COMMONWEALTH OF THE BAHAMAS 2022/FP/CLE/GEN/00072

IN THE SUPREME COURT

Common Law and Equity Division

BETWEEN

KENNETH SCHWEITZER

Plaintiff

AND

CARTER ENTERPRISES LIMITED

Defendant

Before:	His Honourable Justice Andrew Forbes
Appearances:	Mr. Osman Johnson appearing on behalf of the Plaintiff, Mr. Kenneth Schweitzer
	Mr. Harvey O. Tynes, KC with Mrs. Tanisha Tynes-Cambridge and Ms. Roshar Brown on behalf of Carter Enterprises Limited
Trial Dates:	30th June, 2022, 1st July, 6th July 2022, & 7th July, 2022
Closing Submissions:	Plaintiff: 29th August, 2022
	Defendant: 14th July, 2022; 14th September, 2022

Promissory Note, Breach of Contract. Bills of Exchange

JUDGMENT

FORBES, J

BACKGROUND

1. The parties are before the Court for what the Plaintiff alleges was a breach of a promissory note made between himself and members of the Williams family to acquire a fifty percent share of the resort and marina known as "Riding Rock Marina Resort" in San Salvador, The Bahamas.
2. By a Specially Indorsed Writ of Summons filed on the 4th September 2012 the Plaintiff alleges that the Defendant made a promissory note for the sum of $2,000,000.00. The said promissory note was dated the 1st day of April 2007 with repayment to be made to the Plaintiff on the 31st January 2008 (also referred to as the maturity date) in the said promissory note. The Plaintiff alleges that the promissory note provided:
    a. That the principal and interest under the said note shall be repaid by the defendant to the plaintiff on 31st January 2008;
    b. That subject to the approval of the Central Bank of the Bahamas all payments are to be made in the currency of the United States of America;
    c. That the principal amount shall bear interest at the rate of 10% per annum;
    d. That the defendant shall be in default under the said promissory if it failed to pay the sums due thereunder within 30 days of the maturity date;
    e. That the defendant irrevocably and by way of security for the payment and its performance of the terms of the said promissory note appointed the Plaintiff as its true and lawful attorney (with full power to appoint substitute and sub delegate) on behalf of the Defendant in the Defendant's name or otherwise to sign, seal and deliver and complete an indenture of Mortgage in favour of

the Plaintiff over the real property more particularly described in an Indenture of Conveyance dated 29th day of November 1985 and made between Columbus Landings Limited of the one part and the defendant of the other part and recorded in Registry of Records in volume 4462 at pages 369 to 373.

3. The Plaintiff also alleges that after the 31st January 2008 he requested payment from the Defendant but it failed to pay the Plaintiff the sum due under the said promissory note; that prior to the execution of the promissory note the Defendant had made arrangements to import into The Bahamas certain materials for the renovations for its Resort and Marina at Riding Rock in the Island of San Salvador, one of the Islands of the Commonwealth of the Bahamas and in this regard applied to the Ministry of Financial Services & Investments seeking certain customs duty concessions on various goods totaling $2,044.367.40 under the Hotel Encouragement Act which concessions upon application of the Plaintiff were allowed in the sum of $1,611,012.85. He further alleges that he agreed to assist the Defendant with financing of the purchase of the goods which it intended to import into The Bahamas for the purposes of renovating the said Riding Rock Inn and Marina in exchange for the Defendant executing the said promissory note and accordingly the same was executed by the defendant in favour of the Plaintiff.
4. The Plaintiff further alleges that in pursuance of this agreement the Plaintiff spent a total of $1,455,300.62 for the Riding Rock project and the said sum was acknowledged by Kevin Williams, one of the Defendant's duly authorized representative on 7th July 2007 and certified by the Defendant's Accountant, Mr. Arthur Carlson. The Plaintiff alleges that the intention behind the execution of the promissory note was to secure the repayment of all moneys advanced by the Plaintiff for the purchase of materials and furnishing relative to the renovation of Riding Rock Inn and Marina and that should the Plaintiff default in the repayment of the amount owed a mortgage would be placed over the Plaintiff's land as described in an Indenture dated the 29th November 1985 and made between Columbus Landing

Limited and the Plaintiff and recorded in the Registry of Records in Volume 4462 at pages 369 to 373.

