IN THE COURT OF APPEAL OF BELIZE AD 2016

CIVIL APPEAL NO 8 OF 2016

CAYE INTERNATIONAL BANK LIMITED
JOEL M. NAGEL Appellants

v

TOMMY LYNN HAUGEN Respondent

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BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Justice Christopher Blackman	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

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F. Lumor SC, and S. Pitts for the appellant.
E. Courtenay SC, and P. Banner for the respondent.

2 November 2016, 2 November 2018.

AWICH JA

[1] On 28 January 2018, at the end of the trial of this case in the Supreme Court, the learned trial judge, Abel J, made the following orders.

> "… UPON THE DEFENDANTS withdrawing their Counter-Claim and conceding that forfeiture of the Claimant's shares, the crediting of the account of Pacific Paradise Limited with the value of the Claimant's shares, and the withdrawal of US$10,000 from the Claimant's bank account held at

the First Defendant and crediting the account of Pacific Paradise Limited therewith were all unlawfully done and in breach of contract;

IT IS HEREBY ORDERED AND ADJUDGED that:

1. The Defendants shall pay damages in the sum of US$200,655.00 to the Claimant for fraudulent misrepresentation and breach of contract;
2. The Defendant shall pay the sum of US$44,100.12 to the Claimant being interest at the rate of 6% from 31st May 2012 to 28th of January 2016 on the sum of US$200,655;
3. Interest shall continue to accrue on the said sum of US$200,665 at the rate of 6% per annum until payment of the sum of US$200, 665 by the Defendants to the Claimant;
4. The Defendants shall pay the sum of US$2,482.03 to the Claimant being interest at the rate of 6% from 9th of January 2012 to 28th of January 2016 on the sum of US$10,202.03; and
5. The Defendants shall pay costs to the Claimant in the sum of $75,000."

The Grounds of Appeal.

[2] On 22 February 2016, the defendants, now the appellants, (1) Caye International Bank Limited and (2) Joel M. Nagel, appealed by filing a notice and grounds of appeal. The grounds were verbose, extending over seven pages. They were more of speaking notes of counsel than grounds of appeal.

[3] Lest I misreport them, I set out the grounds of appeal in quotation below:

"(1) The Learned trial Judge failed to apply section 8 of the Evidence Act, Cap. 95, Rules 14.4 and 16.3 of the Civil Procedures Rules when the Appellants in their Witness Statements made formal admissions that:

(a) The Respondent is a member/shareholder of the First Appellant and holds 3,417 shares in the capital of the First Appellant; and

(b) That the sum of US$10,201.28 withdrawn from the bank account of the Respondent by the First Appellant had been "fully restored".

Particulars

[i] The Learned trial Judge should have entered judgment for the Respondent on the claim for breach of contract and proceeded to assess damages, if any.

[ii] Having made the formal admissions, there was no dispute or *lis* between the parties regarding the shares and the amount withdrawn to be tried by the court.

(2) (a) The Learned trial Judge erred in law and misdirected himself by failing to put the Respondent to his election of the claim to be tried, the Respondent having –

[i] pleaded his two (2) causes of action, fraud/,misrepresentation and breach of contract, in the alternative.

[ii] acknowledged at the commencement of the proceedings breach of contract and fraud/misrepresentation, causes of action in this particular case, are mutually exclusive.

b) The Respondent cannot assert being a shareholder/member of First Appellant Bank and at the same time raise fraud/misrepresentation in respect of the same shares.

(3) The Learned trial judge erred in law by making orders against the First Appellant Bank when no finding of fraud was made or could have been made by the Court against the Bank.

(4) The Learned trial Judge failed to pay any regard to the fact that the Respondent when formulating its causes of action of fraud/misrepresentation failed to plead or state –

(a) the Appellants' notice or knowledge of the falsity of the alleged facts;

(b) when the Respondent became aware or had knowledge of the facts giving rise to his right to rescind the arrangement made with the Appellants;

(c) whether he suffered any loss or damage as a result of the alleged fraud/misrepresentation.

(5) The Learned trial Judge erred in law and misdirected himself by accepting the statement in the annual summaries filed in the Companies Registry as evidence of fraud/misrepresentation that the Respondent is or was not a member or shareholder of the First Appellant Bank. That the Respondent became "shareholder/member" on 8th September, 2015.

Particulars

(a) The Learned trial Judge should have averted his mind to and apply sections 26 and 33(4) of the Companies Act, Cap. 250 and paragraph 6 of the Witness Statement of Dean Roches.

(b) In paragraphs 28, 29, 30, 35 and 36 of his Witness Statement, the Respondent admitted that he was a shareholder/member of the First Appellant, and attended shareholders meetings, etc.

(c) In paragraph 1, 10, 13 and 14 of the Respondent's Amended Statement of Claim he admitted that he was an investor, customer and shareholder of the First Appellant Bank and that the Bank sought to "forfeit" his shares wrongfully.

(6) (a) If the Respondent had a right to rescind the arrangement made with the appellants, he lost that right, having had knowledge of the facts giving rise to the said right to rescind and thereafter further performed the contract/arrangement with the Appellants.

(b) The Respondent failed to give any notice of his intention to rescind the arrangement made the Appellants.

