

**IN THE SUPREME COURT OF BELIZE, A.D. 2019**

**CLAIM NO: 211 of 2016**

**BETWEEN**

**CASA ALIMENTARIA HENSO, SRL**

**CLAIMANT**

**AND**

**CITRUS PRODUCT OF BELIZE LIMITED**

**DEFENDANT**

**Keywords:** Agreement; Memorandum of Understanding (MOU); Terms of Agreement; Best Efforts, Termination & Entire Agreement Clause; Breach of Agreement for reimbursement of monies advanced; Advances towards Equity or Debt.

**Before the Honorable:** Mr. Justice Courtney A. Abel

**Hearing Date:** 18<sup>th</sup> December, 2018

**Appearances:**

Mr. Eamon H. Courtenay SC, and Pricilla Banner for the Claimant.

Mr. Rodwell Williams SC and Mr. Nigel O. Ebanks for the Defendant.

**WRITTEN JUDGMENT**

**Orally delivered and handed down in draft on the 18<sup>th</sup> day of December, 2018**

**Introduction**

- [1] The Claimant (CASA) is a company incorporated under the laws of the Dominican Republic.
- [2] The Defendant (CPBL) is a company incorporated and doing business in Belize as a processor of citrus fruits into citrus products and by-products for sale in the domestic and international markets.

- [3] This claim is for the sum of US\$685,282.50. It concerns an agreement between the parties entered into in or about November 14, 2007. The agreement is in the form of a Memorandum of Understanding (“the **MOU**”). Under the MOU the parties agreed to develop and implement the installation and operation of a feed mill for producing citrus pellets for feed purposes (“the **Project**”).
- [4] CASA is arguing that CPBL breached the MOU and is entitled to be reimbursed US\$685,282.50 being all funds advanced toward the Project. It is contending that CPBL has failed to meet its obligation to obtain the required long-term guaranteed source of feed material and there has been no formal agreement entered into by the parties superseding the MOU.
- [5] CPBL is denying the claim for reimbursement and is arguing that the project was a joint venture under which it also invested substantial sums and that the MOU, by the mutual consent of the parties, has been superseded and discharged and is spent and no longer of any legal effect.

### **Background**

- [6] On the 14<sup>th</sup> November, 2007 Casa and CPBL entered into the MOU in relation to the Project.
- [7] The Project was divided into three phases.
- [8] Phase 1 concerned the Technical and Commercial components of the project. This component included the assessment of equipment, preliminary designs and plant layout, preliminary costs estimates, pricing and schedules for equipment, construction of plant facilities, site review (including land available for the plant facilities), port facilities for exporting goods produced by the plant and other technical issues as determined by the parties.
- [9] Phase 2 of the Project concerned the issue of financing. This included the final economic and financial modeling, the source of debt financing and commitments, and taxation issues related to the proposed business.

- [10] Phase 3 of the Project provided for the parties executing a shareholders' agreement, setting up and funding a corporate entity, securing all required permissions, and the executing of all material contracts with third parties as required by the Project including matters relating to engineering, procurement, constructing, start-up and commissioning the plant.
- [11] As at 2009, Phases 1 and 2 of the Project were completed and a portion of Phase 3 was completed.
- [12] Insofar as Phase 3 was concerned, the parties were required, among other things, to (i) execute a shareholders' agreement and (ii) set up and fund a corporate entity.
- [13] Clause 2 of the MOU deals with the "Best Efforts" of the parties. It contains the following provisions:
- 2.1 The Parties shall cooperate with each other to complete the Scope of Work described in Section 1 of this MOU in the most expedient manner.*
- 2.2 Each Party shall be responsible for its own costs of time and disbursements in all efforts in respect of activities undertaken under Phases 1 and 2 and will share the costs associated with activities undertaken under Phase 3 in the same proportion of their equity contribution.*
- 2.3 As an evidence of the Parties good faith in the Project and for each other, the Parties agree to advance payments of some of the activities related to Phase 3 of the above referenced scope of work, including, but not limited to down payment of the plant and dismantling costs; as if the results of Phase 1 and 2 were a "go" on the Project.*
- 2.4 The Parties agree to hire external consultants to assist in completing the financial, economic, and technical aspects of the Scope of Work described in Section 1 of this MOU. The Parties will mutually agree on the tasks, scope and conditions related to such external consulting engagements.*