5. The Plaintiff alleges that the Defendant has not made any attempts to obtain the Central bank approval to pay the Plaintiff as required by the promissory note nor supplied it the information so the Plaintiff's application can be granted by the Central Bank; that by letters dated the 9th July 2012 and the 9th August 2012 through his Attorney the Plaintiff presented the promissory note for payment but it was dishonored and the Defendant is in breach of its obligations thereunder. Additionally, that the Defendant through its Attorney in answer to the 9th July letter stated that the Defendant required a proper accounting and adverted to the Plaintiff requiring certain information which the Defendant well knew was in the possession of its Account.
6. The Plaintiff claims that under the terms of the promissory note the Defendant through its representative has admitted that payments to the Plaintiff totaled $1,455,399.62 with interest of 10% per annum; that the sum now owed to the Plaintiff from 17th April 2007 to 4th September 2012 is $2,238,916.82 with interesting accruing at a daily rate of $ 398.73 until payment. The Plaintiff further particularized its claim setting out the sums due as interest from April 2009 to the 17th April, 2012 and interest from the 4th September, 2012 at the per diem rate for a total amount due and owing as $2,238,916.82. Therefore, the Plaintiff claims against the Defendant:- (i) the sum of $2,238,916.82 with interest thereon at a rate of 10% per annum until payment; (ii) or alternatively if the Defendants fails to pay the sum of $2,238,916.82 plus interest, a Declaration that the Plaintiff is entitled under the promissory note to execute a Mortgage over the said property; (iii) Costs and (iv) further and other relief.
7. A Memorandum and Notice of Appearance were entered on behalf of the Defendant and filed on the 19th December 2012. A Defence was filed on the 27th September 2012 and an Amended Defence was filed on the 29th April, 2021.
8. The Defendant in its Defence admits paragraph 1 of the Statement of claim save and except that renovations in the company would be equally divided between the Plaintiff and the Defendant. Further as it

relates to (ii) of paragraph 1 the Plaintiff was solely responsible for obtaining Central Bank Approval. The Defendant denies paragraph 2 of the Statement of Claim and asserts that Plaintiff breached the contract in that he did not provide the sum as described in the promissory note. Further that the Plaintiff further reneged on his contract as both Plaintiff and Defendant were supposed to share equally in regards to the renovation to Riding Rock Resort & Marina. That the Defendant admits paragraph 3 of Statement of Claim in that concessions were given under the Hotel Encouragement Act, but that the goods were never imported. The Defendant denies paragraph 4 of the Statement of Claim and stated that the Plaintiff did not agree to assist the Defendant with financing as they had both agreed to renovate the Riding Rock Inn & Marina at each of their own respective expenses.

9. That the Defendant denies paragraph 5 of the Statement of Claim and puts the Plaintiff to strict proof to produce the original letter. Further that the amount as stated is not accurate and still in dispute as there was to be an agreed itemization between Mr. Williams and Mr. Schweitzer. That the Defendant denies paragraph 6 of the Statement of Claim in that it was never the intention of the Defendant to secure a Mortgage. The Defendant asserts that the Plaintiff was to purchase shares valued at Two Million Dollars ($2,000,000.00) which would represent a fifty percent (50%) interest in the business and due to the Plaintiff's breach of contract the agreement was never successfully manifested. The Defendants denied paragraphs seven through nine of the Statement of Claim.
10. The Defendant by its Amended Defence states that it admits that on or about the 17th April, 2007, Kevin Williams, a Director of the Defendant company executed a Promissory Note in favour of the Plaintiff and that the note contains the provisions set out in Paragraph 1 of the Statement of Claim. However, it is denied that the Promissory Note was intended to create a legal obligation on the part of the Defendant to pay the Plaintiff the sum of Two Million Dollars ($2,000,000.00) or any sum. Further that in addition to the provisions set out at paragraph 1 of the Statement of Claim the Promissory Note also contains an express provision, at paragraph 6 that the Note and

the sums payable thereunder would be convertible into fifty percent (50%) of the preference shares in Riding Rock Holdings, Ltd., a company which would be formed under the laws of the Commonwealth of The Bahamas for the purpose of holding the assets forming part of the Riding Rock Resort and Marina situate in Cockburn Town, San Salvador.