(7) The Learned trial Judge erred in awarding the sums of US$200,655.00 and US$10,202.03 (withdrawn from the account of the Respondent) against the Appellants as general damages for fraud/misrepresentation.

Particulars

(a) The Respondent did not plead the said sums as special damages.

(b) Damages were at large to be assessed by Court.

(c) There was no evidence before the Court upon which damages would have been assessed.

(d) There was no evidence adduced upon which the Court could have assessed damages.

(8) The Learned trial Judge erred in accepting the sum of $75,000.00 claimed by Counsel for the Respondent as costs and failed to do an assessment of the costs of the proceedings in accordance with Rule 64.11.

(9) The Learned trial Judge erred by failing to distinguish between approval of an application for a bank licence as distinct from the issue or grant of the actual bank licence.

(10) The Learned trial Judge misdirected himself by failing to consider and appreciate all the evidence before him that the arrangement between the Respondent and the Second Appellant was in effect the promotion of a proposed bank.

(11) The Learned trial Judge misdirected himself in holding that the statements made by the Appellant were fraudulent and not substantially true given all the evidence before him.

(12) The Learned trial judge misdirected himself in finding that Central Bank did not "finally approve" Caye Bank as a Class A bank and therefore the said statement was made fraudulently.

(13) The Learned trial Judge failed to appreciate the high burden of proof on the Respondent in proving fraudulent misrepresentation and that the evidence failed to rise to the high level of proof required.

(14) The Learned trial Judge utterly failed to recognize that the claim of fraudulent misrepresentation made in 2002 was statute barred as knowledge or the fraud came to the attention and or ought reasonable to have come to the attention of the Respondent in 2003, and the claim was brought in 2014, well after the limitation period of six years.

(15) The trial judge's findings are unreasonable and against the weight of the evidence.

[16] The Appellants will seek an order that the decision, subjects of the appeal, be set aside and the Appellants be allowed the costs of appeal."

[4] Despite the verbosity, we were able to discern two objectives in the appeal that could be of practical consequences to the appellants. We think they are the reasons for the appeal that otherwise has been propped by mostly procedural appeal points. The first objective is that, the appellants would like this Court to set aside order No. 1 to the extent that it states that: "the defendants shall pay damages…for ***fraudulent misrepresentation***…" They would like this Court to expunge any mention of fraud on their part from the judgment and the judgment order of the trial judge. The importance of that is that, fraud is a ground for disqualifying a person from owning a share in, or holding a position of director of a bank or financial institution in Belize.

[5] The second objective is that, if an order that damages are to be assessed is substituted for the order made to pay damages in the sum of US$200,655.00, it will be the appellants' case that, the correct award of damages, based on the market price of the shares, may be less than the sum of US$200,655.00 awarded by the judge. It was more of a hope.

[6] On the evidence and the law, we concluded that, the trial judge did not err in any major ways in the judgment and orders that he made. In our view, the payment of $200,655.00 ordered to be paid by the appellants should be regarded as payment returning the purchase price that the respondent paid for the purchase of shares in Caye International Bank Limited, the first appellant, on a contract that has been rescinded on the ground of fraud, or on a contract that has failed because the consideration from the appellants failed. Further, the appeal against the order for costs is only a minor appeal point. We substitute the order that, costs of the appeal shall be taxed, if not agreed. The respondent conceded this.

The Evidence *- General.*

[7] Generally, this Court will not interfere with a finding of fact made by a trial judge on the evidence. The outline of the evidence is made here for the purpose of identifying and examining the so many transactions that are the subjects of the claim of fraud , or alternatively, breach of contract, for which the judge held the appellants liable; and of course, for the purpose of identifying any valid appellate ground for interfering with any finding of fact.

[8] In the trial court, the claimant, now the respondent, Tommy Lynn Haugen, testified to prove his claim. He was the only witness for the claimant. The defendants, now the appellants, (1) Caye International Bank Limited and (2) Joel M. Nagel, called Mr. Dean Roches, the Chief Operations Officer of the first appellant. He was the only witness for the defendants/appellants. The shortcoming there was that Mr. Roches was not yet in the employment of the first appellant when the transactions in question took place. Learned counsel Mr. R. Williams SC, for the defendants/ appellants, had intended to call the second defendant/appellant, himself, as a witness for their case. His witness

statement had been filed and served on the claimant. However, Mr. Nagel did not attend court on the trial date. He did not send any explanation for his absence. Mr. Williams SC, informed the trial judge that, Mr. Nagel had not contacted him to provide explanation for his absence, counsel had expected Mr. Nagel to attend at the court and testify.

[9] The record of the proceedings does not show that, the trial judge ordered that the witness statement of Mr. Nagel be included in the proceedings, notwithstanding his failure to attend court. We therefore assumed that, the general rule at ***Part 29.8 (1) of the Supreme Court (Civil Procedures) Rules 2005***, which requires that a party who has served a witness statement must call the witness to testify orally, if the party wishes to rely on the content of the witness statement, was applied, and that, the judge accordingly excluded Mr. Nagel's witness statement from the evidence. It was wrong that the statement was included in the record of appeal.

[10] Although in all only two witnesses testified, the evidence was extensive. It covered many transactions between the parties. Many documents were relied upon. The documents were admitted by agreement of the parties. A summary of the evidence follows.

The Evidence*- the parties and relevant entities*.

[11] First the evidence of the identity of the parties. The first appellant, Caye International Bank Limited, is an international bank, also referred to as an offshore bank. It was incorporated in Belize on 14 August 2003. Its address was given as, Marine Towers 4th Floor, Suit 402, Newtown Barracks, Belize City, Belize, Central America. It was granted an, "Unrestricted A Class International Banking Licence," under the International Banking Act, Cap. 267, Laws of Belize, by the Central Bank of Belize on 29 September 2003. I shall refer to Caye International Bank Limited simply as Caye International Bank, or the first appellant.

[12] The second appellant, Mr. Joel M. Nagel, is said to be an attorney in the USA. His address was given as, No. 409 Broad Street, Suite 204, Sewickley, Pennsylvania 15143, U.S.A. He was a promoter of Caye International Bank, and may have become a director and chairman of its board of directors. He first met Mr. Haugen, the respondent, in Belize

in January 2000, when Mr. Haugen came to Belize in a group with others, to look for land to buy for investment. Mr. Nagel advised Mr. Haugen not to buy land in Belize yet, there was land available in Nicaragua. I shall sometimes refer to Mr. Nagel simply as the second appellant.

[13] In his testimony, Mr. Haugen described himself as: "a golf-course architect, designer and builder, and self-employed". His address was given as 2856 29th Ave. No. 112 Birchwood, WI 54817, U.S.A. I shall sometimes refer to Mr. Haugen as the respondent.

The Evidence *- the transactions*

[14] In March or April 2000, at the invitation of Mr. Nagel to inspect about 2,300 acres of land that a group (including himself) intended to purchase in Nicaragua, Mr. Haugen went to Nicaragua and met Messrs Nagel, Cobb and Richard White. They inspected the land, and the three men sought the opinion of Mr. Haugen about whether the land was suitable for golf-courses. He advised that it was suitable. He was requested and returned to Nicaragua on the occasion of the purchase of the land. On this occasion discussions regarding the transactions, the subjects of this appeal, and associated transactions began.

[15] In the course of the discussions Mr. Nagel informed Mr. Haugen that, as part of Mr. Nagel's law practice, he created offshore trusts. In 2001 Mr. Haugen instructed Mr. Nagen to create an irrevocable trust for his family. In February 2002, Mr. Haugen received from Mr. Nagel a certificate of registration of a trust, dated 2 January 2002, acknowledging that, a settlement deed dated 15 December 2001, made between Tommy M. Haugen and Phillis M. Haugen as settlors, of the one part, and Georgetown Trust Limited as trustees, of the other part, was registered under S. 63 of the Trust Act, No. 5 of 1992, Laws of Belize. Mr. Nagel was chairman of the board of directors of Georgetown Trust Limited.

[16] On 17 April 2002, Mr. Nagel advised Mr. Haugen to invest in a hedge fund known as Freedom Fund. Mr. Haugen agreed and Georgetown Trust Limited invested US$400,000.00 from the trust fund in Freedom Fund. Also a total of US$600,000.00 from

Georgetown trust fund was invested in a deposit bank account in a domestic bank in Belize.

[17] On 14 May 2003, Mr. Nagel wrote to Mr. Haugen to tell him about, “a very special and exclusive opportunity available to only a few of my clients and friends,” to invest in shares in an international bank created by converting a very successful mortgage company incorporated in Belize by Mr. Nagel five years earlier, into the international bank. The minimum investment was 1,715 shares, and the maximum was 3,430 shares, at US$58.50, that is, a minimum of US$100,327.50, up to a maximum of US$200,655.00.

[18] The Letter stated as follows:

“**NAGEL & ASSOCIATES, LLC**
ATTORNEYS AT LAW

May 14, 2003

Tommy L. Haugen
1166 Harrison Street
Shakopee, MN 55379

Re: Caye Bank International, Ltd.

Dear Tommy:

You have known me to be someone quite active in business affairs in Belize on behalf of my clients for over a decade now. I would like to tell you about a very special and exclusive opportunity available to only a few of my clients and friends.

I started a mortgage company in Belize with a number of friends and clients over five years ago. The business has done quite well financing other folks’ dreams of owning a house/condo in paradise, while we earned a tidy profit for ourselves.

Two years ago our board of directors approved a plan to convert our mortgage company into a Class A international bank. We believed we could be even more profitable in our pursuits if we had the ability to accept deposits and generate loans with those deposits in addition to using our own capital.

The normally long and bureaucratic process of becoming a bank was further slowed down by September 11, 2001, the wars in Afghanistan and Iraq, and the enactment of the US "Patriot Act" and it's impact on the global financial system. The changes brought about by those events found their way to tiny Belize causing their entire financial system to go through an upheaval.

Despite changes brought about by global events and the highly regulated nature, international banking, (sometimes still call offshore banking), I believe that our venture is one of the most highly lucrative business opportunities in the world. Last year our main competitor in Belize paid out 80% of its initial capitalization as "dividend" and still managed to increase its overall capitalization by 300% (in one year!!!).

Our group, Caye Bank International, Ltd. has put together a great team. Our President is a 35 year bank veteran who retired a few years ago after selling his bank to one of the country's largest banks for $17 billion (that is "B"). Several Directors have major banking experience as directors, and yours truly has been elected Chairman of the new bank's Board. I believe that our innovative products and services will become industry leaders almost immediately.

Our application for a class A licence was finally approved last month by the Belize Central Bank. We are presently working through a litany of pre-opening conditions in order to open our doors. One of those conditions requires an increase in our "paid up" initial cash capital to $3 million. Although our overall capital will be around $3.5 million, cash component is approximately half of that figure with the rest in non-liquid assets such as mortgages and other investments.

This requirement has created an incredible opportunity for just a few sophisticated and accredited investors who are able to act immediately. If you think you might like to become part of the Caye Bank Group, you will have the ability to join our team literally with the ball on the goal line. Because we need additional start-up capital you will get to save the time necessary to work through the banking process and become an owner in what I believe will become an international cash cow.

If you think that this would interest you, let me know and I will get an Executive summary, Subscription Agreement and background information questionnaire off to you at once. The personal disclosure required by the Central Bank is fairly substantial, so if you are adverse to providing such information then this, investment opportunity is not for you. Under the bank current by-laws the minimum subscription amount is $100,327.50 (1,715 shares at $58.50 per share or 2.49%) and the maximum investment amount is $200,655.00 (3,430 shares at $58.50 per share or 4.9%).

We anticipate that we will close out this funding round during June of this year, so if you are interested, please contact me right away. I believe that this is truly an opportunity of a lifetime.

Sincerely,

Joel M. Nagel

JMN/mea."

[19] At the bottom of the letter there was a handwritten note signed also by Mr. Nagel. It stated: "Tommy, I thought this might also be a good way to get your offshore structure moving forward."

[20] In May 2003, Mr. Haugen informed Mr. Nagel that, he was interested in investing in Caye International Bank. Mr. Nagel sent the proposed subscription agreement of Caye International Bank to Mr. Haugen. A memorandum and articles of association was not included. On 18 July 2003 Mr. Haugen sent US$100,000.00, and on 11 August 2003 sent US$100,655.00 for the purchase of the maximum 3,417 shares.

[21] By a letter dated simply November 2003, Mr. Nagel invited Mr. Haugen to an annual shareholders meeting on 17-21 March 2004. By a letter dated 12 January 2004, Mr. Haugen received a share certificate in his name dated earlier on 20 September 2003, for 3,417 shares, and a copy of class A licence of Caye International Bank dated, 29 September 2003.

[22] By a letter dated 19 November 2004, Mr. Haugen received a second letter of invitation to an annual shareholders meeting to be held on 22 March 2006, a year and four months in the future. After this letter Mr. Haugen received some letters of invitation to annual shareholders meeting only upon making inquiry.

The Evidence *– the claim founded on fraudulent misrepresentation.*

[23] The main evidence which Mr. Haugen claimed led him to discover that, the appellants made fraudulent, or reckless representations in respect to Caye International

Bank is this. Following the purchase of land in Nicaragua, Mr. Haugen was engaged by Gran Pacifica to design golf courses and work with the developers of the land. The project was a business known as Pacifica Golf Associates, it was a corporation. Another company known as Exotic Caye International Limited, referred to as ECI, was the holding company of Gran Pacifica and another corporation, Exotic Caye Mortgage Corporation Limited. ECI was "owned" which meant controlled, by Mr. Nagel and Mr. Cobb. There was evidence that at least Exotic Caye International Limited and Exotic Caye Mortgage Corporation Limited were Bahamian corporations.

[24] Part of the golf course and residential lots were developed, and Gran Pacifica sold 100 lots of it. But the project was said to need more money to carry out more development. Mr. Cobb suggested that, a loan be obtained from Caye International Bank in Belize. A company, Pacific Paradise Limited, was incorporated in Belize for the purpose of obtaining the loan. Mr. Haugen was made a director of the company. On 11 June 2009, Caye International Bank granted US$299,750.00 loan facility to Pacific Paradise Limited. Mr. Nagel was chairman of the board of directors of Caye International Bank at the time.

[25] Security for the loan was five land lots in the project, owned by Gran Pacifica, and the equipment owned by Pacifica Golf Associates. Mr. Haugen, acting as a director of Pacific Paradise Limited, signed a promissory note on behalf of Pacific Paradise Limited, promising to pay the loan. His signature was penned above the words, "Pacific Paradise Limited, Director."

[26] Pacific Paradise Limited defaulted in the payment of the loan. On 29 June 2011, Mr. Haugen, received an email letter of demand from the bank for the immediate payment of the full amount owing on the loan, US$257,270.85. He was addressed as, Mr. Tommy Haugen, President, Pacific Paradise Limited.

[27] On 23 September 2011, Mr. Nagel, writing on behalf of Caye International Bank, sent an email to Mr. Haugen and Mr. Eddie Littlefield in which he informed them that, the bank was "working through its default procedures, … This includes the sale of Tommy's shares in the bank."

[28] Mr. Haugen, by email of 24 September 2011, objected to the Bank taking his shares in satisfaction of the loan owed by Pacific Paradise Limited. He explained that, the loan was not made personally to him, and that, he did not provide any personal security for the loan. He notified the bank that, he would take legal action if the bank took his shares and money on his bank account at the bank. He further demanded that, as a shareholder of Caye International Bank, he be given the names of all the directors of the bank. It is not clear whether the Bank obliged. The 3,417 shares were taken by Caye International Bank anyway. The bank stated that, the proceeds of the sale of the shares were to be applied to pay the loan of Pacific Paradise Limited.

[29] Mr. Haugen also demanded that he be given the Memorandum and Articles of Association which he had not been provided with at the time he was invited to take shares. The Memorandum and Articles were never given to him. Mr. Haugen stated that since he paid for the shares in 2003 he never received any dividend on the shares, that would be a period of eleven years to November 2014 when he made the court claim.

[30] Then Mr. Haugen instructed an attorney to ascertain whether he was truly a shareholder in Caye International Bank. An extract from the official record at the Company Registry Office as at 1 October 2013, included a, “Return of Allotments” of shares, presented and filed at the Registry on 11 April 2013. The name of Mr. Haugen was not included on the Return of Allotments. Mr. Nagel and Mr. Cobb were included. There were no return of allotments for all the years before 2013.

[31] Mr. Roches, witness for the appellants, testified that, the Bank did not file annual returns of allotments of shares for all the years before 2013 by error, and that, he was unable to explain the error. He said that he corrected the error by causing the return of allotments presented for filing on 11 April 2013, to be filed, and that thereafter returns of allotments for all the years were filed.

[32] Mr. Roches was employed by Caye International Bank on 3 January 2013. He conceded that he could not speak about matters before that date. Further, he said that he inspected the Register of Shareholders (in the office of the company), and that the

name of Mr. Haugen was on the Register. He was not the one who wrote the name on the Register. He did not produce the Register in court though, so this would be hearsay.

[33] Among the documents agreed to by the parties for trial there was a letter dated, 20 April 2004, from the managing director of Georgetown Trust, to the Central Bank of Belize, requesting that, permission be given to persons on a list attached, to be subscribers to the shares of Caye International Bank. The name of Mr. Haugen was on the list. A formal application form signed by Mr. Haugen was also in the bundle. There was no reply from the Central Bank of Belize among the documents agreed, and none was produced at the trial.

[34] Out of the above evidence of the transactions at issue, Mr. Haugen specified in particular, certain communications from Mr. Nagel, the second appellant, as false representations. Mr. Haugen said that he acted on those false representations by paying a total sum of US$200,655.00 as subscription for 3,417 shares in the first appellant. The representations were the following:

> "a. The 1st Defendant would be converted from a mortgage company in business for over five years into the said 1st Defendant;
>
> b. The 1st Defendant "Caye International Bank Limited" had put together a great team, giving the appearance that the 1st Defendant had already been established.
>
> c. He [the second defendant] had been appointed Chairman of the 'new Bank's Board' even though the said 1st Defendant had not as yet been incorporated.
>
> d. The 1st Defendant's application for a Class A license was approved by the Central Bank of Belize even though the 1st Defendant had not as yet been incorporated and the Central

Bank had not yet approved a Class A license for a proposed bank;

e. The Claimant had acquired 3,417 shares in the Claimant and was a registered shareholder of the 1st Defendant. In fact, the Claimant has never been issued any shares in the 1st Defendant and was never registered as a shareholder of the 1st Defendant, and so received no return for his investment of US$200,655.00."

[35] We observe here that, the communication at e. could not have been a representation for the purpose of inducing the respondent, rather, it is a follow-up perpetuation of the representations at a, b, c and d, by making the respondent continue to believe that, a Belizean mortgage company was indeed converted into the first appellant, a bank. The communication continued to pretend (according to the respondent) that, the respondent invested in the first appellant and obtained shares in it. Whether or not the respondent became a shareholder is more relevant to the alternative claim of breach of the contract, which the appellant admitted anyway.

The Evidence *– the alternative claim for breach of the contract for the purchase of shares*

[36] The respondent also relied on his evidence outlined above regarding fraudulent representation, to prove the alternative claim of breach of the contract under which the appellants were said to have offered shares in the first appellant to the respondent who would have bought them. The claim, in the alternative, was that, the appellants would have breached the contract by wrongfully taking away the shares and crediting the bank loan account of Pacific Paradise Limited with the proceeds of the respondent's shares.

The Evidence *– the claim for breach of the contact to open bank account No. 100833.*

[37] There was a second and separate claim in contract namely, the contract that the respondent claimed that the appellants breached by wrongfully taking the proceeds of the

respondent's bank account No. 100833 under. A summary of the main evidence in respect to that contract is the following.

[38] In May 2006, Mr. Haugen opened a bank deposit account No. 100833 at Caye International Bank, the first appellant, and signed a, "depository Agreement." By 29 September 2011, he had US$10,202.03 on the bank account. On that date Mr. Haugen requested wire transfer of US$8,000.00 from this bank account. The bank did not send the money. On 31 May 2012, the bank informed Mr. Haugen that, it was closing Mr. Haugen's bank account No. 100833 as of that date, and would use the proceeds to pay the debt owed by Pacific Paradise Limited to Caye International Bank. Mr. Haugen objected on the ground that, the debt was owed on a loan for which he was not personally liable; the loan giving rise to the debt was given to Pacific Paradise Limited to which he was just a director. The bank took the proceeds of the bank account, US$10,000.00 anyway.

Determination

[39] We commence our determination by mentioning that, in the trial court and in this Court, the appellants by their counsel, admitted that, the appellants and the respondent entered into two contracts; in one contract the respondent purchased shares in the second appellant; and in the other contract, the respondent opened and kept a bank account No.100833 at the first appellant. Further, the appellants admitted that, they breached the contract under which the respondent bought shares in the first appellant; and breached the contract under which the respondent opened and kept a bank deposit account No. 100833 at the first appellant.

[40] The claim under the contract for the purchase of shares was an alternative claim to the main claim founded on fraudulent misrepresentation or negligent misrepresentation. So, the appellants were liable in the first claim, without proof by evidence, on the alternative claim for breach of the contract for the purchase of shares; and liable in the second claim, without proof by evidence, of breach of the contract for opening and keeping a bank account.

[41] Given the two admissions, this Court is no longer concerned with the question of liability for breach of the two contracts. Further, the Court is also no longer concerned with the question of redress, damages, in regard to the breach of the contract under which bank account No. 100833 was wrongfully closed and the proceeds taken. At the hearing of the appeal, the Court was informed that, the appellants had made good the wrong.

[42] However, regarding the alternative claim under the contact for the purchase of shares a question is left for this Court to decide. It is, whether the trial judge erred when he assessed and ordered payment of, "damages in the sum of $200,655.00… for fraudulent misrepresenting and breach of the contract." That one order was worded to provide one remedy for the two wrongful acts of fraudulent misrepresentation in the main claim, and breach of contract in the alternative claim. A sort of one size fits both.

[43] Further, a related question was raised, although it did not apply directly to the content, or breach of the contract for the sale of the shares. It was this: once the defendants/appellants admitted liability for breach on the contract, was the trial judge still permitted to proceed to try the claim founded on the main fraudulent misrepresentation ground when the two grounds were pleaded in the alternative?

[44] Mr. Lumor submitted that, the judge was not permitted to proceed to try the main ground. He cited s. 8 of Evidence Act, Cap. 95, and Parts 14.4 and 16.3 of the Supreme Court (Civil Procedure) Rules, 2005 in support. Our answer is that, the section and the rules are not prohibitive in their application; the judge could proceed to try the claim on the main ground of fraudulent misrepresentation in the circumstances of these proceedings, notwithstanding that, the ground of fraudulent misrepresentation and the ground of breach of contract were pleaded in the alternative, and one was admitted.

[45] According to the record of proceedings, the judge sought to enter judgments on both admissions of breach of the two contracts and end the proceedings. Counsel for the appellants/defendants agreed that judgments be entered for breach of the contracts; but in respect to the contract for the purchase of shares, he resisted the suggestion that, the respondent/ claimant would then not pursue the claim founded on fraudulent

misrepresentation and the judge would end the proceedings. Counsel asked the judge to proceed with the trial of the claim founded on fraudulent misrepresentation. The judge made repeated inquiry and got the same answer. It seems that counsel believed that the defence that, the representations pleaded as the basis of the claim founded on fraudulent misrepresentation were substantially true, would succeed, and that would clear the name of the appellants/defendants – see pages 279-280, 293,299 – 300 of the record of the proceedings.

[46] The record at pages 228 to 229 summed it up in the following exchange:

> "THE COURT: Your client is prepared to have that issue tried and run the risk of having a judgment of fraudulent representation against the bank or its subscribers, including its subscriber who is not even present to defend himself, right, to defend his position about the representation. The bank and the subscribers are prepared to run the risk?
>
> MR. WILLIAMS: D1 and D2, not the subscribers.
>
> THE COURT: The promoter sorry, who is not even here to defend themselves. He is prepared to take the risk of having a trial run without him being present, the person who is alleged to have made the representation and having fraudulent representation found against him when there are other possibilities can he…? Agreed?
>
> MR. WILLIAMS: Well, My Lord, as I said, as I said, that I have had the opportunity to, I'm not treating that as a kind of interim, but I had the occasion to propose

certain things to my friend. I'm not going to get into that.

THE COURT: I'm just asking because we could start the trial right now and proceed if you are prepared to take the risk.

MR. WILLIAMS: It is certainly, well, we have been brought here.

THE COURT: So let's go."

[47] Having been requested by counsel for the appellants/defendants to proceed to try the main ground of fraudulent misrepresentation, the trial judge accepted the evidence regarding fraudulent misrepresentation set out above including that, the second appellant made the representations identified as a,b,c, and d. The judge accepted that the representations were false, and that the second appellant knowingly and dishonestly made them for the purpose of dishonestly inducing the respondent to buy shares in the first appellant, that is, to enter a contract for the purchase of the shares. He held the appellants/defendants liable for the misrepresentation.

[48] Are there reasons for this Court to reject the findings of fact by the trial judge**?** We did not find any ground for an appellate court to interfere with the findings by the trial judge, of the facts that disclosed false representations made dishonestly by the second appellant for the purpose of inducing the respondent to buy shares in the first appellant. Further, we did not find any ground for interfering with the finding of fact that, the respondent was at the time, induced by the representations and bought the shares at US$200,655.00.

[49] We noted that, learned counsel Mr. F. Lumor for the appellants, did not argue that the judge applied a wrong principle of law in arriving at his findings of fact, or that the judge drew absurd inferences or inferences that were impossible or so improbable that they could not be reasonably accepted by an appellate court. Those would be valid grounds for an appellate court to interfere with findings of fact by a trial judge - see ***Re A***

Solicitor [1945] 1 All ER 445 and also ***Assicurazono Generali Spa v Arab Insurance Group B.S.C [2002] EWCA 1642.***

[50] But Mr. Lumor made a submission that, the trial judge erred in that he misunderstood the evidence in two aspects. First, that the judge misunderstood the statement in the letter from the second appellant that: "our application for a class A licence was finally approved last month [April 2003] by the Belize Central Bank", to mean that the second appellant meant that a Class A Licence had been granted last month. That mistake, Mr. Lumor argued, led the judge to erroneously accept the respondent's evidence that, the statement by the second appellant was false because the first appellant had not yet been incorporated, yet it was said to have obtained the licence.

[51] Assuming that the judge erred, that would be an error regarding only one of the four false representations itemized and several others in the letter which was put in evidence. The other three false representations and others would still support the final decision of the trial judge.

[52] We do not, however, accept that the judge erred. The statement was at least false to the extent that, not the bank or the Belizean mortgage company proposed to be converted into the bank, made the application for the Class A Licence, or was the application made on behalf of such a company. The only reference to the applicant was in the phrase, "our application." The evidence for the appellants did not reveal the existence of a Belizean mortgage company or any group of persons referred to as "a great team", headed by, "a 35 year bank veteran" as President, or the existence of a competitor company in Belize that paid dividend equal to 80% of its initial capital and proceeded to raise again 300% of its initial capital.

[53] Secondly, Mr. Lumor submitted that, the judge failed to appreciate that, the representations made were substantially true. We took that submission to also mean that, the judge misunderstood the evidence and that, there was no dishonesty in making the statements, and so the judge erred in finding fraud in the representations. Assuming that there was some truth in some of the statements of fact made by the second appellant,

the law is that, an appellate court should not interfere with the trial judge's finding of fact (inference from proved primary facts) simply because there is an alternative inference- see the ***Re A Solicitor*** case and ***Assicurazoni Generali Spa v Arab Insurance Group B.S.C. 2002 EWCA Civ. 1642***. In a civil case, the appellant must show that, the judge was plainly wrong.

[54] We reject the submission by Mr. Lumor. The judge dealt with the two points directly and came to the conclusion that, each of the representations were material, and were made for a fraudulent purpose, in particular, to obtain money towards achieving the sum of US$3,000.000.00 required by the Central Bank of Belize as a condition for granting a licence. A part of the judgment on pages 485 to 486 conveys much of the judge's reasons and conclusions. We have not been shown an error, and we have not found any in the judge's decision.

[55] The part of the judgment that we referred to is this: "Counsel for Mr. Tommy Haugen, in his closing submissions, adverted to the very many ways in which the representations made in the letter to Mr. Tommy Haugen of the 14th May, 2003 were patently false and misleading. I entirely agree with him in the way that he has characterized such representations and further completely accept his submissions that they were done with the expressed and subtle purpose of misleading Mr. Tommy Haugen about the situation. That the same was done in the hook, by way of material misrepresentations, for him to subscribe for the shares of Caye Bank. I also agree that this was done in order to partially satisfy the Central Bank condition to have $3,000,000.00 paid up share capital. I am not going to go through each and every way that the representations were indeed misrepresentations, but I find that each and every representation was, in a material particular, material misrepresentations done for a fraudulent purpose; and therefore I find that the alleged fraudulent misrepresentations, as contained in the Statement of Claim, have been proved. Further I am satisfied that such misrepresentations were indeed proved, to the high degree of cogency that is required in a case involving an allegation of fraud, indeed a sophisticated fraud by an attorney against his client, which makes such a fraud all the more heinous and disturbing."

Determination*- the law.*

[56] Misrepresentation is an untrue or misleading statement of fact (sometimes of law), made by one party to the other in the course of negotiating a contract, that induces the other party to enter into the contract. The meaning of fraudulent representation was developed in the old case, ***Williams Derry JC. Wakefeild, M. M.Moore, J. Pethick and S.J. Wilde v Sir Henry William Peek (1889) 14 App Case 337.*** It is commonly referred to as ***Derry v Peek***. It was an action in the tort of deceit. Their Lordships considered fraud an essential element in the tort of deceit. Fraud is conveyed by a representation, a fraudulent representation at that. A fraudulent representation is relevant to the present appeal because it is an essential part in a claim in contract founded on misrepresentation. On page 374, Lord Herchell stated this:

> ***"I think the authorities established the following propositions: First, in order to sustain an action in deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false…To prevent a false statement being fraudulent, there must, I think always be an honest belief in its truth…"***

[57] In the case, the House of Lords decided that, there was no evidence that the directors of the company who were the appellants, believed that the statements they made in the company's prospectus were untrue, there was no fraud; the appeal was allowed.

[58] Excluded from misrepresentation statements are statements which are of: opinion, mere sales puffs, future intention and originally a statement of law. A statement of law was gradually accepted as a statement that could be a misrepresentation statement in: ***Keinwort Benson Ltd. v Lincoln City Council [1999] 2 AC 349 (HL); Pankhania v London Borough of Hackney [2002] EWHC 2441 (ch);*** and ***Brennan v Bolt Burden (a firm) [2004] EWCA Civ. 1017***.

