property to the claimants. The claimants have sworn that they did not sign any such agreement, and have denied that the signatures appearing thereon are theirs. The written agreement is given as item 2 in the appendix to this judgment and is hereinafter referred to as the "disputed agreement."

5. The claimants, after the visit of August, 2010, left Belize around the 7th September, 2010, and returned to Canada to make full arrangements to relocate to Belize. On the 29th October, 2010 they returned to Belize "with loads of luggage and two dogs to live our dream," according to the second claimant. The claimants were taken to the guest house and handed the keys. There were not experienced in the administration and management of a guest house, and the defendants were helpful in providing training to the claimants in this regard. The claimants divided the work of the guest house. The No. 1 claimant did the cooking and repairs, and the No. 2 claimant did the cleaning and the laundry. After operating the guest house for a few months, the claimants began to question whether the business was able to pay for itself. The view of the claimants was that, in addition

to the deposit, a sale of their home in Canada could bring in an additional US$300,000 to pay towards the purchase price; and the balance, according to the defendants, would be paid by monthly installments of $5000 until the full purchase price was paid. The claimants began to question whether they could meet the monthly payments due to their experience of the business of the guest house up to that point. The first defendant by email dated 13th July, 2010, before the claimants began running the business, had stated to the claimants that "the business clearly makes enough dollars to make decent size payment …. The B&B makes enough dollars for you to pay the balance off in five years." The claimants allegedly experiencing something different, requested again financial statements for the business. The claimants, as we saw above, had by email since 27th May, 2010 had made it known that financial statements were important. The defendants claim that financial statements were sent for the year 2007/2008 which the claimants admitted receiving. Financial statements for 2009 were tendered in evidence by the first and second defendants who testified that they were sent to the claimants in May 2010. The 2009 financial statements are given at item 1 in the appendix. The claimants admitted receiving the financial statements; but testified that they were a one page document, and did not appear truthful to them, and so they required from the defendants proof of the matters stated in the financial statements, which was not provided.

6. The above financial statements were prepared by the first defendant who is not an accountant. In addition, as at December, 2010, the title

for the property was not in the name of the first and second defendants. They were not the owners of the property at that time. The claimants therefore consulted an attorney-at-law who wrote a letter dated 17th January, 2011 requesting financial statements for the years 2008 to 2010 prepared by a certified accountant, and copies of the title for the property, in addition to other information, within seven days of the date of the letter, failing which the claimants requested the return of their deposit of US$150,000.

7. There was no reply to this letter, so the claimants, through their attorney, sent another letter to the defendants dated 27th January, 2011 demanding that the defendants return to the claimants the US$150,000 deposit. This did not occur; and on the 26th January, 2011, the claimants removed from the guest house, leaving the lock and keys on a kitchen table. On 1st of February, 2011 attorney for the defendants wrote to the claimants alleging breach of a written agreement of 2nd September, 2010, mentioned above, which the claimants have denied that they signed; and claiming rights under that same agreement. On 15th March, 2011 the claimants filed a claim against the defendants as follows:

> "1. The claim is for the sum of US$150,000.00 being funds paid to the defendants as a deposit towards the purchase of a property and business operation which was to be held in trust pending the signing of a Sale Agreement, which did not occur. The payment having been made towards a consideration that has failed entirely.

2. Interest pursuant to section 166 of the Supreme Court of Judicature Act.
3. Costs.
4. Such further or other relief as the court sees fit."

8. The defendants by a counterclaim dated 10th May, 2011 alleged that the claimants breached the said agreement of 2nd September, 2010, which the claimants swore they did not sign; and the defendants counterclaimed for damages for such breach. The defendants also made a counterclaim for breach of a non disclosure agreement which we will consider below.

9. As mentioned above, the main issues include whether the evidence establishes the existence of an oral contract of sale; and whether such contract, assuming that it exists, is evidenced by a note or memorandum in writing signed by the party to be charged: see section 55(1) of the Law of Property Act Chapter 190. The court has first to look to see if there is sufficient acts of performance pointing to the establishment of an oral contract. There is circumstantial evidence, such as the fact that the claimants paid US$150,000 deposit; sold their property in Canada, came to Belize and occupied the property and managed the guest house, and considered several draft written agreements to purchase the property, in relation to a possible oral contract. In addition there are a number of e-mails between the parties, and the question is whether they prove or show that there was an oral contract of sale. One e-mail from the defendants to the

claimants states: "How funny you are. Well I think you are good for Belize. … And the two of you can make anything work:" see e-mail dated 27th April. 2011. By e-mail of the same date the claimants wrote: "We sat down and compared all the properties we looked at and your place is at the top of the list." The claimants continued: "We really want to buy your place and we could come up with a good down payment," and "we have been thinking of your place and living there. We want your place so bad and we would like to buy your place under a corporation": see e-mails dated 22, 27 May, 2010; and 14 and 2 June, 2010.