11. The Defendant also asserts that on or about the 7th January, 2006 prior to the creation of the said Promissory Note, the Plaintiff made an agreement in writing with Kevin Williams, Carlos Williams, Michelle Williams and Jason Williams ("the Williams Family") that the Plaintiff would purchase a fifty percent (50%) interest in the Riding Rock Marina and Resort property and business at the proce of Two Million Dollars ($2,000,000.00). Moreover, that the Promissory Note was created by the Defendant solely for the purpose of enabling the Plaintiff to obtain a loan in the sum of Two Million Dollars ($2,000,000.00) from a "Chinese" source in order to purchase fifty percent (50%) of the preference shares in the holding company, Riding Rock Holdings Ltd; that the Plaintiff never paid the sum of Two Million Dollars ($2,000,000.00) or any part thereof to the Williams Family and he never acquired a fifty percent (50%) interest or any interest in the Riding Rock Marina and Resort property and business.

12. The Defendant further avers that in or about the year 2006 the Plaintiff and the Williams family entered into an independent collateral oral agreement that should the Plaintiff acquire a fifty percent (50%) beneficial interest in the Riding Rock Marina and Resort property, the Plaintiff and the Williams family would share the cost of renovation and improvements to the property equally. The Defendant admits that in pursuance of that collateral agreement the Plaintiff purchased building supplies and materials that were used to renovate and improve the Resort property but denies that the value of the building materials provided by the Plaintiff exceeded the sum of Four Hundred Thousand ($400,000.00) Dollars and puts the Plaintiff to strict proof of the value of the building materials. The Defendant also denies that the Promissory Note was created for the purpose of securing payment to the Plaintiff for the cost of the building materials which were used to

renovate the Resort property. The Defendant in response to paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the Statement of Claim repeats paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of its Amended Defence; specifically denies paragraph 4 of the Statement of Claim and repeats paragraphs 7, 8 and 10 of its Amended Defence; specifically denies paragraph 5 of the Statement of Claim and repeats paragraph 10 of its Amended Defence; specifically denies paragraph 6 of the Statement of Claim and repeats paragraph 2 of its Amended Defence and specifically denies that it is or was ever indebted to the Plaintiff in the sum of $2,238,916.82 as alleged in paragraph 9 of the Statement of Claim or any sum and repeats paragraph 2 of its Amended Defence.

13. The Plaintiff filed a Reply to the Defendant's Amended Defence on the 15th July, 2021 and for the most part either denied the contents of the Amended Defence and/or neither admitted or denied the contents of the Amended Defence and put the Defendant to strict proof and referred to the contents of the Statement of Claim. In particular the Plaintiff neither admits or denies the contents of paragraphs 1, 3, 4, and 8 of the Amended Defence and repeats the contents of paragraphs 1 through 9 of the Plaintiff's Writ of Summons and Statement of Claim; the Plaintiff denies the contents of paragraphs 2, 5, 6, 7, 10, 11, 12, 13, and 14 of the Amended Defence and repeats the contents of paragraphs 1 through 9 of the Plaintiff's Writ of Summons and Statement of Claim. The Plaintiff in response to paragraph 4 of the Amended Defence puts the Defendant to strict proof as it concerns the existence of a prior agreement in writing dated on or about the 7th January, 2006 and the terms therein; denies paragraph 5 of the Amended Defence and specifically denies that the said Promissory Note was ever created and/or intended to be used for the purpose of obtaining any loan in the sum of Two Million Dollars ($2,000,000.00) or a loan for any sum whatsoever from a "Chinese source", which "Chinese source" the Plaintiff avers never existed and puts the Plaintiff to strict proof. The Plaintiff also denies paragraph 6 of the Amended Defence and avers that the Defendant's servants, agents and/or representatives acknowledged in writing the value of funds and/or goods and services provided to the Defendant by the Plaintiff and puts the Plaintiff to strict

proof. Further the Plaintiff denies the contents of paragraph 15 of the Amended Defence and avers that the Defendant is indebted to it [him] for a sum in excess of $2,238,916.82 in addition to interest payable on this sum and the Defendant is put to strict proof.

