IN THE SUPREME COURT OF BELIZE, A. D. 2013

CLAIM NO. 547 OF 2013

BETWEEN:

(CARLOS ROMERO	**CLAIMANT**
(	
(AND	
(	
(KATHLEEN HOHENKIRK	**FIRST DEFENDANT**
(RAY HOHENKIRK	**SECOND DEFENDANT**
(CARIBBEAN TREASURES LTD.	**THIRD DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mrs. Robertha Magnus-Usher for the Claimant

Ms. Stevanni Duncan of Barrow and Williams for the Defendants

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D E C I S I O N

Facts

1. Carlos Romero, the Claimant, was a business partner with Kathleen and Ray Hohenkirk, the First and Second Defendant investing in a business known as Caribbean Treasures Ltd, the Third Defendant. Mr. Romero claimed that he invested $170,000 which he described as his life-savings to help the Defendants fund the business as startup capital, and in exchange he was supposed to receive 2000 shares in the company. He was never given his shares, nor was he given any percentage of the profits of the company as per a

written agreement he had with the First and Second Defendants; he therefore brought an action for summary judgment seeking payment of the sum he had invested. This court awarded him $150,000 and left the balance of $20,000 for trial since the Defendants suddenly informed the Court that they had just discovered that they had records to prove that this $20,000 had already been repaid to Mr. Romero. The Claimant contends that this amount of $20,000 has never been repaid and that the Defendants are still obligated to pay him that amount, and in addition damages for 20% profits he claims is owed to him by the company as per the terms of written Agreement, interest and costs. The Defendants on the other hand says that this amount of $20,000 was not an investment, but a short term loan which has already been repaid by them to Mr. Romero.

Issue

2. Was this $20,000 an investment or a loan made by Mr. Romero to the Hohenkirks? Is Mr. Romero entitled to the repayment of this money as his investment made in the Defendant Company for shares which were never given to him, plus damages, interest and costs? Or are the Defendants entitled to judgment on the basis that this money was a loan that has already been repaid by them to Mr. Romero?

The Claimant's Evidence

3. The Claimant called one witness in this trial. Mr. Romero testified in his affidavit dated March 24th, 2015 that he received judgment on $150,000 after a portion of his claim was granted by this court in a summary trial held on November 24th, 2014 based on admissions made by the Defendants. At that hearing, the Defendants submitted for the

first time that they had already repaid $20,000 to the Claimant several years earlier and that this “fact” was only discovered by them the day before the hearing. He also contends that the Defendants have failed to comply with the order of the court as they have not paid interest or costs arising from the summary trial as ordered. He was allowed to amplify his evidence at trial to say that the cash voucher tendered by the Defendants as Exhibit ”KH1” is not an original and he only saw the original that same morning of trial. He further states that he believes that the signature on the voucher is not his signature, but he cannot guarantee that it is not his signature. He points out that the voucher is marked “Shareholder’s Investment”. He says that upon comparison with his other signatures he notes slight differences such as two dots on it, when he normally only signs with one dot. Mr. Romero says that in addition to the $170,000 he invested in the company, he had other business transactions where he made short term loans to the company which were separate from the initial investment. Mrs. Hohenkirk approached him for additional investment but he was reluctant to make any more until the paperwork had been completed. He said the nature of the products acquired by the company for printing were t-shirts, caps and souvenirs which were imported from abroad. They were shipped by containers by sea, and he recalls that it was at least two containers per year. During meetings held by the Claimant with the Defendants, repayments of this $20,000 was never discussed.

4. Under cross-examination by Ms. Duncan for the Defendants, Mr. Romero said he still owns the restaurant and bar located at the Tourism Village called the Wet Lizard. He also owns a gift shop located in the same building also named the Wet Lizard. He was

asked whether he had a receipt to prove the additional $20,000 he was claiming and he said he thought he had given it to his attorney as proof of payment. He was shown his witness statement and attachments and asked by Ms. Duncan to locate that receipt among the exhibits in his case but he was unable to do so. It was then put to Mr. Romero that the reason he did not attach the receipt was because he knew that the $20,000 had already been repaid to him. He said no. It was further put to him that the reason why the receipt was not tendered was because he knew it would show the court that the $20,000 was not for the purchase of shares as he now claims, but rather for a loan to clear a container. At this point he was shown a receipt attached to his witness statement and asked to look at it to see what was marked: "Clearing container (Investor's Deposit)". He said it was marked "Investor's Deposit." He was asked how many small loans he made to the Defendants separate from the $150,000 and the $20,000. The witness said he couldn't recall as it was nine years ago. He does remember that he gave the Defendants short term loans at least once maybe twice. He couldn't recall what were the amounts of those loans but he knows he has already received repayment for those additional short term loans from the Defendants. Ms. Duncan then suggested to Mr. Romero that he did receive a cheque from the Defendants in the amount of $10,000 dated May 2nd, 2007. The witness said that he does not recall. It was too long. She also put it to Mr. Romero that he did receive a cheque from the Defendants dated 20th July, 2007. Mr. Romero said he did not recall. It was also suggested to him that the $20,000 that he paid to the Defendants was for clearing a container. He said No. He agreed that he signed an Agreement for Investment along

with the Defendants. Upon re-examination by Mrs. Usher, Mr. Romero clarified that he has never received repayment of any portion of the $170,000 he invested in the Defendants' business.

The Defendant's Evidence

5. The First Defendant was the only witness for the Defence. Mrs. Kathleen Hohenkirk said in her witness statement dated June 9th 2015 that she and her husband Ray Hohenkirk (the Second Defendant) shared an amicable relationship with Mr. Carlos Romero as business associates. She says that the 3rd Defendant was incorporated on 5th July, 2006 and it is in the business of wholesale and retail of high quality apparel and accessories. She states that the Claimant provided financial assistance to them for the business by paying a total of $170,000: $150,000 for the purchase of shares and $20,000 to assist with the cost of clearing a container. Mrs. Hohenkirk says that while the $150,000 was resolved in a summary trial, and has been repaid in full by order of the court, she had forgotten that they had already repaid the $20,000 lent to them by Mr. Romero for the cost of clearing the container . It was not until her accountant found the documents (now marked KH1) and brought them to her attention that she saw the record of repayment.

In amplification of her witness statement, she also explained that the first document in KH 1 represents a cheque processed and posted in her company's QuickBooks System which would represent a cheque paid to Mr. Romero. It shows that the cheque was from their Belize Bank account, the cheque number, the date the cheque was written, who it was paid to, the amount which was paid and in the bottom in the memo it shows

what the cheque was paid for. The second document was a cheque voucher that was written for the sum of $10,000 that was paid to Mr. Romero and which he signed for on the 20th July, 2007. This voucher represents the next cheque written in their accounting system. The 3rd document is a screen shot of the cheque that was written to Mr. Romero on the 20th July, 2007 taken from their Scotia Bank Checking Account for the sum of $10,000 which represented payment towards clearing of the container. Item 4 represents their Atlantic Bank Account from May 2007 and shows the same cheque from May 2007 cleared on May 7th, 2007 for the sum of $10,000. The 5th document represents their Scotia Bank account for the month of July where a cheque for the sum of $10,000 was cleared on 23rd July. Mrs. Hohenkirk explained that "cleared" meant that the cheques were returned to them and their bank statement was reconciled as all items that were issued or deposited were accounted for. Her evidence is that the documents show that Mr. Romero deposited $10,000 to his bank account in another bank and that was the reason that the cheque came back to them a few days later and not on the same day.

6. Mrs. Hohenkirk was cross-examined extensively by Mrs. Usher on behalf of the Claimant. It was put to the witness that in the Defence filed in response to this Claim, she admitted that Mr. Romero paid them $170,000 for 2000 shares. After looking at her Defence, Mrs. Hohenkirk said yes. She was then shown two receipts attached to the Claim and questioned as to whether those receipts dated 14th July, 2006 and 27th October, 2006 had the words "investor" or "invest" on them. She agreed. Mrs. Hohenkirk was asked what was her professional experience before she started her own

business. She said she was a banker at Scotia Bank in Grenada. She also agreed that nowhere on the 2 receipts was the word “loan”, and she also agreed that as an experienced banker she knew the difference between a loan and an investment. It was put to her that the documents she attached as exhibits are computer generated, and she agreed. She was asked whether there was any signature on these documents and she said no. When asked when were the documents attached and exhibited as KH1 prepared, she said these are documents prepared by their Accounts Clerk whenever a cheque was issued. She further stated that the document is on their computer system as part of their Quick Books so the records can be pulled up. The witness was then questioned about her evidence relating to bank reconciliation of her company’s accounting records and whether she has disclosed to court records of that internal reconciliation of payments made, income, expenses, and balance sheets. Mrs. Hohenkirk said no. She also agreed that she did not disclose the cancelled cheque to the court. She was then asked about the first document marked “Refund on loan”, and asked whether the loan was for $10,000 to clear the container. She disagreed. Then she was asked whether she has disclosed the original of the screen shot of the cheque and she said no. She further agreed with Counsel’s suggestion that anyone can go on a computer and type whatever information they wish to type, but she disagreed with the suggestion that this document was not prepared until the day just before summary judgment. She also disagreed that there were no bank reconciliation statements to account for the payments; she said her attorney had copies attached to the original but her attorney did not ask for them so she just sent proof of the bank statement. She was

asked whether the Scotia Bank and Atlantic Bank statements showing two payments of $10,000 each revealed to whom these cheques were paid. She said no. She was asked whether she was aware that the Claimant had requested disclosure of her audited financials; the witness said her attorney has all the documents that were requested. She then explained that as a small company, their bank did not require audited financial statements so they did in-house financial statements where an accountant came in checked their books and signed off that what they do is correct. Mrs. Hohenkirk said she is not an Accountant so she does not prepare the records; their trial balance is filed, whatever documents, loan information is given to a qualified Accountant who comes in and goes through their books and they prepare the financials. Cash vouchers are prepared by an Accounts Clerk. She was then challenged on the specific information contained in the unaudited financial records she had provided to the court. On the Current Liability and Liabilities and Equities stated in her company's records for 2006 and 2007, she was asked whether there was any notation of any short term loan of $20,000. She said no there was not; she clarified there was no notations of loans at all. She agreed Mr. Romero was never a Director of the company, and also reluctantly agreed that Mr. Romero was never given shares in the company. She agreed that there was no signature of a Director on the financial statements. She also agreed that there was no signature of Mr. Romero on the first cash voucher exhibited by her. She also agreed that the payment dates for both items differed. Mrs. Hohenkirk disagreed that the payments she was claiming were made to Mr. Romero were made one year later and claims they were made within a six month or seven month period. The first part of

the $20,000 was paid in May and the second part was paid in July. She agreed that she approached Mr. Romero for a loan even after he paid them the investment of $170,000. She stated that she did not submit a cancelled cheque because it is now 2015 and documents are destroyed after four years. Finally, she said she had not submitted any wholesome document showing the history for that period from her company's internal records because it was never requested.

7. Under re-examination by Ms. Duncan, Mrs. Hohenkirk explained that the bank statement and vouchers were pulled out of the archives. She also stated that at the time of preparing the Defence to this Claim she did not remember that $20,000 had already been repaid by them to Mr. Romero, and it was only until they needed to go trial that her Accountant reminded her of this payment. She also said that it was their intention to place Mr. Romero as a Director of the company. At the time when Caribbean Treasures was registered she and her husband were not Belizeans so they gave Mr. Romero documents to have them processed through a lawyer. Mr. Romero never returned the documents nor did he pay the fees for his shares to be issued to him. In trying to clarify why Mr. Romero's amount was under the heading Director's Liabilities even though he was not a Director, Mrs. Hohenkirk said, "*We just put it there. In fact the monies that were placed there, even though the other shareholder it was just a loan and not the shareholder. They were not Director. We placed all the funds into that one account*".

Legal Submissions On Behalf of the Claimant

8. Mrs. Usher on behalf of the Claimant submits that the Defendant's affidavit dated November 24th, 2014 in response to the application for summary judgment included two important assertions and sworn testimony:

    a) At paragraph (5): *"With a young but promising business, we the Defendants were in need of working capital to mobilize operations of the 3rd Defendant, and the Claimant offered assistance by contributing a total of $170,000 which amount was paid in two instalments $150,000 and $20,000 respectively"*.

    b) At paragraph 8: *"It was agreed initially between the Claimant and the 1st and 2nd Defendants that the Claimant's* ***contribution would constitute a 20% investment*** *in the equity of the 3rd Defendant or 2000 shares, which investment would generate a return to the Claimant of 20% of the 3rd Defendant's annual net profit"*.

Mrs. Usher cites Black's Law Dictionary which defines contribution to capital as *"a fund or property contributed by shareowners as financial basis for operation of corporation's business and signifies recourses whose dedication to users of the corporation is made the foundation for issuance of capital stock and which become irrevocably devoted to satisfaction of all obligations of corporation."* The Witness Statement filed by the Defendant on June 9th, 2015 reflects that the Defendants changed their earlier assertion that the $170,000 was a contribution; they now described that money as "*financial assistance*" for the business. Learned Counsel submits that the use of the word "*contribution*" suggests that the money was not a "*loan*" which had to be repaid, but an

act more permanent i.e. an investment. What the money was used to do was a matter of choice by the Company and its Directors. Mrs. Usher further challenges the Defendant's assertion that shares were not issued to the Claimant because he did not pay for proper filings to be done for him to be registered as a shareholder and as a director. She submits that there is no obligation on the part of a shareholder to pay for proper filings to be done to register him as a shareholder or a Director. She makes the salient point that the filing fee of $10.00 could certainly have been paid out of the $170,000 Mr. Romero had already invested in the company. In addition, she argues that it is unbelievable that a person who has been very helpful to the company would refuse to pay the minimal filing fees to formalize his investment if that was requested.

9. Mrs. Usher also challenges the documents presented by the Defendants as proof of payment of the $20,000 which she describes as "*two unsigned computer generated slips*". Learned Counsel emphasizes the fact that the Defendants failed to produce a copy of the cancelled cheque, the Bank Reconciliation Statement, any accounting record (e.g. profit and loss statements) or any other proof that these slips were part of their records and not documents prepared on the eve of a pending judgment against them. She submits that the burden to produce Bank Reconciliation Statements or Accounting Records was particularly strong because their testimony had contradicted the fundamental position in their Defence. The witness for the Defence said that the Bank Reconciliation Statements existed but had been given to their attorney so the question is if that is true, why weren't they disclosed. Mrs. Usher also points out that, in addition

to the fact that no original of the vouchers were disclosed despite being requested the disclosed documents had the following inconsistencies:

> *"(a) It bears no stamp, no heading and no insignia indicating the entity on whose behalf it is made;*
>
> *(b) The words 'Refund Shareholders Investment' is written with two (2) different inks;*
>
> *(c) The signature purporting to be that of CARLOS ROMERO is dramatically different from his normal signature. In his testimony the Claimant points out the difference. He says his signature has one dot not two. This signature has a clear marking of two dots. An examination of all his signatures on the various pleadings and affidavits filed herein demonstrates that there is always only one dot formed in the 'U' portion of his signature. The original voucher was not tendered in evidence*
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> *(d) The voucher also has no serial number, which would have shown that it was part of or a sequence in existing documents by the Company;*
>
> *(e) It has no seal, no stamp of the Company;*
>
> *(f) The most discredited part of the voucher is that it has the words 'Refund Shareholder Investment'. A Shareholders Investment is not to be 'refunded'. More importantly the use of the word investment indicates the very nature of the transaction. If reliance is placed on this document, it indicates clearly, that at the time the $20,000.00 was paid, it was an investment. And in 2006 based on his investment made, it was agreed he was to get 2,000 shares.*
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> *(g) The 3rd document forming part of the 'KH 1' is another computer generated slip bearing the date 20 July, 2007. This payment would have been made nine (9) months after the receipt of the $20,000.00. Its inconsistencies are:*
>
> *(i) No stamp or signature;*

(ii) No supporting accounting records or Bank Reconciliation Statement;

(iii) At the bottom of the slip, the 1st column is headed 'Shareholders Liability' and next to that is refund monies loaned to clear container $10,000.00;

(iv) The Claimant was never made a Shareholder. By the Defendants' Witness's own admission in Court the loan was not recorded under Shareholder's Liability in their unsigned and unaudited accounts. Yet on this slip it is purportedly placed here. In fact the witness said in court the loan was recorder under 'Director's Loan' in the unaudited statements;

(v) The other major contradiction in this regard is that the Defendants have based the repayment of the $20,000.00 on the fact that it was a short term loan, however, in court the witness says it was recorded under Director's Loan, which as can be seen on the unaudited financial statements, is a long term liability, not short term. Wholly inconsistent;

(vi) The cash voucher of the 20th July, 2007 and the computer slip bearing the same date, state two (2) dramatically different purposes. One says 'return of shareholders investment' and the other refund of monies loaned to clear container".

In addition, Mrs. Usher states that it is easy to generate computerized slips to match a bank statement. Those slips do not say to whom payment was made and the purpose of the payment. She submits that the evidence of the Defendants is contradictory, confusing, false and in some instances grave misrepresentation.

10. Mrs. Usher contends that the Defendants made a dramatic departure from the Defence without amending their Defence, in breach of Rule 10.5(4) of the Civil Procedure Rules.

"Where the Defendants deny any of the allegations in the claim form or statement of claim:

a) The Defendant must state the reason for doing so; and

b) If the Defendant intends to prove a different version of events from that given by the Claimant, the Defendant's own version must be set out in the defence."

Learned Counsel cites Rule 10.7(1) of the Civil Procedure Rules:

"The defendant may not rely on any allegation or factual argument which is not set out in the defence but which could have been set out there unless the Court gives permission."

She also relies on Rule 10.7(3) of the Civil Procedure Rules: *"The court may not give the Defendant such permission after the case management conference unless the defendant can satisfy the court that there has been some significant change in circumstances which became known only after the date of the case management"*. Mrs. Usher notes the Claimant was allowed by the court, in the interest of justice, despite the Claimant's objection, to change the nature of their case at the Application for Summary Judgment. She submits that the finding of a cheque which triggered the recall that this money was a "*loan*" and not an investment is not a change in circumstances as this was done only when judgment was requested. The Defendants' evidence cannot be viewed as reliable

as they failed to establish a change of circumstances and they continued to rely on a Defence that admitted the Claimant's case. A change to a party's case even if allowed at a late stage must be supported by an amendment of the pleadings ***Savings and Investment Bank Ltd v Fincken*** [2003] EWCA Civ 1630 para 68-78**.**

Mrs. Usher submits that the Defendant has 17years of banking experience as shown on the Business plan attached to her Witness Statement; yet she did not put on the receipt that she signed that the $20,000 referred to a loan, and she admitted in cross-examination that she knows the difference between an investment and a loan. Finally, Mrs. Usher asks that the Claimant be awarded damages in the amount of $21,192.00 in damages for the use of his money by the Defendants for eight years. This figure is based on her submission that the Defendants records reveal that the company made a net profit in 2012 of $26,490.00, and the Claimant was therefore entitled to receive $5,298.00 as returns on his investment for 2012. In addition, Mrs. Usher submits that for the years of 2010, 2011, 2012, 2013, 2014 and 2015, 50% of the sum stated as returns for 2012 would be a reasonable presumption of the minimum returns that should have been paid to the Claimant for his investment. She is also asking for interest at 12% as of October 27th, 2006 and costs.

Legal Submissions on Behalf Of the Defendants

11. Ms. Duncan on behalf of the Defendants argues that $150,000 of the $170,000 has been awarded to the Claimant by the court in summary judgment and has been repaid in full by the Defendants. Therefore the only issue which remains is the amount of $20,000 as

the matter now before the court in these proceedings. Learned Counsel contends that on a balance of probabilities, the Claimant was unable to discharge his burden of proving that the $20,000 is owed to him by the Defendants; she also argues that the version of events based on the evidence presented is more probable than the version of the Claimant.

Ms. Duncan cites Denning J in ***Miller v Minister of Pensions*** [1974] 2 ALLER 372 as follows:

> *"It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not."*

12. Ms. Duncan argues that the documents exhibited to the witness statement of Kathleen Hohenkirk as KH1 were never challenged by counsel for the Claimant as to their authenticity based on deception or fraudulently doctored for the purpose of trial. She submits that the law is clear that a party will be deemed to admit the authenticity of a document disclosed to him unless he has served notice that he wishes the document to be proved at trial (Rule 28.18 of Supreme Court (Civil Procedure) Rules 2005). The Claimant's failure to serve such a notice means that the authenticity of the documents is now shielded from challenge and any suggestion or notion that the documents may not be authentic must be absolutely disregarded. In response to suggestions made to Mrs. Hohenkirk in cross-examination that the original cancelled cheques were not disclosed, Learned Counsel argues that the law of evidence allows the use of secondary evidence under the best evidence rule in the absence of primary evidence. The cancelled cheques would admittedly be the best evidence; however those cancelled

cheques are not available today having been destroyed or disposed of by the Defendants due to length of time that has passed as per testimony of Mrs. Hohenkirk. In the absence of the actual cheques, the Defendants were able to present electronic records stored automatically in their accounting software. This is good secondary evidence of the cheques actually prepared and issued to Carlos Romero.

13. Ms. Duncan goes on to argue that the court should find on the evidence presented that it is more probable than not that the $20,000 was repaid by the Defendants to the Claimant some years ago. The Defendant initially agreed in their pleadings that the said $20,000 given to them by the Claimant was for the purchase of shares. This continued to be the honest belief of the Defendants until a search of their records revealed documentary evidence that the $20,000 was not for the purchase of shares in the 3rd Defendant Company, but for the clearing of a container of equipment and machinery. The documentary evidence further showed that the $20,000 had actually been repaid to the Claimant in the year 2007. Standing on the strength of the uncovered records, the Defendants now maintain that the $20,000 has been repaid to the Claimant and that no further sums are owed to him. Ms. Duncan submits that the printouts show the particular bank from whence the funds would be debited, the date when the cheques were prepared, the reference numbers on the cheques, the person to whom the cheques were issued, the amounts for which the cheques were drawn, and a notation indicating what the payment was for. On the first printout it is plainly visible that the cheque would be debited from an account at Atlantic Bank, that the cheque was prepared on 2nd May, 2007 that the reference number of the cheque was 4658819, that

the cheque was made out to Carlos Romero, that the amount of the cheques was $10,000, and that the payment was for the "*refund on loan to clear container*".

14. On the second printout, Ms. Duncan submits that it is plainly visible that the cheque would be debited from an account at Scotia Bank, that the cheque was prepared on 20th July, 2007 that the reference number of the cheque was 4370, that the cheque was made out to Carlos Romero, that the amount of the cheque was $10,000 and that the payment was for the "*refund monies loaned to clear container*" as stated in Exhibit KH1. Learned Counsel submits that these cheques are sufficiently corroborative of the averment that the $20,000 paid by Carlos Romero was actually a loan for the clearing of a container when considered in light of the sure testimony of Mrs. Hohenkirk, the receipt received by Carlos Romero, which receipt he admitted to receiving, and the notations on the printouts. It is significant to recall that the Claimant admitted in cross-examination that he has only made one payment of $20,000 to the Defendants in all the time of doing business with them. He confirms that any previous small loans he may have made would not have been larger than about $5,000 each and all have since been paid back. In further support of the position that the Claimant received repayment, Ms. Duncan submits that the Defendants have submitted two bank statements dating back to the material time. She emphasizes the point that these bank statements are not authored or created by the Defendants and are third party documents which confirm that the cheques that would have been received by the Claimant were in fact deposited and the respective accounts of the Defendants debited for a total of $20,000. She submits that it follows logically that based on (1) the fact of the two cheques being