10. At the date of the e-mails and the date on which the claimants began to occupy and manage the property, the defendants did not own the property by any title or certificate of title, which is some evidence that a contract for sale was not established by the parties. The circumstantial evidence and the e-mails in this case do not, in my view, establish or prove that there was an oral contract of sale between the claimants and the defendants. If I am wrong in the above, the other issues are the disputed agreement, and whether there is a note or memorandum in writing signed by the claimants, as provided for in section 55(1) of the law of Property Act, for the sale of the property.

11. The disputed agreement is in writing, but there are certain matters to be mentioned about it. Firstly, there is no precise date on the agreement of its execution: it simply states "September two thousand ten." Secondly, the date for possession of the property is stated as "on

or before ------ 2010." Thirdly, there is provision at the back page for the disputed agreement to be signed and sealed in the presence of a Justice of the Peace; but this was not done, as there is no signature of a Justice of the Peace on the said agreement. Fourthly, and most importantly, although the Nos. 1 and 2 defendants have sworn that they are part owners of the property; and although the land certificate or title for the property shows that they own the property jointly, neither the name nor the signature of the number two defendant appears on the disputed agreement. There is evidence, from the No. 2 defendant, that she was present at the signing of the disputed agreement and that she prepared it. Accepting that she was present at the signing, no reason is advanced as to why she did not sign it, if her intention was, as joint owner, to sell the property to the claimants. Fifthly, the disputed agreement has the No. 1 defendant as the vendor and as the fee simple owner of the property, when, at the date on the disputed agreement, she was not the fee simple owner. Sixthly, the No. 1 defendant did not tell the claimants at that date that she was not the owner of the property.

12. Let us return to the question of the disputed agreement and whether there is memorandum or note in writing signed by the claimants for the sale of the property. The No. 1 claimant, on being shown the disputed agreement in court, testified that this was the first time that he saw the agreement, and that though the signature thereon looks like his, neither he nor his wife signed the disputed agreement. He testified that he did not sign the said agreement. The second claimant has testified that during the past five years, her signature has been

consistent, and she would be able to say, with certainty, if a signature is hers. She testified that she was not an expert in handwriting. She further testified that she had sent all required documents to the first defendant, for the purpose of applying for retiree resident status in Belize. On being shown one of the documents which had the name of the second claimant at the bottom, the second claimant testified that she did not believe that the name was her signature. She also said she was not sure it was her signature and suggested that it was a forgery. But in cross-examination she indicated that she signed the document. In her witness statement at paragraph 25 she said that the signature on the document was a forgery. The document is given at item 3 in the appendix to this judgment. In relation to the disputed agreement, the second claimant states that the signature "looks like my signature," but that she did not sign the agreement.

13. The Nos. 1 and 2 defendants, on the other hand claimed that the claimants signed the disputed agreement at the guest house in the presence of the second defendant. The said defendants urged that the purpose of the visit in August 2010 by the claimants was to sign the agreement. The No. 1 and 2 defendants submitted that when one considers the purpose of the visit, and also the above inconsistencies in the claimant's evidence, including evidence to the effect that the signatures on the disputed agreement looked like theirs; and considering the e-mail evidence in this case, in particular the e-mails dated 30th December, 2010, 6th and 10th January, 2011, this evidence shows, according to the defendants, that the weight of the evidence establishes that the disputed agreement was signed by the claimants,

and there is a valid and enforceable agreement which binds the parties. The defendants say that there are many e-mails between the parties which show that the disputed agreement was signed by the parties, but the ancillary agreement remained outstanding. The defendants say that the weight of the evidence in the e-mails "establishes that the Principal Agreement was in fact signed." The defendants rely on e-mails mentioned above dated 22, 27 May, 2010; and 14 and 2nd June, 2010 to show that the disputed agreement was signed by the claimants.