*2.5 After completion of Phase 2, the Parties agree to enter into formal contractual agreements which will supersede this MOU.*

*2.6 The Parties shall associate with each other on the Project on an exclusive basis as long as this MOU is in effect.*

*2.7 This MOU does not obligate any of the Parties to make an equity investment or financing commitment in the Project.*

[14] The effect of these provisions, in my view, makes it clear that there' is a differentiation between advances which are in effect towards debt or loans as opposed to advances which are towards equity (investment in the company).

[15] Clause 4 of the MOU contains the critical provisions in terms of these proceedings relating to 'Termination' and provides as follows:

*"The MOU shall terminate on the earliest of any of the following events:*

- a. The Project is deemed to be unviable from the results of the detailed feasibility study (Phase 1);*
- b. The date that this MOU is superseded by a formal contractual agreement executed between the parties as provided for under Section 2.4 [actually – 2.5] of this MOU;*
- c. The parties fail to receive corporate approvals, governmental permits (including but not limited to environmental permits), or other approvals as necessary for the Project to proceed;*
- d. The parties fail to secure financing for the Project;*
- e. The parties fail to secure suitable port facilities for exporting the goods produced by the Project;*
- f. CPBL fails to obtain a long-term guaranteed source of feed material in an amount of at least 6 million boxes*

*of citrus per crop season and in other acceptable terms and conditions;*

- g. *In the event this MOU is terminated for a cause other than 'b' above, CPBL agrees to reimburse CASA all monies advanced by CASA under Section 2.3 in a time and manner to be agreed between the Parties."*

[16] Clause 8 of the MOU is a clause that relates to the entire agreement and states as follows:

*"This MOU constitutes the entire agreement between the parties, supersedes all prior written and oral agreements and understandings and may be amended only in writing by the parties."*

[17] On 1<sup>st</sup> July, 2008 shortly after the date of execution of the MOU, the corporate entity referred to at clause 1.2 (Phase 3) of the MOU was also incorporated using the name Belize Citrus Feeds Limited ("**BCFL**").

[18] The shareholding for **BCFL** was allotted with 55% of the shares to CPBL and 45% of the shares to CASA.

[19] The incorporation of **BCFL** was expressly provided for in the MOU.

[20] The purpose for incorporating this entity was to have an investment vehicle for use in implementing the Project.

[21] Operations for the feed mill project commenced in March 2010.

[22] After commencement of operations, CPBL provided the following amount of feed material per crop season:

<b><u>Crop Season</u></b>	<b><u>Amount of Boxes</u></b>
a. Crop Season 2010-2011 season	1.3 million – end of crop
b. Crop Season 2011-2012	5.19 million
c. Crop Season 2012-2013	4.3 million
d. Crop Season 2013-2014	4.45 million
e. Crop Season 2014-2015	3.31 million

- [23] As early as 15<sup>th</sup> May, 2012 CASA began expressing concerns about the feed mill productivity targets by emails which it wrote to CPBL.
- [24] By a further email dated 4<sup>th</sup> November, 2013 CASA expressed its concerns regarding the fact that the feed provided was below the agreed minimum of six million boxes.
- [25] A question arises for determination whether CPBL failed, as agreed, to obtain a long-term guaranteed source of feed material in an amount of at least six million boxes of citrus per crop season? I think I can answer that summarily by saying that I am quite satisfied on the evidence, and I think it is conceded by witness for CPBL, that it did fail, as agreed, to obtain a long term guaranteed source of feed material in the amount of at least six million boxes of citrus per crop season.
- [26] In any event by a letter dated 15<sup>th</sup> March, 2016 CASA caused its attorneys-at-law, Courtenay Coye LLP to write to CPBL to indicate that section 4 of the MOU provides for its termination pursuant to clause (f) as follows: "*CPBL fails to obtain a long-term guaranteed source of feed material in an amount of at least 6 million boxes of citrus per crop season and in other acceptable terms and conditions*". And it in effect terminated.
- [27] CPBL was also informed that clause 4(f) had not been fulfilled in that CPBL had failed to secure the required six million boxes of feed material per crop season which was fundamental to make the Project profitable. CPBL was further informed that the company, BCFL, had sustained losses every year since it began operations. I think this is undisputed although the cause for the failure of CPBL to provide the required amount of feed material for the operations may be disputed. But in any event on average, only about 3.7 million boxes per year had been delivered.
- [28] Pursuant to that letter by Courtenay Coye LLP, CASA formally terminated the MOU pursuant to clause 4(f) and invoked clause 4(g) of the MOU in the following terms:

*"In the event this MOU is terminated for a cause other than 'b' above, CPBL agrees to reimburse CASA all monies*

*advanced by CASA under Section 2.3 in a time and manner to be agreed between the parties.”*

- [29] CPBL was also notified that since the MOU had been terminated pursuant to 4(f), CPBL was “*liable to reimburse CASA all monies advanced by CASA under Section 2.3 of the MOU in the sum of US\$685,282.50.*”
- [30] CASA therefore demanded payment forthwith of the said sum together with legal fees in the amount of 15% of the amount claimed.
- [31] The sum of US\$685,282.50 was paid by CASA to CPBL as follows:

<b>Date</b>	<b>Amount US (in thousands)</b>	<b>Source</b>
30 December 2007	110	CASA WT
11 March 2009	100	CASA WT
1 April 2008	100	CASA WT
14 April 2008	137	CASA WT
30 April 2008	20	CASA WT
22 May 2008	35	CASA WT
26 June 2008	35	CASA WT
5 August 2008	150	CASA WT
30 September 2008	27,592.55	Transfer BFP payable to C. Alvarez to share subscription
30 September 2009	60,684.50	Transfer BFP payable to C. Alvarez to share subscription
9 October 2009	25	CASA WT
13 May 2009	50	CASA WT
30 November 2009	50	CASA WT
30 July 2010	25	Commission applied towards equity
<b>Total</b>	<b>900,277.05</b>	

- [32] CPBL refused to make the payment by way of reimbursement.
- [33] The long and short of the present case is that CASA after demanding payment of the sum which is the subject of this claim made the demand

for such payment which has not been made and the present claim was initiated.

### **The Court Proceedings**

- [34] CASA filed a claim form against CPBL on the 20<sup>th</sup> April, 2016 for the sum of US\$685,282.50.
- [35] CPBL filed a defence on the 13<sup>th</sup> June which it amended on the 25<sup>th</sup> July, 2016.
- [36] It is clear that the first seven paragraphs of the statement of claim were admitted which included who the parties are and that they are proper parties to these proceedings.
- [37] It is also admitted in the Defence that the MOU was made as I have stated, and it admitted clause 4(f) and 4(g). It is also admitted that the parties caused BCFL to be registered on 1<sup>st</sup> July 2008, and that the claimant has invested the sum of \$685, 282, 50 in the project.
- [38] The amended defence was filed on the 29<sup>th</sup> July 2016.
- [39] The case has been quite heavily managed from the 11<sup>th</sup> July, 2016 to 13<sup>th</sup> February, 2017 when it seemed to have fallen between the cracks in the court system. But, on the 8<sup>th</sup> October, 2018 directions were given and the matter was set up for trial to today's date.
- [40] The witnesses in the case included Mr. Hugo Socorro for CASA. I must acknowledge that having seen and heard him I found him to be a very impressive witness. His evidence was very clear. He is obviously a very thoughtful businessman who understood the case very well.
- [41] Mr. Jaime Alpuche testified on behalf of CPBL. He was the chief executive officer of the CPBL at the time that he signed his witness statement which was 25<sup>th</sup> October, 2016. Having seen and heard Mr. Alpuche's evidence, I can only say that under cross-examination, he all but conceded the case presented against CPBL. To that extent, he was candid and I found him to be a witness which this Court ought to rely upon. The second witness for CPBL was Dr. Henry Canton and he is a former chief executive officer. I cannot say I rely very much on his

evidence, as I found him to be evasive in the little evidence to which he testified in favour of CPBL. The less I say about him I think the better.

