IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM NO. 602 of 2014

PACIFIC FREEZONE N.V.	**CLAIMANT**
AND	
RAJU ARJUNDAS HARJANI	**1st DEFENDANT**
PERLA HARJANI	**2nd DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Hearings
2015
16th March
1st April

Mrs. Agnes Segura-Gillett for the Claimant.
Mrs. Kathleen D. Lewis for the Defendants.

Keywords: Bills of Exchange – Cheque dishonoured for non-payment – Defences – Waiver – Discharge – Bills of Exchange Act Cap 245.

JUDGMENT

1. The Claimant and the first Defendant are two experienced businessmen, both directors of companies, doing business in the Corozal Freezone. They agreed to conduct business with each other. The Claimant, a resident of Curacao, agreed to supply goods and the first Defendant agreed to purchase those goods on credit. Business was good and the relationship between the

two continued for a little more than one year. There seemed to be no formality to the credit arrangement for the supply of these goods. The Claimant believed the goods were to be paid for sixty to ninety days after delivery and the Defendant assumed he could pay 'whenever.' In July 2013 however, the Defendant gives the Claimant (in part payment of his overall debt) a personal cheque made out in the sum of US$78,000 and drawn on an account in his (the first Defendant's) name and that of his wife (the second Defendant).

2. The first Defendant admits that at that time he did this he knew that the account had already been closed. On presentation, the cheque is inevitably returned to the Claimant as dishonoured, with consequential bank fees. He immediately advises the first Defendant of this. The Claimant says that subsequently, in an effort to secure payment of his debt, he agreed to accept US$60,000 in full satisfaction of the amount owing on the dishonoured cheque. He also allowed the first Defendant to pay in installments of US$1,500. monthly, until completion. They both signed a written agreement dated May 12th 2014 evidencing the debt as US$60,000 and including the said payment arrangement. There is also, in that agreement, two clauses which read:

> ***"NOW THEREFORE THE PARTIES*** hereby agree as follows:
> 1. *In the event that Shahil Company Limited (Raju- Arjandas-Harjani is unable to pay the monies owed, Pacific Free Zone NV, Curacao (Kishore Balani) will Proceed with Legal Actions under the Laws of Belize.*
>
> ***IT IS FURTHER AGREED that:***
> 1. *It is fully understood that if Shahil Company Limited (Raju A Harjani) complies with the terms of the Agreement all legal actions will seize to exist and the Agreement shall be construed as fully complied."*

3. The first Defendant says that between June and July 2014, in accordance with the written agreement (by three instalments), he paid the entire US$60,000 debt to the Claimant. And he proffers three receipts signed by the Claimant's agent and his good self as evidence of this. The Claimant and his agent state that those receipts have been tampered with and do not reflect the true total amount of only $2,000 paid by the first Defendant. He has therefore brought this claim for:

> *"Damages in the sum of Seventy Four Thousand Twenty Three Dollars & Eighty Five Cents, Currency of the United States of America (US$74,023.85) or its equivalent in Belize Dollars, being One Hundred Forty Nine Thousand, Three Hundred Forty Three Dollars & Twelve Cents (BZ$149,343.12) in respect of a dishonoured cheque paid by the Defendants to the Claimant. The Claimant further claims Interest and Costs."*

4. The parties have agreed the issue as follows:

> 1. *Whether the Defendants are indebted to the Claimant in the sum of US$74,023.85 or any sums at all.*
>
> *(i) What sums were paid by the Defendants to Nivedan Import & Export Company Ltd. for the benefit of the Claimant.*
>
> *(ii) Whether the Claimant is entitled to recover the initial amount owed on account of the dishonoured cheque or whether he can only recover the sums set out in the Agreement of May 12th 2014.*

The Debt:

5. Although Counsel for the Defendants seemed to make an issue of the actual debt this court is certain that there really can be no issue. The first Defendant was clear in his defence when he stated *"... after the Defendant was informed of the bounce cheque he and the Claimant entered into a written agreemtn (sic)*

for the payment of the $78,000.00 and it was agreed between the two the (sic) instead of a payment of US$78,000 the Defendant would pay US$60,000.00."

6. This court therefore finds that by his own admission the Defendant agrees that the debt was initially US$78,000 but was discounted to US$60,000.00 by agreement. The first Defendant in his cross-examination embarked on a circuitous and treacherous exercise of demonstrating that he had in fact already paid somewhere between US$14,000 and US$18,000 dollars towards the initial debt, hence the reason for the discount. He brought no evidence other than his 'say so' to prove this. Having not amended his defence to reflect same the court can only find that his testimony runs contrary to his pleaded case and cannot be relied upon. His explanation is rejected wholesale and the initial debt in issue is accepted as US$78,000.

The Claim:

7. More importantly however, the Claimant has opted to sue on the cheque pursuant to the Bills of Exchange Act Cap 245 (hereinafter The Act), rather than on a debt or breach of any agreement or contract. This bit of old fashioned law (1923) is clear. Cheques are classed as a Bill of Exchange – Section 74(1) of The Act reads: *"A cheque is a bill of exchange drawn on a banker payable on demand."*

Section 56(1) of The Act explains that:

> *"The drawer of a bill, by drawing it –*
>
> *(a) Engages that, on due presentment, it shall be accepted and paid accordingly to its tenor, and that if it is dishonoured he will compensate the holder or any indorser who is compelled to pay it."*

Section 48(1): *A bill is dishonoured by non-payment-*

(a) when it is duly presented for payment and payment is refused or cannot be obtained; or

(b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

8. A cheque is in essence the equivalent of cash – see ***Nova (Jersey) Knit Ltd v Kammgarn Spinnerei EmbH (1977) 1 WLR 713***. Therefore where it has been dishonoured the law gives the person to whom it was made payable an immediate right to issue proceedings once notice has been given. The drawer is then liable to compensate the payee. Such compensation includes the amount of the bill, interest thereon from the time of presentment for payment and in lieu, where the bill is dishonoured abroad, the re-exchange with interest until payment (Section 58 of The Act). ***Gibbs v Fremont (1853) 9 Exch 25*** guides that where no reserved rate of interest is specified then the statutory rate of interest must apply.

9. Now, when a cheque is tendered for payment for goods or services there are two distinct contracts. Firstly, the one for the supply of goods or services and secondly the contract represented by the cheque itself which is an unconditional promise or an undertaking to pay the specified sum written on that cheque – see ***Starke v Chesseman (1699), Garth 509***. Therefore, suing on the cheque is different to suing on the contract for the supply of goods or services. The defences that could be entertained on either contract are considerably different.

10. Where the Claimant sues on the cheque the court is not required to look behind the cheque at any breaches of the supply contract or other acts which

precipitated the writing of that cheque. Those are not viable defences, nor are they proper counterclaims. As stated in ***Nova (Jersey) Knit Ltd (Supra) pg 721*** *"...* English law does not allow cross-claims, or defences, except such limited defences as those bases on fraud, invalidity or failure of consideration to be made." Therefore, allowed defences must relate to the cheque itself. This is now provided for by Statute 1. fraud where the debtor did not actually sign the cheque. Where perhaps his signature was forged or placed on the cheque without his permission – Section 24(1) of The Act. 2. A total failure of consideration where the purchaser is provided with nothing of value – Section 28(1) of The Act. 3. Where a cheque is provided in respect of an illegal contract the law will not allow payment. 4. Nor would it allow payment where the signatory signed under duress, that is where some unlawful pressure was being exerted on him. 5. Finally, misrepresentation where he alleges that he did not realize what he was paying for. By Section 31(2) the burden of proof in these circumstances shifts:

> *31.-1 ...*
>
> *(2) Every holder of a bill is prima facie deemed to be a holder in due course; but if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."*

11. In the alternative, however, where the seller sues on the initial contract the buyer can use any available defence in respect of the sale of goods or services itself e.g. variation, of that contract, or poor quality of workmanship. This route may prove to be long and difficult. And most

persons faced with a dishonoured cheque may instead wisely avail themselves of the option of suing on the cheque.

The Dishonoured Cheque:

12. The first Defendant says that when he gave the cheque to the Claimant it was with both their full understanding and appreciation that it was simply an acknowledgement of the outstanding debt. It was not intended to be cashed. The Claimant on the other hand asserts that it was intended as payment towards the outstanding debt and he deposited it accordingly.

13. This court considers the evidence provided. By January 2013 the first Defendant had a balance of US$95,192.50 outstanding. Between April and May he had paid a mere US$9,400 and no more, towards that debt and the Claimant was pressing him for payment. There is exhibited by the Claimant an e-mail to the first Defendant dated April 4, 2013 which reads *"your present amount is US$95,192.50 (less the $3000 you gave me) balance is US$92,192.50 ... boss this is BIG amount you cannot give payment of $3000 only ??? plus work on it and remit me the same asap."*

14. The urgency of the demand and the seriousness of the issue is impressed. The Claimant wanted payment. On the 27th July, 2013, when the first Defendant gave the $78,000 cheque to the Claimant he also gave him US$2000 cash. Even with that payment he still had an amount outstanding. His account with the Claimant was immediately credited with US$80,000 and the Claimant deposited the cheque three days later on July 30th, 2013. The most critical observation one can make is that the first Defendant is an experienced businessman. He has or has had a chequing account so one can

safely accept that he knows the business, and understands the responsibility, of cheque writing and signing.

15. The cheque itself is dated 24th July, 2013 and properly signed. Two later cheques under his hand, which were issued to the Claimant were also in evidence. They were allegedly post dated and upon his request were never cashed but returned to him when he explained that his account did not have sufficient funds. His approach with the cheque in issue was completely different. He did not do that here. It was a current and properly issued cheque and there is nothing to indicate that it was not to be cashed. Further, it makes absolutely no good business sense to properly issue a cheque as acknowledgment of a debt when a mere written agreement evidencing same could have better sufficed. Moreover, the cheque was not in the sum of the outstanding debt as presented by the Claimant and never refuted by the Defendant. I reject the Defendant's evidence and find that the cheque issued under his hand on the 24th July, 2013 was good and ought to have been paid upon presentation. In any event Section 47(4) of The Act instructs that "The fact that the holder has reason to believe that the bill will, *on presentment, be dishonoured, does not dispense* with *the necessity for presentment."*

16. Having been dishonoured the defences are few but the Claimant must first prove that he has given proper notice in accordance with Section 49 which states:

> "*Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer*

and each indorser, and any drawer, and indorser to whom such notice is not given is discharged."

Was notice given:

17. Section 50 of the Act speaks to the validity of the notice given. It must be given by or on behalf of the holder and must be in writing or by personal communication intimating that the clearly identifiable bill has been dishonoured whether by non-acceptance or non-payment. Personal communication is not defined in The Act, but given their ordinary dictionary meaning, it is certainly wider than 'notice in writing' and to my mind would include a personal telephone call between the drawer and the holder. This would be equivalent to a verbal statement which was accepted as good notice in ***Martin v Margeon (1851), 18 L.T.O.S. 99***. Having been unable to find any case law on this specific issue, I so hold.

18. Where there are two or more drawers who are not partners notice must be given to each of them unless one of them has authority to receive such notice for the other(s).

19. Notice may be given as soon as the bill is dishonoured and in any event within a reasonable time. 'A reasonable time' where the parties reside in different places (as in the instant case) is where according to Section 50 L(ii) *"the notice is sent off on the day after the dishonour of the bill, if there is a post ... and if there is no such post on that day, then by the next post thereafter*." It was difficult to reconcile the general mode of giving notice by personal communication with this particular subsection which seemed to completely exclude same. However, that was quickly resolved when the age of The Act was

considered. I find with the advancement of time and technology a telephone call made immediately or the next day following would equally suffice without causing battery to the particular subsection.

20. In the present case the Claimant says he was notified by his bank on the 9th September and received the debit slip on the 10th September, 2013. The debit slip is indeed dated 10th September, 2013. At paragraph 24 and 25 of his witness statement he explains: *"Upon receiving the advice slip from our bank, I was most upset and immediately contacted Raju via telephone. I confronted Raju about his dishonesty in issuing a cheque to Pacific knowing full well that the account on which it was drawn was closed. I demanded immediate payment of the outstanding US$78,000 together with the fees and expenses that Pacific had incurred because of the dishonoured cheque."*

21. The first Defendant at paragraph 6 of his witness statement says: *"In October 2013 Mr. Balani informed me that his Company by mistake deposited the cheque and the cheque bounced, and charges was (sic) incurred in the amount of US$23.85 ..."*

22. I am inclined to believe the Claimant. He had waited for a considerable period of time on payment and now being confronted with a dishonoured cheque it seemed more likely that he would not have delayed in communicating this to the first Defendant. The Defendant's sequence of events and explanations simply did not ring true. I therefore find that the Claimant did properly notify the first Defendant, within a reasonable time, that the cheque had been dishonoured. Notice was therefore both valid and effective. In any event the first Defendant raised no issue of delay in his pleadings.