The Plaintiff's Case

14. Plaintiff's Counsel during his opening statement summarized the Plaintiff's case as the Plaintiff provided funding, material and financial support to the Defendant for the renovation and repair of the said Resort and whether as a result the Plaintiff is entitled to a refund and/or repayment of the said funds advanced. Additionally, that the Plaintiff's advancement of the said funding was paid with the understanding that the same was done as an investment and that the Defendant would transfer a percentage stake in the said Resort to the Plaintiff.
15. The Plaintiff's evidence is found in his Witnesses Statements filed on the 23rd April, 2014 and the 21st February, 2022 respectively. The Plaintiff also relies on the evidence as found in the Witness Statements of Lisa Mitchell, Ed Campy and Russell Yarema all filed on the 21st February, 2022 respectively in support of his case.
16. The Plaintiff also relies on the Plaintiff's Bundle of Documents filed the 24th March, 2022 and pages 1 through 17 being agreed between the parties.

The Plaintiff

17. In his first Witness Statement the Plaintiff's evidence is that he is a self-employed contractor engaged in the business of installation of windows, roofs and gutters and that he came to know of the Defendant Company and its principals through his visits to San Salvador. His evidence is that on or about the 15th March, 2007 a fax was sent from Mr. Bryan Glinton, the Defendant's Attorneys to Mr. Jack Cox, the Plaintiff's Attorney in the United States regarding the restructuring of

Riding Rock Resort and Marian which comprised of a 25 acre tract of land and several businesses including a hotel, a marina, fuel dock, fuel business and a dive center. Further that an e-mail was sent to Riding Rock from Bryan Glinton on the 17th April, 2007 regarding a Promissory Note to be signed by the Defendant which was executed and Mr. Kevin Williams as a representative/director for the Defendant on the same date; that the said Promissory Note was intended to cover moneys advanced and moneys about to be advanced to the Defendant; that he is advised that the Defendant by law is responsible for stamping the said note but failed to do so and he consequently paid the stamp duty on the same.

18. The Plaintiff continues that before the execution of the said note the Defendant had made arrangements to import into The Bahamas certain materials for the renovations of the said Resort and applied to the then Ministry of Financial Services and Investments seeking certain customs duty concessions on various goods totaling $2,044,367.40 under the Hotel Encourage Act and was allowed the sum of $1,611,012.85 in concessions. Further, that in the memo Mr. Glinton had proposed to set up the structure by which he would have gained an interest in the project and quoted him a fee for carrying out such service on behalf of the Williams family in the sum of $35,000.00 which he paid but the said services were never provided; that some months after the maturity date in the said note his attorney Mr. Jack Cox wrote to Mr. Glinton requested the return of the $35,000.00 paid to Glinton, Sweeting and O'Brien for attending to the Investment Board and Central Bank approvals which were never obtained; that the $35,000.00 was included as part of the payments admitted by the Defendant as having been made by him; that he also employed the services of Graham Thompson and Co but nothing was achieved.

19. The Plaintiff continues that he had agreed to assist the Defendant with the financing of the purchase of the goods which it intended to import in The Bahamas for the purpose of renovating the said Resort in exchange for the Defendant executing the said note and the same was executed in his favour by the Defendant; that the intention behind the execution of the note was to secure the repayment of all moneys

advanced by him for the purchase of materials and furnishing relative to the renovation of the said Resort and with the intention that should the Defendant default in the repayment of the amount owed a mortgage would be placed over the Defendant's land. Further that without having any of the necessary approvals in place he proceeded to fund the project by providing funds and paying for materials and by letter dated the 7th July, 2007 according to the Defendant's authorized representative, Kevin Williams acknowledged that the amount spent for the said project totaled $1,455,300.62, the said amount was also certified by the Defendant's Accountant, Mr. Arthur Carlson. The Plaintiff states that in spite of the proposal made in the memo from Mr. Glinton nothing was done to advance his position in respect of any applications which should have been made to the Investments Board or the National Economic Council as far as he was aware and that his attorney, Mr. Cox requested the return of the $35,000.00 from Glinton, Sweeting, O'Brien but no funds were returned; that after consulting with Mr. Julian Bostwick he obtained the Investment Board approvals in or around November 2008 but was confronted in 2009 that the Defendant had not taken any steps required under the said memo and he had already spent by April 2007 the sum of $1,455,399.62 on the basis of the said note and it became clear at that point to take steps to recover the moneys he had already spent.