prepared and issued to Carlos Romero totaling $20,000; (2) the fact that the bank statements unequivocally refer to these same cheques based on corresponding cheque reference numbers; (3) the fact of the cash voucher being signed by the Claimant; (4) the fact that the Claimant could not recall whether he received the cheques or not; and (5) the fact the Defendants were certain that the Claimant did receive these cheques, the probability lies very much in favour of the Defendants and the Court as a matter of responsibility and legal principle ought to find that the Claimant has failed to discharge the burden of the standard of proof. In conclusion, Ms. Duncan argues that the rate of interest awarded (in the event the Court finds in favor of the Claimant) should be 6% as per Section 167 of the Supreme Court of Judicature Act, and not 12% as claimed by the Claimant on any post judgment award from date of judgment until payment. She also cited Consolidated Claim No. 371 of 2005 and Claim No. 450 of 2005 ***L& R Transfer Limited v The Town Council of Orange Walk*** which dealt with the exercise of the court's discretion in awarding pre-judgement interest under Section 166, and ***Blue Sky Belize Limited v Belize Aquaculture Limited*** Civil Appeal No. 8 of 2012 which addressed the statutory rate of interest to be awarded post-judgment.

15. In her submissions in reply, Mrs. Usher stressed that the authenticity of the documents produced by the Defendants was challenged and opposed at the very first opportunity, that is, at the hearing of the Application for summary judgment, which is where they were first disclosed to this Court. She emphasizes that the documents have been challenged as being computer generated with no cheques to support and no bank statements. Mrs. Usher submits that the Defendants knew and had notice that the

authenticity of their evidence was being challenged and should therefore have prepared their case to satisfactorily override the Admission made in their Defence. She contends that even if the documents are deemed to be what they purport to be on the face, they still do not advance the Defendant's case because:

i. The documents contradict their statement of case set out in their Defence;

ii. They do not establish even the totally contrary case they set out in their Witness Statement i.e. the $20,000 was a LOAN and that the LOAN was repaid, because:

a) The cash voucher dated 20/7/07 says the money referred to was an investment;
b) The cash voucher dated 20/7/07 was for only $10,000;
c) The computer slips are still unsigned, unstamped and not originals. At least these documents should have been tendered as originals;
d) The documents do not expressly state or show that the $20,000 paid by the Claimant was being repaid at this time;
e) The Claimant says he made more than one (1) loans to the Defendants, separate and apart from the money invested. So were these documents (if in fact authentic) evidence of loans made to the Defendants?
f) The Bank Statements do not show to whom the deduction from their account was paid and the purpose of payment;
g) The cancelled cheques were not produced;

h) The documents and evidence of the Defendant's when weighed and examined as a whole is filled with

contradictions and inconsistencies and therefore lacking credibility.

16. Mrs. Usher submits that when the Court decides the case on a balance of probabilities, the Court would find that

i) The case made out by the Defendants in their Witness Statement contradicts their Defence. The nature of the Defendants' case was therefore not laid out in their pleadings;

ii) The inconsistencies and contradictions in the documents themselves are numerous. One document refers to the $10,000 as a "loan" and another refers to an "investment" of $10,000;

iii) None of the documents clearly refers to the $20,000 paid by Mr. Romero on October 27th, 2006. In fact none of the documents indicated that they were part payment of a loan or balance on a loan of $20,000 and each done at a separate time was for $10, 000 and not for $20,000;

iv) The failure to amend the Defence deprived the Claimant of the opportunity to Reply to the new materials and contend in their pleadings that the documents were fraudulent;

v) The Court has to consider the evidence elicited that Mr. Romero did extend separate short term loans to the Defendants from time to time

and by Mrs. Hohenkirk own admission that even after obtaining the $170,000 she did go back to the Claimant to seek a loan;

vi) The unequivocal revelation from the Defendants Witness in cross-examination that they had misrepresented their companies' financial status in respect of monies received from Romero, the Claimant;

vii) The clear admission made by the Defendant in their Defence was that they had obtained $170,000 from the Claimant as an investment in their Company but had not issued the shares as agreed, meant that the issue was no longer left to be determined. The Claimant therefore sought judgment thereon and acted thereon. Finally, Mrs. Usher submits that the Defence's Witness Statement is diametrically opposed to the Defence, and that this is therefore not one of the instances where they can be read together as establishing the ambit of the Defendant's case as in ***DMV Ltd. v Tom Vidrine*** Civil Appeal No. 1 of 2010**.** Additionally, the Defendants in cross-examination said that their Defence was not the truth, even though the Certificate of Truth was attached.

Ruling

17. I am grateful to both counsel for their comprehensive submissions which have assisted the Court in determining this issue. Having considered all the evidence led in this case and having considered the submissions, I find that the Claimant has proven his case on a balance of probabilities. In the interest of justice, I gave the Defendants over the

strenuous objection of the Claimant (at the 99th hour when they said they had discovered proof of payment) the opportunity to present their evidence that this $20,000 paid to them by Mr. Romero had already been repaid. However, I must say that I have not been persuaded by the quality of the evidence of the Defendants at all. Having personally examined the documents submitted as Exhibit KH1, I do not see any proof that the $20,000 (which the Defendants clearly agreed in their Defence was owed to the Claimant as an investment) was repaid to him either in part or in total. While it is true that the bank statements from the Defendants show that cheques were indeed paid to Mr. Romero in May and July in 2007, and that those cheques were cleared through the company's Atlantic Bank and Scotia Bank Accounts, there is still not a scintilla of evidence that these funds were paid in reference to either part or total payment of the $20,000 made by Carlos Romero to the Defendants on 27th October 2006. The Defendants have admitted in their Defence (which as Mrs. Usher rightly pointed out was never amended and on which they continued to rely at trial) that $170,000 was the amount given to them as an investment by Mr. Romero. I find that the $20,000 was definitely an investment, and whether the Company chose to use that money to clear a container or do any other business, does not detract from the fact that it was a part of Mr. Romero's investment in the company. I therefore find that he is entitled to the $20,000 to be returned to him by the Defendants. The Court does not believe for a moment that Mr. Romero, who had invested his money so heavily in financing this company would balk at paying a small sum to be registered as a Director and Shareholder in that very same company. I was also not impressed with the manner

in which the Defendant glibly admitted that they listed Mr. Romero as a Director in their records even though he was never made a Director, they just "*put it there*". To my mind this comment calls into question the accuracy of their entire records, as the Court wonders what else was just casually put into these unaudited records without any regard as to whether it was true or not. I also find it strange that while the Defendant admitted she is not an Accountant and she didn't prepare the records, why didn't they call the Accountant to inform the Court as to the preparation of these records. And why were the original bank statements if available as claimed by Mrs. Hohenkirk not presented to the Court to present some context as to the documents tendered in Exhibit KH1 on behalf of the Defendants.

18. Judgment is in favour of the Claimant. In addition, I also find that Mr. Romero is entitled to damages in the sum of $21,192.00 as calculated by Mrs. Usher because the Defendants had the use of his life savings for eight years to fund and develop their company and yet, quite unconscionably and unjustifiably, they refused to issue him his shares and make him a Director as they kept promising to do. Costs are also awarded to the Claimant to be paid by the Defendants to be assessed or agreed. Interest is awarded in keeping with section 167 of the Supreme Court of Judicature Act (as rightly pointed out by Ms. Duncan) at the rate of 6% from the date of judgment until date of payment.

Dated this Friday, 24th day of June, 2016

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Michelle Arana
Supreme Court Judge