23. Although it is questionable whether the second Defendant is in fact a drawer especially since she was not a signatory and the account had already been closed this court finds that there has been no evidence, at all provided, of her having been given notice. Nor is there any evidence that she is a member of a partnership with the first Defendant. Having not been given notice she is accordingly discharged as a party pursuant to Section 49 of The Act and shall have her costs in this action.

24. This does not mean that the cheque or the other party who remains (the first Defendant) are discharged. Unless he proves that he has been otherwise discharged he continues to be liable.

Discharge:

25. Like any contract the parties are by agreement able to waive or vary the terms, however there are statutory restrictions for this to amount to an actual discharge of the party. Section 63 of The Act states:

> *(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.*
>
> *(2) The renunciation must be in writing unless the bill is delivered up to the acceptor.*
>
> *(3) The liabilities of any party to a bill may, in like manner, be renounced by the holder before, at or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.*

26. Although counsel for the first Defendant never raised waiver expressly the evidence provided supports this possible contention. The terms of the

agreement entered into by the parties after the cheque had been dishonoured falls now to be considered.

27. We begin on the premise that there must be an acceptance by both parties that that agreement really referred back to the dishonoured cheque. The Claimant speaks of a sum of US$74,000 after admitting that he had accepted a US$4000 payment from the first Defendant subsequent to the cheque having been dishonoured. The Defendant speaks of US$78,000 (as settled earlier in this judgment) which is the precise sum on the cheque. Although the written agreement refers only to a debt of US$60,000 parole evidence proves that that figure is the discounted debt arising from the dishonoured cheque. It is the Claimant's negotiated fruits of his attempt to rectify the situation following discussing, pleading and cajoling.

28. The Defendant can say that by entering into this new written arrangement the Claimant waived or renounced his rights. The Claimant says that waiver was not 'absolute or unconditional' and he points triumphantly to the two clauses outlined at paragraph 2 of this judgment. I agree with the Claimant. He clearly retained his rights against the first Defendant and could now bring this action as the bill was never absolutely discharged. However if the first Defendant satisfied the condition, there would be accord and satisfaction and equity would not allow the Claimant to be unjustly enriched. He would be estopped from enforcing his right to payment under the dishonoured cheque. This therefore brings us to a consideration of the receipts which the first Defendant asserts evidences payment in full.

The three receipts:

29. It was the Claimant's pleaded case that all three receipts had been prepared by the first Defendant and that his agent Mr. Rajesh Gupta simply signed each receipt as presented and affixed his seal. He stated further that when those receipts were signed, they totalled $2,000 and no more. The first payment made on the 5th June, 2014 was in the sum of US$1,000.00, the second made on the 15th June, 2014 was for US$700,00 and the third payment made on the 21st July, 2014 was for US$300. The first Defendant on the other hand said that he paid US$51,000, US$8,700 and US$300 respectively as appears on each receipt.

30. After Case Management the Claimant was granted leave and the court appointed a handwriting expert. He was requested to examine and report on any evidence of tampering and additions of letters, symbols and numbers to those receipts. He used a leica comparison microscope, coaxial light system, leica stereoscope incident light source and a video spectral comparator. His findings were that "*there were (sic) general evidence of tampering and additions made to all three receipts thoroughly analyzed."* However, "*thorough analysis was conducted on the numbers and (sic) were possibly inserted but there was not enough evidence to conclusively conclude it was inserted after the original receipt was written."* The expert withstood a lengthy list of questions put to him by counsel for the Defendant prior to trial. At trial he was vigorously cross-examined but maintained that the receipts had been tampered with and his report explains why.

31. Counsel for the Defendant in her submissions presented Section 47(1) of the Evidence Act Cap 95 which deals with the writing or signature on a

document. This court could not perceive the relevance of this particular section since neither the handwriting nor signature on any document was in issue. Both the Claimant and the first Defendant accepted that the receipts were written up by the first Defendant and signed by the Claimant's agent and the first Defendant. There was no need for comparisons of handwriting or any test of acquaintance with handwriting. The issue was not one of genuineness but rather one of tampering.

