

CARIBBEAN COURT OF JUSTICE

Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

**CCJ Civil Appeal No. BZCV2019/004
BZ Civil Appeal No. 8 of 2016**

BETWEEN

CAYE INTERNATIONAL BANK LIMITED

APPELLANTS

JOEL M NAGEL

AND

TOMMY LYNN HAUGEN

RESPONDENT

Before The Honourables

**Mr Justice J Wit, JCCJ
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice A Burgess, JCCJ
Mr Justice P Jamadar, JCCJ**

Appearances

Mr James Guthrie, QC, Mr Fred Lumor, SC and Ms Sheena Pitts for the Appellants

Mr Eamon H Courtenay, SC and Ms Pricilla J Banner, for the Respondent

JUDGMENT

of

**The Honourable Justices Wit,
Anderson, Rajnauth-Lee, Burgess, and Jamadar**

Delivered by

**The Honourable Mr Justice Jacob Wit
on the 28th day of July 2020**

JUDGMENT OF THE HONOURABLE MR. JUSTICE WIT, JCCJ:

[1] In 2014, the Respondent (“Mr Haugen”) sued the Appellants (“Caye Bank” and “Mr Nagel”) for damages in the Supreme Court of Belize. The claims were based on two separate issues. The first issue was this: in 2003, Caye Bank and Mr Nagel had persuaded Mr Haugen to purchase 3,417 shares in Caye Bank for which he paid Caye Bank US\$ 200,655.00 in total. Mr Haugen alleged that the Bank and Mr Nagel had fraudulently misrepresented the status of Caye Bank. He also alleged that he had never received the shares he had purchased (although he also suggested that these shares had been wrongly forfeited by Caye Bank). With respect to this issue, he demanded damages in the sum of US\$ 200,655.00 (a) for fraudulent misrepresentation (a tort) or, alternatively, (b) for breach of contract. The second issue was the original reason why Mr Haugen decided to take Caye Bank and Mr Nagel to court. He alleged that a sum of US\$ 10,202.03 had wrongly been withdrawn from his account with Caye Bank, constituting a breach of contract with respect to that account. Mr Haugen demanded that this sum be repaid to him. He further insisted that all the amounts claimed by him, should be paid with interest pursuant to sections 166 and 167 of the Supreme Court of Judicature Act. He also claimed costs and such further or other relief which the Court would think fit.

[2] Although all these claims had been strongly contested by Caye Bank and Mr Nagel in their written Defence, they conceded on the first day of the trial the second plank of Mr Haugen’s case (the wrongful withdrawal of moneys from his bank account). However, they firmly maintained their opposition to the claim for fraudulent misrepresentation. Despite their arguments, the court ruled against them and ordered them to pay the damages demanded “for fraudulent misrepresentation and breach of contract”, plus interest as well as interest on the amount of US\$10,202.03 (by that time, the amount had apparently already been repaid to Mr Haugen). Caye Bank and Mr Nagel were also ordered to pay costs to Mr Haugen in the sum of \$75,000.

[3] Caye Bank and Mr Nagel appealed this judgment to the Court of Appeal. At the hearing of the appeal, that court was informed that the Bank and Mr Nagel had made good the wrong caused by the conceded breach of contract with respect to the wrongful

withdrawal of US\$ 10,202.03 from Mr Haugen's bank account. As to the first issue, the Court of Appeal agreed with the trial judge that Caye Bank and Mr Nagel had been guilty of fraudulent misrepresentation. However, the Court of Appeal pointed out that the trial judge should have made a choice between the alleged causes of action: fraudulent misrepresentation in tort or, alternatively, breach of contract. The Court of Appeal viewed the latter cause of action as the appropriate one and stated: "The remedy for fraudulent misrepresentation is rescission and or damages." They dismissed the appeal, substituted the order to pay damages as formulated by the trial judge with an order "that the contract for shares ... is rescinded and the appellants shall pay the sum of US\$ 200,655.00 back to the respondent as part of the rescission. 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."

[4] Caye Bank and Mr Nagel subsequently appealed to this Court. Having read the filed documents and the written submissions, and having heard counsels' oral submissions, we indicated that we were not persuaded that there had been any misrepresentation, fraudulent or otherwise, by Caye Bank or Mr Nagel. We also indicated that the facts seemed to show that the shares had in fact been received by Mr Haugen if only because there had been a purported forfeiture of these shares by Caye Bank around 2012. We therefore allowed the parties some time to discuss how to proceed with this matter. Thereupon, the parties presented us with a consent order which we adopted as fair and appropriate. Hence, we gave the following orders: we allowed the appeal, setting aside the decision and orders of the Court of Appeal. We further remitted the issue of the breach of contract arising from the forfeiture of Mr Haugen's shares in Caye Bank to the Supreme Court for damages to be assessed by a Judge other than the Trial Judge, and we ordered the parties to file and serve written submissions on the issue of costs within 21 days (which they did). Having regard to these submissions, we now issue our decision on those costs.

[5] Our decision on the substance of this matter must logically have an effect on the decisions of the courts below, also, and particularly with respect to costs. Both courts ruled against Caye Bank and Mr Nagel, who were ordered to pay all or most of the costs of Mr Haugen. Because of our decision in this appeal, however, the tables are turned. Caye Bank and Mr Nagel are without a doubt to a great extent the successful party in

this appeal and they equally should have been successful in the appeal before the Court of Appeal.

[6] The situation in the first instance court, however, is substantially different. Without going into details, we have no difficulty in stating that the conduct of Caye Bank and Mr Nagel especially before (but also to some extent during) the proceedings in that court had been unfair and oppressive, unnecessarily requiring Mr Haugen to commence proceedings. This situation was exacerbated by their decision to wait until the first day of the trial to concede the obvious: that they had been wrong to forfeit Mr Haugen's shares and to withdraw moneys from his account without his authorisation. Given this conduct of Caye Bank and Mr Nagel as well as the fact that Mr Haugen was obviously right all along with respect to this plank of his claims, he should be entitled to get his costs with respect to this part of his claims. On the other hand, with respect to his claim for damages on the ground of fraudulent misrepresentation he is, with hindsight, clearly the unsuccessful party. Although this claim was far more important, both in terms of monetary value as in terms of consequences for Caye Bank (a finding of fraudulent misrepresentation would have made it impossible for the bank to continue its business), we are of the view that, given the background and origins of this litigation, this should not result in a cost order exceeding the one Mr Haugen himself is entitled to. With respect to the costs in the Supreme Court, we therefore conclude that both parties should share the burden of this part of the litigation thus that they bear their own costs.

[7] The mitigating effects that were present in the Supreme court do not exist in the Court of Appeal and in this Court. There, the issue was solely the misrepresentation issue and the pre-litigation history of the case is of far less relevance than in the trial court. However, it was rightly conceded by Caye Bank and Mr Nagel that Mr Haugen should in fairness be allowed to claim compensation for the period Caye Bank maintained that Mr Haugen's shares were forfeited, and any special damages he may prove. Although this was never specifically pleaded at first instance, it does justice to Mr Haugen's general position that he was wrongly treated by Caye Bank and Mr Nagel. This ought to be reflected in the cost orders. Although Caye Bank and Mr Nagel are entitled to recover their costs both in this Court and in the Court of Appeal, these should be reduced to 80%.

[8] The Court therefore orders that the Respondent, Mr Haugen, shall pay 80% of the costs of the Appellants, Caye Bank and Mr Nagel, in this Court and in the Court of Appeal, to be taxed, if not agreed. The parties shall bear their own costs in the Supreme Court.

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar