

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

Claim No. 565 of 2011

Between:

DONAGH HAWTIN

Claimant

And

**COLDWELL BANKER
AMBERGRIS CAYE LTD
BELIZE PREMIER REALTY LTD**

**Defendant
1st Defendant
2nd Defendant**

Before: Hon. Chief Justice Kenneth Benjamin.

**Appearances: Mr. Estevan Perera for the Claimant
Mrs. Ashanti Arthurs Martin for the Defendants**

JUDGMENT

[1] The Claimant has brought proceedings for damages in the sum of US \$61,750.00 for breach of contract against the 1st Defendant, a limited liability company registered under the Companies Act, Cap. 250 of the Laws of Belize carrying on the business of providing real estate services. The Claim is in respect of certain renovations not carried out by the 1st Defendant to the property owned by the Claimant and described as Parcel 117, Block 7 in the San Pedro Registration Section, Belize ("the property"). The 2nd Defendant is also a limited liability company incorporated in Belize and its directors and shareholders are the same as those of the 1st Defendant. Its business is that of acting as an escrow agent to hold funds for the 1st Defendant and generally.

BACKGROUND

- [2] The Claimant resides in Ireland. She was on vacation in San Pedro, Ambergris Caye, Belize in February, 2010. She met one Adrian Thompson in San Pedro Town. He was a sales representative for the 1st Defendant. Later, on February 18, 2010, she received an email from Ricardo Caveras ("Ricardo") stating that his "business partner, Adrian" had passed on her contact information to him and that he was offering to show her some properties on the Island. This led to her being shown a few properties by Ricardo along with Adrian. A few days later, she received another email from Ricardo who then took her to see the property and to visit Hol Chan Resort Development to view condos available for sale
- [3] After viewing the property, which was incomplete, Ricardo negotiated with her and he made a counter-offer of US\$250,000.00. She was advised that a deposit of US\$ 25,000.00 was required. She was taken by Ricardo to the office of the 1st Defendant in San Pedro Town. There, she met Dmitri Iodine, whom she says Ricardo told her was his business partner. A cash deposit of US\$ 1,000.00 was paid as earnest money and a receipt was issued by Dmitri, as broker on behalf of the 1st Defendant and the 2nd Defendant. However, she was given business cards in the names of Dmitri, Ricardo and Adrian. Each card had the logo of Coldwell Banker Ambergris Caye and the same office address and telephone number. The mobile numbers differed as did the email addresses. Dmitri and Adrian had email addresses as per the 1st Defendant's website of www.BuyRealEstateBelize.com whereas, Ricardo had a gmail address. On the business cards, Dmitri, Ricardo and Adrian were differently described as "Broker", "Broker Associate" or "Sales Representative" respectively.
- [4] The balance of the deposit in the sum of US\$ 24,000.00 and later the balance of the purchase price were paid by wire transfer into the accounts for the 2nd Defendant as per instructions given to the Claimant. Indeed, the purchase

agreement for the property on the letter-head of the 1st Defendant made reference to an "Escrow Holder" and clause 15 stated that "All Deposits shall be held by Coldwell Banker Ambergris Caye as Escrow Agent..."

[5] Upon her return to Ireland, the Claimant received an email on March 3, 2010 from Ricardo informing her that, her offer had been accepted. The balance of the deposit in the sum of US\$ 24,000.00 was sent to the escrow account held in the name of the 2nd Defendant. By email of March 9, 2000, Dmitri confirmed receipt of the funds in "our escrow account". Having regard to an email of March 3, 2000 from Ricardo to the Claimant, it would appear that instructions for the completion of the transaction were relayed by subsequently Land Certificate in the name of the Claimant was issued dated May 10, 2010.

[6] From an incomplete email dated February 26, 2010, it would appear that the Claimant had commenced discussions with Ricardo upon her return to Ireland about the cost of construction on San Pedro. In the email exchanges on March 10, 2010 the Claimant referred to the "rest of the project" and looking forward to receiving construction bids. Ricardo replied with suggestions for the completion of the property.

[7] In an email dated March 17, 2010, Ricardo wrote to the Claimant inquiring as to the progress towards the closing with one Alberto. He also stated as follows:

[8]

"I have heard from Dmitri that you may have some questions, you need me to answer. Please forward your questions and I will answer as quickly as possible and to the best of my ability. Also I have received a full set of plans for the construction of the building."

He further wrote:

"...upon your command we can get started with the completion. ASI stated before I will make myself available to assist you with the completion process".

This email as with the other complete emails from Ricardo exhibited carried at its ending the following:

“Ricardo Caveras, Associate Broker
www.BuyRealEstateBelize.com
Coldwell Banker Ambergris Caye Ltd.
11 Coconut Drive
San Pedro Town, Belize”

- [9] Ricardo sent an email dated April 22, 2010 to the Claimant. An attachment headed “WORK LIST” set out works to be performed with the prices. The prices aggregated US\$ 88,900.00 with an additional cost of US\$ 16,500.00 for the completion of a 2-bedroom apartment on the ground floor. The estimates were for the completion of the upper two floors of the property. Additionally, a payment schedule was proposed commencing with a deposit of 50% and successive payments of 10% based on stages of completion of the works. The final paragraph read:

“All payments need to be deposited to the Coldwell Banker Escrow Account, and I will disburse payments to sub-contractors as they complete each task. Please decide how many wire-transfers you would prefer.”

Dmitri freely accepted that Ricardo had obtained his concurrence for the sums to be paid for the renovation works to be deposited in the escrow account held in the name of the 2nd Defendant.

- [10] The Claimant accepted Ricardo’s proposal for the renovation works and she wired to the said escrow account the sums of US\$ 44,450.00 on April 27, 2010 and US\$ 20, 800.00 on June 17, 2010. At Ricardo’s request, the sum of US\$ 10,000.00 in cash and US\$ 31,792.00 were disbursed to him on May 3, 2010. The receipts signed by Ricardo acknowledged that he had received the said sums from the 1st Defendant “as part of the payment for the renovation” of the

property. Another request for funds was made on June 25, 2010 for a bank draft for BZ\$ 35,369.00 and cash of BZ\$ 6,000.00 by Ricardo from the monies being held in the escrow account at Atlantic International Bank. Dmitri wrote a letter to the Manager of the Bank authorizing the debiting of the account in the name of the 2nd Defendant for the stated purpose of: Construction and Remodelling of the property. Dmitri said that he was surprised by the amounts withdrawn in a short space of time and requested Ricardo to provide copies of receipts for payments made as a record of how the monies were used. Ricardo furnished three (3) undated receipts for amounts totalling US\$ 28,000.00 as deposits for works.

[11] On June 7, 2010, Ricardo emailed the Claimant informing her that work was progressing nicely on her property. He provided requested information for the marketing and resale of the property at an asking price of US\$ 659,000.00. It was stated that according to his breakdown which allowed for an 8% commission charged by his office, her profit was projected to be US\$ 215,900.00. There was exhibited by the Claimant an email dated June 9, 2010 in which she referred to a call received from Ricardo and that she was awaiting receipt of a contract (presumably for the listing of the property).

[12] Chronologically, the next correspondence made available to the court was an email of October 20, 2010 from Ricardo's email address to the Claimant in response to one from her to Ricardo of October 16, 2010 dealing largely with a puppy. Mr. Crichton informed the Claimant that Ricardo was no longer a part of the team at the 1st Defendant. By then, Ricardo had been arrested in mid-October, 2010 as a fugitive from the United States of America.

[13] On October 23, 2010, the Claimant wrote Dmitri by email as follows:

"I understand that Ricardo Caveras was an employee of Coldwell Banker and was, as such, working for you. Please confirm that the work that Coldwell Banker, has contracted to do, will be carried out by your

company within a reasonable time scale and with the budget that has been agreed and paid. We are anxious to have the property completed as agreed and the marketing started as soon as possible.”

The Claimant also sought confirmation as to what work was completed and in progress as well as what had been paid. Additional questions relating to the delays in the marketing of the property were put to the Dmitri, to whom she sent documents including the email of June 7, 2010, from Ricardo detailing information for the marketing and resale of the property. Dmitri responded on October 24, 2010 indicating his intention to obtain a bank statement. On the same day, he confirmed receipt of US \$65,000.00.

[14] As evidenced by a lengthy email dated October 29, 2010, Dmitri wrote to the Claimant detailing the results of his inquiries into the renovation of the property. He informed her that the receipts for deposits made to contractors were not signed by the contractors, who never received any deposits. Further, there was an unpaid account at the hardware store “for the house”. Exhibit “DH38” showed a balance of \$ 4,637.65 due to S.P. Hardware Ltd. by “Ricardo Joseph” as at October 31, 2010. Dmitri referred to receipts for the disbursements of approximately US\$ 63,000.00 to Ricardo in cheques save for US\$ 10,000.00 in cash. He committed to assisting the Claimant in the finishing and sale of the house and offered to cover some of the payments from his own money. He made two proposals: The first option was to complete the 2nd and 3rd floors as per the original plan for an additional US\$ 26, 900.00. The second option was to paint the interior and exterior of the building and leave it in that condition without windows and interior finishes. The latter option included a grant of US\$ 20, 000.00 to the buyer out of the 1st Defendant’s Commission. Both options included the satisfaction of the debt owing to the hardware store. A formal contract for either option was proposed.

[15] Dmitri addressed the 1st Defendant’s relationship with Ricardo in this way:

“He was not an employee of our company, but an independent contractor – his contract states that he is responsible for his own actions.”

In a later email of November 2, 2010, he wrote:

“As far as we see the situation he was an independent contractor and not an employee of the company. We’re in business selling real estate and not renovating properties – it was his private matter. Therefore we would not assume any responsibility for him. I would like to help you finish the house however.”

He further pointed out:

“You did not have an actual signed contract with Ricardo – it was his outline of what he was planning to do. I want to do things differently and sign an actual contract with yours and mine signatures and outlines of what will be done and the exact payments.”

- [16] In response to an email from the Claimant, Dmitri emailed her on October 30, 2010 advising her that the realistic price of the completed house including the ground floor apartment and seawall would be US\$ 549,000.00 and its existing condition, US\$ 459,000.00 with a grant of US\$ 20,000.00 from commissions for renovations. He also said that he intended to begin the painting and that the work to complete the building would take less than three months.
- [17] The Claimant responded by email of November 5, 2010 with a counter-proposal for the installation of extension doors and windows, painting of the interior and exterior and some strategic landscaping and beach work with no further payments. She further said that she wished to have the property marketed for US\$ 519,000.00 after the said work was done.

[18] There followed a varied proposal by Dmitri to do the following for a payment of US\$ 7,000.00: plastering of the ceiling; painting of the interior and exterior; installation of windows and entrance doors; essential landscaping including trucking of sand and planting of palm trees; and the paying off of the hardware store debt. It was further stipulated that a new contract outlining the terms and a release letter be signed simultaneously before and not after completion of the work. The listing price of US\$ 519,000.00 was suggested and the completion time was changed.

[19] Having reached agreement, the Claimant signed two documents dated November 10, 2010. One was headed "MUTUAL RELEASE" was signed by the Claimant and by Dmitri loudine representing the 1st Defendant. The full text of the document was as follows:

"MUTUAL RELEASE

This mutual release, executed on November 10, 2010 between Donagh Hawtin and Dimitri loudine representing Coldwell Banker Ambergris Caye intended to effect the elimination of any obligations by either party as hereinafter designated. Whereas, disputes and differences have arisen between the parties with respect to that certain agreement between Ricardo Caveras and Donagh Hawtin in regards to renovations / finishing of residential dwelling located on the parcel 117, Block 7, San Pedro Registration Section.

Whereas both parties recognize that by the execution of this mutual they are relinquishing their respective legal rights with reference to the herein mentioned disputes and differences, both parties agree that in consideration of this execution of this mutual release, each party for (sic) his heirs or assigns, expressly releases the other party and his heirs and assigns, from all liability for claims and/ or demands which may arise from that certain agreement between Caveras and Donagh Hawtin in regards to renovations/finishing of residential dwelling located on the parcel 117, Block 7, San Pedro Registration Section.

Dmitri loudine agrees to indemnify and hold harmless Donagh Hawtin against loss or threatened loss or expense by reason of the liability or potential liability to the contractors/suppliers or any other parties or any subsequent proceedings arising out of the period of time from the date of property purchase to the date of completion of pointing and installation of windows and doors by Dmitri loudine”.

- [20] The other document was also signed by Dmitri loudine and the Claimant and was headed “Residential Dwelling Finishing Agreement and Release of Liability.” It was stated that the consideration for this agreement was US\$ 7,000.00 and that the Agreement was entered into between the Claimant as property owner and Dmitri loudine. The body of document read:

“Dmitri loudine to provide following services in finishing second and third floors of the residential dwelling located at the above noted address and email choices for all materials used for Donagh Hawtin’s confirmation.

Paint the property outside light sand color and accent color light grey, inside white colour – three coats (samples to be emailed before painting)

Pay off arrears at SP hardware store and get a release letter.

Deliver ten (10) truck loads of sea sand to the property and plant one (1) ft high Palm trees.

Order and install sliding up down windows and exterior doors, windows are to have screens. Window frames and French windows are to be made from plastic or aluminium white enamel painted frames with rust resistant hardware. Doors are to be made from Mahogany or other hardwood (Samples to be emailed before ordering).

Upon completion and photographic evidence of the work above, Donagh Hawtin to wire Dmitri loudine US\$ 7,000.00 due for the completion of windows and doors work and painting by return, but no later than five (5) working due to time for instructions to be sent to the bank and actioned.

All above-mentioned work to be completed within sixty (60) days of signing of this agreement by both parties.”

- [21] On November 29, 2010, Dmitri loudine representing the 1st Defendant and the owner/manager of SP Hardware signed a receipt and release in respect of the debt owed for materials purchased to renovate the property by Ricardo Joseph Caveras upon payment of the sum of \$2,500.00. There was no dispute that the debt was liquidated.
- [22] Dmitri took instructions from the Claimant as to the painting. The interior and exterior of the building was painted according to samples approved by the Claimant and the ceiling and other areas were plastered. A Mahogany door was installed at the main entrance to the building. Sand was purchased and spread on the shore. These works were carried out by Magdaleno Martinez, who was paid BZ\$ 6,300.00 in December 2010. Nineteen (19) windows and two (2) glass sliding doors were installed by Immer Campos of the IS glass Shop at a cost of BZ\$ 9,000.00 as per contract between himself and Dmitri. All materials except for the windows and sliding doors were purchased by Dmitri or on his instructions. The Claimant was furnished with photographs of the work done. She pointed out snags in the painting on January 13, 2011. Subsequently, she was sent a photograph of the Mahogany door and she expressed her satisfaction with it, while recommending it be coated with yacht varnish.
- [23] Dmitri expected over \$25,000.00 in January 2011 he requested payment of the US\$ 7,000.00 from the Claimant. She paid him US\$ 3,500.00 with the balance to be paid upon inspection of the works performed.
- [24] In February, 2011, Phillip Jones and Leslie Jones, friends of the Claimant, visited San Pedro. After uplifting the keys to the property from the 1st defendant's office, they inspected the house. On February 8, 2011, they met with Dmitri. The discussion included an offer by Dmitri to furnish the second and third floors for the balance of \$24,900.00 although he said the quality of the finish would be

lower than specified in the agreement. The Claimant stated that she was advised not to pay the balance of US\$ 3,500.00 to Dmitri.

PLEADINGS

- [25] The Claimant commenced suit by Claim Form filed on 2011 with Statement of Claim. The Defendants acknowledged service and filed a Defence. An Amended Claim Form was filed on November 18, 2011 with an Amended Statement of Claim. It was alleged that Dmitri and Ricardo acted as agents of the 1st Defendant in the purchase of the property which the Defendants admitted in their Amended Defence filed on December 1, 2011. The Claimant further averred that by virtue of what was displayed at the bottom of their emails both Dmitri and Ricardo were working for and on behalf of the 1st Defendant. Reference was made to Ricardo's email of March 7, 2010.
- [26] It was averred in the Amended Statement of Claim that the email of April 22, 2010 from Ricardo offering to renovate the property was accepted with Ricardo acting as an agent for the 1st Defendant. It was pleaded that the 1st Defendant did not indicate to the Claimant that Ricardo was not one of its agents or was acting outside of his authority, therefore the Claimant understood that both Ricardo and Dmitri had ostensible authority to act on behalf of the 1st Defendant. It was also stated that at all material times, the 1st Defendant knew that Ricardo was indicating to all clients that he was acting on behalf of the 1st Defendant by virtue of his business card and the display at the end of his emails.
- [27] The Claimant complained that there was little work done on the renovations after the two instalments of 10% of the contract price were transferred into the 1st Defendant's escrow account. The work done was estimated at US\$ 7,000.00. It was also situated that under the Second Agreement of November 10, 2010 some of the renovation works were not completed.

- [28] The Claimant pleaded that the Mutual Release was not prepared as a Deed nor was there any consideration given to the Claimant, hence it was of no effect and unenforceable. The sum of US\$ 61,750.00 was claimed as being unaccounted for by the 1st Defendant having been demanded and not returned by the 1st Defendant. The Amended Claim also sought interest and costs.
- [29] In the Amended Defence, the 2nd Defendant admitted providing escrow services to the 1st Defendant as well as generally. The 1st Defendant responded that Dmitri communicated with the Claimant in relation to the purchase/sale of the property but that he had no communications with her in relation to the renovations to the property until after the agreement with Ricardo for the renovations was not performed. In relation to the email, of March 17, 2010, it was clarified that Ricardo had stated that Dmitri had instructed him to answer the questions she had and he did not state that Dmitri had instructed him to assist with the sale.
- [30] It was denied that Ricardo had acted as an agent for the 1st Defendant for the purpose of renovating the property or in the agreement to do so as all discussions were with Ricardo in his personal capacity. Any arrangement between the Defendants and the Claimant for the renovation of the property was denied. The Defendants limited their involvement to the release of funds by Dmitri as an agent the 2nd Defendant from the escrow account. It was denied that the 1st Defendant was in the business of a construction company or renovation of its client's homes. The 1st Defendant denied failing to complete the renovations and asserted that the agreement to renovate the Claimant's property was between the Claimant and Ricardo.
- [31] The 1st Defendant said that by the Release, the Claimant promised to release the 1st Defendant from liability, upon which premise the 1st Defendant has relied and acted to its detriment. It was urged that both documents of November 10, 2010 ought to be read together.

- [32] The 1st Defendant said that it had fully performed its obligations under the Second Agreement and had shown its bona fide by carrying out additional renovation works. It was denied that the Claimant is entitled to the return of US\$ 61,750.00 or any part thereof by virtue of the Release and in the performance of the Second Agreement.
- [33] By Amended Counterclaim, the 1st Defendant claimed for specific performance of the Second Agreement dated November 10, 2010 and damages of US\$ 3500.00 being the balance owed on the said Second Agreement. In the alternative, the 1st Defendant claimed a set-off of all sums expended pursuant to the terms of the Second Agreement.
- [34] The parties joined issue on the Claim. In the Defence to the Counterclaim it was asserted that notwithstanding the terms of the Second Agreement the 1st Defendant was nevertheless bound by the first Agreement with the Claimant. The counterclaim was denied and it was averred that the work done by the 1st Defendant under the Second Agreement was of sub-standard quality and in any event, the terms of the Second Agreement were not completed by the 1st Defendant, hence the Claimant's refusal to pay the balance of US\$ 3,500.00.
- [35] Upon an application by the Claimant which was consented to by the Defendants, the Court appointed International Environments Ltd. as an expert. Pursuant to the Order of Court, the expert submitted a report dated March 30, 2012 by its Carlo Arguelles on April 27, 2012, the Defendants submitted questions to which the expert responded on May 2, 2012.

THE ISSUES

[36] Having regard to the averments in the pleadings, the following issues emerged for the determination of the Court:

1. Whether Ricardo was an agent of the 1st Defendant capable of entering into an agreement with the Claimant to renovate her house.
2. If so, whether any monies were due to the Claimant upon the renovation agreement.
3. Whether the Mutual Release is valid and enforceable by the 1st Defendant against the Claimant.
4. Whether the 1st Defendant is entitled to specific performance of the agreement of November 10, 2010.

WAS RICARDO CAVERAS AN AGENT OF THE FIRST DEFENDANT FOR THE PURPOSES OF THE RENOVATION AGREEMENT?

[37] The position of the 1st Defendant was that Ricardo was a broker associated with the 1st Defendant and this status did not render him capable of contracting on behalf of the 1st Defendant. In so submitting, the 1st Defendant said that since it is a corporation, it can only act through agents and was further limited by its incorporation documents which are available for public inspection (See: Chitty on Contracts 29th ed, Vol II at para. 31-057)

[38] The Claimant's main plank was that, at all material times, Ricardo Caveras was an agent acting on behalf of the 1st Defendant when the agreement for the renovation work was entered into with the Claimant. Learned Counsel submitted that even if Ricardo was not considered to have actual authority, he would have had apparent or ostensible authority to act on behalf of the 1st Defendant in respect of all matters.

- [39] It is fundamental that the authority conferred by a principal on an agent may be express or implied from the conduct or circumstances surrounding the relationship of the parties. On the facts presented in this case, the Claimant referred to an email of March 17, 2010 as evidence of Dmitri commending Ricardo to her to assist her with the sale. Upon a reading of the email this was not an accurate representation of its content. As set out in paragraph 5 of the Amended Defence, it was stated by Ricardo that he had been informed that the Claimant had some questions which he offered to answer. It was never said that Dmitri asked Ricardo to answer the questions far less did Dmitri so state himself. It was also to be observed that before that email, the Claimant was already in discussions with Ricardo about the renovation of the building on the property, as evidenced by the email of March 10, 2010
- [40] The issue then was whether there was ostensible authority for Ricardo to act as agent for and contract on behalf of the 1st Defendant. The general principle is stated at Article 72 in Bowstead and Reynolds on Agency, 19th ed. At para. 8-013 as follows:

“Where a person by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation; to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.”

The classic case of **Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd. [1964] D.B. 480** was cited by Learned Counsel for the Claimant. The dictum of Diplock, LG (as he then was) highlighted the concept of a representation by the principal in these words:

“An ‘apparent’ or ‘ostensible’ authority... is a legal relationship between the principal and the contractor created by a representation made by the principal to the contractor, intended to be and in fact acted upon by the

contractor, that the agent has authority to enter or behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal for himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contact."

The question to be decided was whether the 1st Defendant is bound as the principal with Ricardo as his agent.

[41] The Claimant relied upon the fact that the business card and email of Ricardo displayed the name, office address and telephone number of the 1st Defendant. The Corporate logo was displayed on the business card. Further, the Claimant was taken to the 1st Defendant's office by Ricardo and there she met Dmitri whose business card described him as the broker/owner. Other witnesses testified as to Ricardo being associated with the 1st Defendant as a sales person in the case of Dennis Hyde and as a member of the team as he was described by Eden Crichton in his email to the Claimant.

[42] Dmitri did not resile from the fact of Ricardo being a broker associated with the 1st Defendant for the sale and purchase. Eden Crichton is testimony was consistent with that of Dmitri when he said that Ricardo was an associate and an independent agent like him although they took turns to man the office as per a schedule. Instructions were taken from Dmitri as the broker in as much as he and Dmitri sold properties for the 1st Defendant.