[59] The evidence in this appeal case undoubtedly supports the decision of the trial judge that, the second appellant made the statements in his letter dated May 14, 2003, knowingly, to the respondent. The content included material untrue statements of facts that were dishonestly intended to induce the respondent to purchase shares in the first appellant. The respondent was induced and purchased 3,417 shares at US$200,655.00. For over ten years up to 2014, the date of brining his claim, the respondent did not receive any return. The trial judge did not err when he held that, the appellants were liable to the respondent for fraudulent misrepresentation.

[60] It was not part of the case in the court below, whether the first defendant could be liable for the representations made by the second appellant. It was also not part of the questions on appeal.

Determination- *remedy***.**

[61] The appeal against the order for damages is that, the judge erred in awarding US$200,655.00 as general damages, whether for misrepresentation or breach of contract, when there was no evidence on which it was assessed. The respondent's submission was simply that, the judge did not err, the sum of US$200,655.00 put the respondent back in the position he would have been in had he not entered the contract for the purchase of shares as the result of inducement by the second appellant.

[62] This ground drew much bewilderment from the bench. It prompted such inquiring questions as: did the respondent get more than he paid for the shares? Is this about form or substance?

[63] Although the judge held the appellant liable on the ground of misrepresentation and on the ground of breach of the contract for the purchase of shares, the grounds were pleaded and decided in the alternative. There can be remedy for liability in respect to only one of the alternative grounds. In this case the remedy will be in respect to liability on the main ground of misrepresentation.

[64] The remedy of rescission is available for all types of misrepresentation – fraudulent misrepresentation, negligent misrepresentation and innocent misrepresentation. The judge held that, there was fraudulent misrepresentation. We agree. The remedy for fraudulent misrepresentation is rescission and or damages.

[65] The object of rescission is to put the contracting parties into the position that they would have been in if the contract had never existed. Rescission may not be ordered where: the innocent party has affirmed the contract; it is impossible to restore the parties to their original position; lapse of a long time; a third party has acquired right in the transaction; and damages would be a better remedy. None of these bar circumstances were disclosed in the evidence.

[66] The respondent/claimant in his statement of claim asked for "damages for fraudulent misrepresentation in the sum of US $200,655.00, in the alternative, rescission of the agreement for the subscription of shares in the first defendant." In his submission in the trial, learned counsel Mr. E. Courtenay SC, for the respondent, said that the respondent wanted to have his money returned, he did not want the shares any more, he did not want anything to do with the appellants any more. He did not ask for judgment to be entered, and an order for damages to be assessed. Mr. R. Williams SC, for the appellants/defendants made submission only about liability for misrepresentation. He said it was not proved. He did not say anything about remedy in the event his client was found liable. He did not ask for an order that damages be assessed.

[67] The judge did not indicate the basis of his order that, the defendants shall pay, "…damages in the sum of US$200,655.00…for fraudulent misrepresentation and breach of contract". He surmised that, the value of the claim was much more than the value of the shares. Counsel for the respondent did not take up that erroneous invitation.

[68] We concluded that, the judge was not obliged to order that, damages be assessed at a later date, when the parties did not make the request. We are of the view that, had the judge embarked on assessment of damages for fraudulent misrepresentation, he would have, on the evidence available, assessed damages at US$200,655.00 anyway.

Damages for misrepresentation are assessed on the principle of the law of tort. Loss of return for investment would have been taken care of by an award of interest. The ground of fraudulent misrepresentation was the main ground, had damages been awarded for liability under the ground, they would not be awarded on the alternative ground of breach of contract as well. The judge awarded damages on both grounds. It was an error. The error was of form not substance.

[69] The order that we decided to make is an order of rescission of the contract for the purchase of the shares in Caye International Bank Ltd made in two parts on 18 July 2003, and 11 August 2003. It is the remedy that the respondent/claimant asked for. The appellants /defendants did not oppose. It is the order that resolves the matter completely.

[70] The appeal is dismissed, except that, the order that, the defendants shall pay damages in the sum of US$200,655.00 to the claimant for fraudulent misrepresentation and breach of contract, is set aside. We substitute the order that, the contract for the purchase of shares in Caye International Ltd, made on 18 July 2003 and 11 August 2003, is rescinded and the appellants shall pay the sum of US$200,655.00 back to the respondent as part of rescission. By consent, the order for costs in the court below is to be taxed, if not agreed. The rest of the orders made by the trial judge are confirmed. 80% of costs in this Court are awarded to the respondent, to be taxed, if not agreed. The order for costs in this Court is provisional, to be made absolute in 14 days unless there has been an application for a different order.

[71] We considered the grounds that we did not deal with of no consequence to the appeal.

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AWICH JA

BLACKMAN JA

[72] I have read the draft of the judgment prepared by Awich JA and am in agreement with the disposition of the appeal and the orders proposed.

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BLACKMAN JA

DUCILLE JA

[73] I concur in the reasons for judgment given, and the orders proposed, in the judgment of Awich JA, which I have read in draft.

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DUCILLE JA