14. The evidence in the e-mails establish, in my view, that there was an intention to purchase the property; but I think it involves some stretching of that evidence to say that the e-mails "references the fact that the Principal Agreement was signed" by the claimants. There are other e-mails dated 10th December, 2010 and 6th and 10th January, 2011 in which the defendants expressed views which are relied on by the said defendants to say that the disputed Agreement was signed by the claimants. It is not only the case that these e-mails do not mention the disputed agreement, but it would be to unreasonably stretch these e-mails to say that they establish that the claimants signed the disputed agreement. On the other hand, the claimants insist that they did not sign the disputed agreement and the signatures appearing thereon are no theirs.

15. Due to the importance of the disputed agreement to the allegations and counterclaim of the No. 1 and 2 defendants, an expert, perhaps, should have been called to compare the known signatures of the

claimants to the signatures on the disputed agreement, and give the court his opinion. But neither party called an expert to testify. Moreover, no person was called to give an opinion as to the signature or handwriting on the disputed agreement under sections 47 or 48 of the Evidence Act Chapter 95. The sections are as follows:

> "47.-(1) Where there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him is admissible in evidence.
>
> (2) A person is deemed to be acquainted with the handwriting of another person when he has at any time seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself, or under his authority, and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.
>
> 48. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and those writings and the evidence of witnesses respecting them may be submitted to the court as evidence of the genuineness or otherwise of the writing in dispute."

16. The above sections were not utilized by either of the parties for purposes of proving whether or not the claimants signed the disputed agreement. The court itself, I venture to think, can look at the accepted signatures of the claimants, such as appear on their affidavits

and witness statements, and compare them to the signatures on the disputed agreement and make a decision whether or not the claimants signed the disputed agreement. But speaking for myself, a judge ought to be cautious in undertaking such a course, not only because his view cannot be tested in cross-examination, but also because he would be giving his opinion on the disputed signatures when he may not be considered as falling within the provisions of section 47 above in which the National Assembly identified who is authorized to give an opinion on handwriting. It would also seem that if the National Assembly intended that a judge should undertake such a task, it would have made provisions to that effect in the above sections or other provisions of the Evidence Act. But even if I look at the known signatures of the claimants, and the alleged signatures on the disputed agreement, they look to me, close; but I am not comfortable to go so far and say that I am satisfied, on a balance of probabilities, that the signatures on the disputed agreement are those of the claimants.

17. The burden of proof is on the claimants to prove the claim, and on the defendants to prove the counterclaim, on a balance of probabilities. In the counterclaim, the defendants allege that the claimants breached the disputed agreement of sale, as a result of which they suffered loss and damage. The success of the counterclaim depends on whether there is a memorandum or note thereof in writing signed by the claimants; and whether the disputed agreement was signed by the claimants. The burden of proof is on the defendants to prove the counterclaim that the claimants signed the disputed agreement, or that there is such memorandum or note signed by the claimants with respect to the sale

of the property. In the absence of expert evidence on the signatures on the disputed agreement, and in the absence of an opinion of a person under section 47, or a witness under section 48 above, and on my finding above on the evidence as a whole, I am not satisfied, on a balance of probabilities, that the claimants made or signed the disputed agreement. I am also not satisfied on the evidence that there is a memorandum or note signed by the claimants for the sale of the property It is well established that the required contents of a note or memorandum under section 55(1) of the Act, in relation to a contract of sale of property are: the identities of the parties; the consideration or price of the property, material terms of the contract; and a description of the property: See Re: ***Lindrea 1913, 109 LT 623 Stabroek Trading Estate Ltd. v. Eggleton 1983 1 AC444, Hawking v. Price 1947 Ch. 281 and Plant v. Bourne 18972 Ch 281***. On the evidence, it has not been shown that there is a memorandum or note thereof signed by the claimant to purchase the property.

18. On all the evidence there is no agreement or contract of sale, and no such contract, on the facts, is evidenced by a note or memorandum in writing signed by the claimants. It has not been proven that the disputed agreement was signed by the claimants. Since there was no such contract or agreement in place, the claimant could not be held to have breached it. It follows therefore that the claimants were not legally required to sign the Ancillary Agreement above which itself was consequently not in force. It is accepted by the defendants that the claimants paid $US150,000 towards the purchase of the guest house, and that this amount was received by the No. 3 defendant for

and on behalf of the No. 1 and 2 defendants and was used to pay a debt owing to Lori Reed by the said defendants. There is no agreement in place under which the No. 1 and 2 defendants are entitled to forfeit the deposit of US$150,000.

19. Though there was no agreement in place between the parties to purchase the property, there was, without a doubt, an oral agreement for the claimants to occupy the guest house. There is no evidence that the claimants made financial payments for occupation of the guest house. It is accepted that the claimants occupied or lived at the guest house or property from 31st October, 2010 to 26th January, 2011 about, three months. It is also alleged by the No. 1 and 2 defendants that the claimants, during the period of occupation, incurred expenses mainly for utilities in the amount of $39,724.39, according to the No. 1 defendant. Also exhibited by the No. 1 and 2 defendants is a list of items allegedly removed or "ruined" by the claimants to a value of $2,563.06. Finally, the No. 1 and 2 defendants claim that they incurred expenses while the claimants were "running the business;" and the defendants tendered numerous invoices, receipts and bills from several business entities and public utilities providers to show that the expenses therein were paid by them. In addition, the No. 1 and 2 defendants exhibited several cheques to show that they paid some expenses. Included in the No. 1 and 2 defendants' counterclaim are claims for all the above expenses, as well as damages for breach of a non disclosure agreement.

20. In relation to the amount of $2,563.06, the No. 1 and 2 defendants' case in the counterclaim is that certain items identified by the defendants, "were either removed by the ancillary defendants (the claimants) when they left the guest house or ruined as a result of the neglect of the ancillary defendants," to used the words of the counterclaim. The defendants are claiming the estimated value of the items allegedly removed or ruined by the claimants. The No. 1 defendant exhibited a list of the items allegedly damaged or ruined by the claimants. An employee of the No. 1 and 2 defendants, Josimar Ku, who was employed as a manager of the guest house swore that several items were left in the open on the verandah of the guest house by the claimants when they gave up the guest house, and were damaged or ruined because the items "had been drenched by rain." He testified that some of the other items on the list were thrown away by the claimants, such as "tiki torches' while others were taken or removed by the claimants. He testified that the No. 1 and 2 defendants had to purchase and replace the items. The claimants deny that they removed or ruined or damaged the items. I have seen Mr. Ku testified and I observed his demeanour and how he answered questions in the witness box. I believe his evidence about damage to the items. I give judgment for the defendants in the sum claimed for the items in the amount of BZ$2,563.06. This amount will be set off or deducted from the US$150,000.

21. The defendants also claim special damages in the above amount of $39,724.39. The basis of the counterclaim for this amount, to use the words of the counterclaim is, "as a result of ancillary defendants

(claimants) actions." I take the word "actions" there to mean the claimants breach of the disputed agreement, when paragraphs 44 and 45 of the counterclaim are considered. As I have held above, there was no such agreement, and hence there could be no breach by the claimants. Moreover, the No. 1 and 2 defendants had exhibited at annex 5 of the counterclaim, a bundle of invoices and bills to prove that they paid the $39,724.39 which they alleged were expenses incurred by the claimants. The claimants submitted, inter alia, that all the bills were for services to the guest house, without which the visiting guests could not have been accommodated there. The expenses, according to the claimants, were for the guest house, and not expenses incurred by the claimants. And all profits for the period the claimants were at the guest house were, according to the claimants, paid over to the No. 1 and 2 defendants, and therefore the expenses incurred were not recoverable from them. The defendants submit bills and invoices from several business places in Belize including BTL, Belize Water Authority and Tropic Air to prove the expenses, but it is unknown who the persons are who prepared these invoices or bills, and none of them was called, and none swore to any affidavit or witness statement that the amounts stated in the bills and invoices were paid by the No. 1 and 2 defendants. There are copies of cheques written by the No. 2 defendant in amounts payable to various entities. But the amounts in the cheques seem to be alleged payments in relation to the disputed agreement which was not in place. For all the above reasons, the counterclaim for the amount of $39,724.39 fails. The other claims in the counterclaim for forfeiture and losses and damage due to the alleged breach of the disputed

agreement by the claimants also fail for the same reason: There was no agreement of sale. The counterclaim for the set off at paragraph 50 is therefore refused.