### **Issues**

[42] The following questions arise for determination:

- (a) Whether CPBL owes the funds pursuant to clause 4(g)?
- (b) Whether the MOU was terminated by the parties' conduct?

### **Whether the Defendant breached the terms of the MOU?**

[43] Having been taken through all the relevant documents by learned Senior Counsel on behalf of the claimant and the defendant, I am left in absolutely no doubt whatsoever that CPBL failed to obtain a long term guaranteed source of feed material in an amount of at least six million boxes of citrus per crop season; and I consider that there is no evidence before me that any other term or condition was acceptable by the parties.

[44] Earlier I indicated that Mr. Alpuche, a witness for CPBL, all but conceded the case against it<sup>1</sup>. In regard to the present issue I rely on the concession by this witness under cross-examination that CASA is entitled to reimbursement.

[45] I also have concluded, having seen all the witnesses and gone through all the documents (which I will not go through all over again) that I have no hesitation in finding that Counsel for CASA indeed quite properly terminated, for cause, the MOU, because of the failure by CPBL to obtain a long terms guaranteed source of feed material in the amount of at least six million boxes of citrus per crop season.

[46] As such and because this is a breach of the agreement and is not due to clause 4(b), which we can take as read, there is an agreement for the reimbursement of all monies advanced by CASA which is the amount claimed by the claimant. As a result I have determined that CPBL owes the funds, the subject of the claim, US\$685,282.50, to CASA by way of reimbursement of advance payments under Clause 2.3 of the MOU.

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<sup>1</sup> See paragraph 40 above.

### **Whether the MOU was terminated by the parties' conduct?**

- [47] Now, just out of completeness, CPBL as I have said, had raised the defence which is that the MOU was terminated by the parties conduct and with their mutual consent. Also that in any event that the MOU had been spent. To put it mildly I find such a suggestion is self conflicting in principle.
- [48] In any event, even on the evidence, it is clear that the MOU had specific clauses as to how it should be terminated and did not include termination by conduct. Indeed clause 8 specifically, in my view, excludes conduct as a mode of termination as it expressly provided for the mode of termination and in any event that it should only be amended in writing by the parties. That, in my view, excludes the possibility of amendment by conduct.
- [49] As an aside, I might say that I found the pleading of the amended defence a little difficult to follow; it was certainly confusing and seemed to be in certain places inconsistent with certain admissions which had been made.
- [50] Also as an aside I must say in conclusion that, unusually in this case, that even if it did not appear to me to me at first to be strongly in favour of CASA, as the case went along it seemed to get stronger and stronger, in so far as CASA is concerned.
- [51] I really cannot, for the life of me, see that there is any kind of credible defence by CPBL of the claim by CASA. This has relevance in relation to the question of interest.

### **Determination**

- [52] In conclusion, I will order that CPBL pay to CASA the sum of US685, 282, 50 being an advanced payment of some of the activities related to phase three of the MOU, specifically, in relation to the down payment of the plant and dismantling cost.

### **Costs**

- [53] It seems to me that cost should follow the event and because the claimant has wholly succeeded it is therefore entitled to the agreed cost of \$25,000.00.

## **Disposition**

[54] Judgment is entered for the Claimant in its claim against the Defendant in the following terms:

- (a) The Defendant shall pay to the Claimant the sum of US\$685,282,50 advanced by the Claimant to the Defendant under the MOU dated 14<sup>th</sup> November 2007*
- (b) The Defendant shall pay to the Claimant interest at the rate of 6% per annum from the 15<sup>th</sup> March 2016 to 18<sup>th</sup> December 2018 in the sum of US113,663.02*
- (c) The Defendant shall pay to the Claimant Interest at the rate of 6% per annum from the 18<sup>th</sup> December 2018 until payment of the debt in full, at the daily rate of US112.65*
- (d) The Defendant shall pay to the Claimant costs in the agreed sum of BZ25,000.00;*

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**The Hon. Mr. Justice Courtney A. Abel**

**22nd May 2019**