32. When the court coupled the experts finding with the evidence provided by the Claimant and the first Defendant it could do nothing more than draw the irresistible conclusion that the receipts had been tampered with after Rajesh Gupta had signed them and that in truth and in fact the first Defendant had paid nothing more than US$2,000.

33. Let us examine the evidence which was put before the court. The Claimant brought his company's statements of the first Defendant's account. The first Defendant brought his 'say so'. Both agreed that the first Defendant had never paid any installments as large as or close to US$51,000 prior to the cheque for US$78,000. From the records his largest seemed to be a solitary US$20,000. A payment as large as $17,000 was therefore unusual. The Claimant exhibited the Agreement which showed that the Defendant was expected to pay US$1,700 per month. The two initial payments asserted by the Claimant of US$1000 and US$7000 totalled the agreed installment of US$1,700. Both were made in the month of June. The third was made in July and could be perceived as a part payment (for which the Defendant had a penchant). The Defendant again presented his 'say so' and a statement by his wife and witness that he had told her that he paid US$51,000 towards the

debt. I cannot omit to say here that she seemed to know nothing more of the second Defendant's business and dealings. In fact in her defence she vehemently denied being a part of the business or its operations.

34. The Claimant brought Rajesh Gupta, a forthright and seemingly honest individual who appeared disinterested in the dispute save and except that he, his signature and stamp were being implicated in what he knew to be a lie. He stated definitively that the first payment was US$1000, the second US$700 and the last US$300. He said those were the figures on the receipts when he signed them. He sent e-mail information of the first two payments to the Claimant and subsequently paid over all the money he received. I could find no reason to disbelieve him.

35. The Defendant on the other hand gave the Claimant a cheque which he knew, without a doubt, would be dishonoured. Then he presented a confusing, contradictory and inconsistent account of what transpired. He claimed that although business was good and he had liquid cash he did not make regular payments or pay off the debt to the Claimant because he was not being pressured and in any case the Claimant did not mind small payments. He said he could pay more, but agreed to US$1,700 per month, because that's what he *"wanted to pay."* He said he only paid off the debt in June and July because he believed the Claimant when he told him that he would show the Agreement to everyone in Corozal and China and he the Defendant would not be able to get credit again. As ludicrous as it sounds that was his explanation. I rejected it as a contrivance. I also rejected the receipts and accepted the evidence from the Claimant that the Defendant had paid no more than $2,000 pursuant to the written agreement,

36. **The Breach and the Bill:**

The first Defendant's default in his obligation under the Agreement to pay by monthly instalments was a fundamental breach. It would allow the innocent party (the Claimant) to treat the contract as discharged. Only the rights that had been acquired unconditionally under the discharged agreement would be unaffected – ***McDonald v Dennys Lascelles Ltd. (1933) 48 CLR 457***. It is clear from all the evidence previously discussed that the US$60,000 was a discount provided by the Claimant in an effort to secure some form of payment. Having not fulfilled the requirements of the new contract the Defendant cannot now claim the benefits of that right which was conditionally granted.

37. It remains open to the Claimant to pursue any legal recourse available to him. Since the bill was never discharged he may safely avail himself of this avenue as he has opted to do. The Defendant can find no shelter to such a claim under a contract which he has himself repudiated.

Conclusion:

38. I find that the sum of US$4000 and US$2,000 had been paid towards the dishonoured cheque, equity will not allow the Claimant to be paid twice. He will therefore be awarded the amount stated on the cheque, less US$6,000, as damages with interest at the rate of 6% per annum from the 1st August, 2013 (the date of presentment) in accordance with Section 166 of the Supreme Court of Judicature Act Cap 91 and the decision in ***Blue Sky v Belize Aquaculture Ltd. Civil Appeal No. 8 of 2012.***

39. The Claimant shall also be reimbursed for the bank fees. In his claim he sought $5,000 costs and he shall have that from the second Defendant.

40. The Order of the court is as follows:

1. Judgment for the Claimant against the first Defendant in the sum of US$72,000 and US$23.85 with interest at the rate of 6% per annum from 1st August, 2013.
2. The first Defendant shall pay the Claimant's costs in the sum of $5,000.00.
3. The claim against the second Defendant is hereby dismissed.
4. The Claimant shall pay the second Defendant's costs in the sum of $1,000.00.

SONYA YOUNG
JUDGE OF THE SUPREME COURT