[43] From the totality of the evidence, there is no reference to any conversation or written communication between the Claimant and Dmitri as to the renovation works before the email of October 23, 2010 from the Claimant. It is significant that in order to respond, Dmitri had to make inquiries and conduct research to ascertain the status of the renovation works as per the offer embodied in Ricardo's email of April 22, 2010 accepted by the Claimant. It seems to me to be quite apparent that the scope of Ricardo's authority was restricted to the sale/purchase transaction with the Claimant. As previously iterated, the matters relating to the closing were assigned to one Alberto. Further, the business of Coldwell Banker, which the Claimant was insistent on describing as internationally recognized is that of real estate. There was no evidence to suggest that the 1st Defendant was in the business of renovating houses. All correspondence relating to the renovation works flowed between the Claimant and Ricardo. The case of **Panorama Developments (Guildford) Ltd v Fidelis Furnishings (Fabrics) Ltd [1971] 2 D.B. 711** laid over by Learned Counsel for the Claimant can be distinguished. On the basis that in the present case, Ricardo's emails described him as broker/associate in contrast to the agent in the cited case describing himself as Company Secretary on the defendant's letter-head.

[44] The only matter that incurred some pause was the fact of the Claimant being instructed to wire the deposit and instalments pursuant to the agreement to the account of the 2nd Defendant. However, this was easily answered in the Amended Defence and by Dmitri to the effect that the 2nd Defendant offered escrow services not only to the 1st Defendant but generally. The course of conduct was that Ricardo had sought Dmitri's prior consent to have the moneys wired to the 2nd Defendant's escrow account and thereafter Ricardo made requests to Dmitri for disbursements. Accordingly, the involvement of the 2nd Defendant was merely as a stakeholder for the funds wired by the Claimant.

[45] Taking the evidence in the round as commended by **Earl Cairns, LJ. In Hussey v Home-Payne (1879) 4 App. Cas. 311** at p. 316 the Claimant has failed to

discharge the burden of establishing that Ricardo acted as an agent for the 1st Defendant in contracting for the renovation works. In the result, the Claimant is not entitled to the return of the sum of US\$ 61,750.00.

IS THE MUTUAL RELEASE ENFORCEABLE AGAINST THE CLAIMANTS?

[46] The Learned Counsel for the Claimant contended that the document headed 'Mutual Release' signed by the Claimant and Dmitri representing the 1st Defendant was not valid and not enforceable for want of consideration. It was submitted that since the release required consideration and it was not in the form of a deed, consideration must flow from the 1st Defendant as promisor to the Claimant as promisee.

[47] It was urged by Learned Counsel for the defendants that, assuming the existence of the renovation agreement between the 1st Defendant and the Claimant, the conjoined effect of the Mutual Release and the Residential Dwelling Finishing Agreement and Release from Liability (the Second Agreement) was that the renovation agreement was terminated and all rights and obligations thereunder terminated and the Second Agreement amounted to a new agreement with obligations imposed on the Claimant and the 1st Defendant. It was argued that the consideration for the release was the performance by the 1st Defendant of the Second Agreement as both documents are to be read together. I wholly accepted this proposition which was supported by the learned authors of Chitty on Contract 31st ed., Vol.1 at para. 12 & 08. The passage reads:

“Extrinsic evidence is also admissible to prove the true consideration, where no consideration, or a nominal consideration, has been stated, where the expressed consideration is in general terms or ambiguously stated, or where the consideration is inaccurately recorded. Also an additional consideration may be proved, provided it does not contradict the stated consideration.”

[48] Further or alternatively, it was submitted that the consideration was by virtue of the 1st Defendant being required under the Second Agreement to perform acts which were not contained in the initial agreement, namely; the indemnifying of the Claimant against liability to contractors/suppliers; the purchase and spreading of ten (10) truck loads of sea sand on the property; and the planting of one (1) foot high palm trees on the property. In addition, the 1st Defendant gratuitously undertook to and did plaster the ceiling of the second floor and to construct a fort of concrete blocks to prevent erosion of the sand. Accordingly, the second Agreement amounted to an entirely new contract which I accept to be the case. The position was therefore distinguishable from the principle enunciated in **Stilk v. Myvick (1809) 2 Camp. 317** which referred to by the Court of Appeal of England in **Williams v Roffey Bros & Nicholls (Contractors) Ltd. [1990] 1 All E.R. 512.** However, having regard to the finding of absence of a contractual relationship between the Claimant and the 1st Defendant for the renovation works, this matter has only been dealt with for completeness. Plainly, this was an awkward situation for both the Claimant and the 1st Defendant in that Ricardo had been arrested and taken away from San Pedro leaving the Claimant's funds depleted and the renovation works incomplete. Dmitri expressed that he wanted to assist the Claimant out of her predicament which gave rise to the Mutual Release and the Second Agreement. Obviously, Dmitri wanted to act prudently to avoid any future dispute as to liability on the part of the 1st Defendant.