22. In relation to the counterclaim with respect to the non disclosure agreement dated 28th February, 2010 the defendants are not named as parties or beneficiaries to this agreement and cannot claim remedies under it. As mentioned above, the claimants did occupy the guest house for about three months from 31st October, 2010 to 26th January, 2011. It is true that there was no agreement between the parties for the payment of rent to the defendants for the period of the occupation. The fact however remains, which is not disputed, that the claimants occupied and used the guest house for which the defendants eventually got title, and in my view, a court of equity, in fairness and in justice, ought to require the claimants to make some payment for that occupation and use of the guest house. The only evidence I have found as to the rate for the guest house is BZ$120. or US$60. per night, and the claimant occupied it for eighty-eight nights from 31st October, 2010 to 26th January, 2011 making a total of US$5,280 or BZ$10,560. This amount will be set off or deducted from the US$150,000 payable by the first and second defendants to the claimants. When the set off of BZ$2,563.06 and BZ$10,560 are deducted from US$150,000 or BZ$300,000, the remaining amount is $286,876.94.

23. The claim against the third defendant, as well as the other defendants as stated in the claim, is for the said US$150,000. There is evidence

that the amount, though paid to the account of the third defendant as a representative or agent of the No. 1 and 2 defendants, was paid over by the third defendant to Lori Reed for and on behalf of the No. 1 and 2 defendants. From the facts of this case, and the emails between the parties, it is clear to me that the claimants knew when they wired the US$150,000 to the account of the third defendant, that the money was for the No. 1 and 2 defendants. I am not satisfied on the evidence that there was any trust agreement or agreement between the third defendant and the claimants, that the US$150,000 would be held in escrow account for the claimants. The third defendant was the agent for the 1st and 2nd defendants. In ***Ellis v. Goulton 1983 1 QB 351,*** brought to the attention of the court by learned counsel for the third defendant, the court held that payment of a deposit to a vendor's solicitor as agent for the vendor was equivalent to payment to the vendor, and that an action against the agent is not maintainable. Moreover, the evidence is overwhelming that the sum of US$150,000 was paid for and on behalf of the No. 1 and 2 defendants, and was not retained by the third defendant. The claim against the third defendant fails.

**Conclusion**

24. The claimants for the purposes of purchasing the guest house, paid to the No. 1 and 2 defendants, through the third defendant, a deposit of US$150,000 on the purchase price for the guest house of US$699,000. At the time of the payment of the deposit, there was no oral contract or signed agreement between the parties in place, and the No. 1 and 2 defendants did not have title for the property or guest house in their

names. After the payment of the deposit, the No. 1 and 2 defendants alleged that an agreement was signed by the claimants to purchase the guest house on 2nd September, 2010 and the said defendants counterclaimed for breach of the agreement.

25. The claimants denied signing any such agreement. No expert or other witness was called to give an opinion on whether or not the claimants signed the agreement to purchase the guest house. The No. 1 and 2 defendants have not proven the counterclaim that there was an oral contract of sale, nor have they proven that, assuming there was such a contract, it was evidenced by a note or memorandum in writing signed by the claimants. The defendants have not proven on the counterclaim that the claimants signed the disputed agreement in relation to the purchase of the property. The court is not satisfied there was any contract or agreement of sale signed by the claimants to purchase the property. Since there was no such contract or agreement to purchase the guest house there is no legal basis for the defendants to forfeit the deposit. The claimants are therefore entitled to the return of the deposit, less the cost for the use and occupation of the property by the claimants, and for the items damaged due to their fault in the total of $13,123.06. When this is deducted from the US$150,000 or BZ$300.000 a balance of $286,876.94 remains. Since the success of the counterclaim depended on a contract or agreement of sale, and there was no such agreement or contract, the counterclaim fails. There is no merit in the claim against the third defendant. Costs follow the evidence. The court also has a discretion, and in the

exercise of that discretion, the court is entitled to consider the conduct of the parties.

26. I therefore make the following orders:

(1) The No. 1 and 2 defendants jointly or severally shall pay on or before 1st February, 2013 to the claimants the sum of BZ$286,876.94.

(2) The claim against the third defendant is dismissed.

(3) The counterclaims are dismissed.

(4) The No. 1 and 2 defendants shall pay interest on the sum at (1) above at the rate of 6% per annum from 15th March, 2011 until the full sum is paid.

(5) The No. 1 and 2 defendants shall pay costs to the claimants in the sum of BZ$28,687.

(6) The claimants shall pay costs to the third defendant in the sum of $10,000.

Oswell Legall
JUDGE OF THE SUPREME COURT
15th November, 2012

P.T.O.

## APPENDIX

ITEM 1

Disputed Agreement

ITEM 2

Financial Statement

ITEM 3

Qualified Retired Pensions Form

P.T.O.