IS THE 1ST DEFENDANT ENTITLED TO SPECIFIC PERFORMANCE?

[49] The Claimant relied upon the expert report to urge the Court to find that the 1st Defendant had failed to complete the works it was obliged to perform under the Second Agreement and that the work done was of sub-standard quality. The counterclaim sought payment of US\$3,500.00 unpaid under the Second Agreement.

- [50] The report dealt with the existing electrical installation and the existing rough-in of the plumbing. These matters were referable to the original agreement and did not fall within the purview of the Second Agreement. The expert took issue with the plastering and the painting of the interior and stated that most of the plastering was complete and there were only two coats of primer and no interior paint. However, in cross examination, he conceded that it was possible that there may have been three coats of paint applied. As to the exterior of the building, he found that the plastering was complete as was the painting.
- [51] As to the exterior windows and sliding doors installed by Immer Campos, Mr. Arguelles reported that the existing windows were of poor quality, not PVC coated and not of tempered glass. In his testimony he stated that the windows were improperly installed to open up and down as against from side to side. This was disputed by Mr. Campos who said he supervised the installation of the windows which were designed with spring mechanisms to move up and down. He also, explained why it was necessary to cut the cement wall for some of the windows to accommodate the locking mechanism. It was conceded that some plastering was required in the aftermath of the installation.
- [52] The sliding doors were also described as being of low quality and not installed properly. The expert was unable to open the doors but he accepted that the elements may have contributed to the state of the doors given that installation, had taken place some eighteen (18) months before. The expert recommended that all the 20 windows and the two doors be replaced. The Court heard from Eden Crichton and Immer Campos both of whom said that the windows and doors were all opening and closing satisfactorily when installation was completed.
- [53] Dmitri's email of November 2, 2010, to the Claimant cautioned that in helping to finish the house all finishes would be of standard quality as against luxury items though not of poor or low quality. In assessing this matter, the Court had regard to

the photographs of the building and the evidence of Immer Campos that he had installed windows and doors throughout San Pedro and in Belize City. In addition, I found Eden Crichton and Immer Campos to be credible witnesses who were forthright in rendering testimony. The evidence conclusively pointed towards the windows and doors being of standard quality and to the fact that the windows and doors were over time affected by virtue of the building being located near the ocean at the mercy of the weather and being unoccupied for an extended period.

[54] The expert stated that there was no sea wall constructed on the property. This was an obvious misunderstanding as Dmitri explained that a fort of cinder blocks were erected and covered with sea sand to act as a barrier to prevent erosion.

[55] As to the entrance door which was to be of mahogany and coated with yacht varnish, a photograph of the door that was sent to the Claimant was exhibited. The Claimant had expressed satisfaction with it. The expert described it as a Mennonite door that was unsuitable for the location and overall cost of the house. He stated that the lock set was basic and the installation was incomplete as the door rubbed on the ground when opened. The latter statement belied the photograph that the expert himself tendered which showed a distinct gap between the bolts of the door and the floor. This was an obvious case of the expert recommending a high-end item as against standard quality.

[56] The Court noted that the expert estimated the cost to complete the plastering around the window frames and glass doors at BZ\$ 3,500.00. This was not challenged and there was no denial that such work had to be done. This amount ought therefore, to be deducted from the balance owing on the second Agreement. I therefore award the sum of US\$ 1,750.00 to the Claimant on the Counterclaim.

ORDERS

- [1] The Claim stands dismissed with prescribed costs to the Defendants as per value of the Claim.
- [2] Judgment for the Claimant on the counterclaim for the sum of BZ\$ 3,500.00 with no order as to costs.

DATED this 21st day of October , 2017.



KENNETH A. BENJAMIN
Chief Justice of Belize