20. Further, that the Defendant up to April 2009 had not made any attempt to obtain the Central Bank approval to pay him as required by the said note nor supplied the information to the Central Bank so that his application could be approved; that on the 22nd April 2009 his attorneys sent a demand letter to Mr. Kevin Williams requesting payment under the said note but no reply was received; that as a result and on the advice of his attorneys he made applications to the Central Bank and the Investments Board and on the 10th March, 2010 his application was approved to enable him to hold a mortgage over the said land identified in the said note subject to obtaining the necessary approval from the Central Bank and payment of the prescribed fee; that the Central Bank on the 8th September 2011 made the approval conditional upon the production of documentary evidence that the

moneys was converted to Bahamian Dollars and the submissions of invoices and the supporting Customs Entry forms issued in respect of the imported goods.

21. The Plaintiff states that on the 9th July, 2012 a demand letter was served on the Defendant's registered office pointing out that the maturity date had expired but the amount due had not been paid to him; that the said letter was passed on to the Defendant's attorneys (Glinton, Sweeting, O'Brien) and by letter dated the 24th July, 2012 replied that the Defendant had not received a proper accounting; that his attorneys replied to their letter dated the 9th August, 2012 pointing out that all of the invoices were sent to the Defendant and that his claim is based strictly on the moneys admitted to have been received by the Defendant plus interest as set out in the said note; that the Defendant's attorneys in receipt of the said letter advised that their clients were traveling on holiday and were note in a position to provide a response. However, the Plaintiff states that they never provided a response and he subsequently commenced these proceedings.

22. It is his evidence that by the said letters dated the 9th July and 9th August, 2012 the said note was presented for payment but was dishonored; that the Defendant is in breach of its obligations thereunder; that the Defendant has had use of the materials he purchased and sent to San Salvador for the renovation of the Resort and they have kept all of the moneys they admitted he paid on the said project and that they acknowledge that they received the goods and used the same but are refusing to pay.

23. The Plaintiff's evidence also found in his second Witness Statement in part is that he originally went to the said Resort in June 2004 and fished for five weeks there; that he returned in 2005 and spent the month of July fishing there; that while visiting the property he spoke to Kevin Williams acting on behalf of the Defendant who informed him that he needed financial help to fix the problems with the marina. He continues that he told Mr. Williams that he would be interested in investing in the marina; that he was willing to invest two million dollars ($2,000,000.00) for a fifty percent (50%) ownership stake of all marina properties and all businesses on the property. He states that his attorney drafted a

letter of intent on or about the 9th January, 2006 which pertained to the purchase of a fifty percent (50%) interest in the said Resort; that the said letter was signed by Kevin and Carlos Williams acting for the Defendant and himself and Edward Campany; that at that time he also advised Kevin Williams that they needed to make emergency repairs to the seawall so it would not destroy the hotel rooms and inlet. Further, that on or about June 2006 he agreed with Russell Yarema to act as a consultant and business manager as it concerned his interest in the said resort; that on or about the 6th May, 2006 he paid Brian Glinton Thirty Five Thousand ($35,000.00) Dollars for his Bahamian investment approval and to form several corporations to run all the businesses included in the said letter of intent; that at a meeting with the Defendant's representatives on or about the 2nd August, 2006, Kevin Williams and I asked Russell Yarema to raise an additional Two Million ($2,000,000.00) Dollars for the Resort.

24. It is also his evidence that on or about the 8th January, 2007 he met with Russell Yarema and Lisa A. Mitchell along with Kevin and Carlos Williams acting on behalf of the Defendant at Bass Pro Shops; that the purpose of the meeting was to have a face to face encounter with all the parties involved in addition to introducing Lisa Mitchell and to look at how they would move forward with the project. He continues that on or about the 17th April, 2007 he had a meeting in Brian Glinton's office with Kevin and Carlos Williams acting for the Defendant and Russell Yarema; that at that meeting he advised Kevin and Carlos Williams that he needed his investment in the Resort secured with a promissory note; that Brian Glinton wrote up a promissory note at the meeting for Two millions ($2,000,000.00) at ten percent interest (10%) to protect his interest. Further, that after the said note was executed by the Defendant's representatives he provided Kevin Williams with additional funds to keep the repairs moving forward; that after the said note was written and signed by all parties Brian Glinton notarized the note and told him it was a legal document but told him not to record it as the bank would not lend them any money if it was recorded and that Brian Glinton told him to take the note home and put it in his safe. The Plaintiff also states that on or about the 7th July, 2007 he met with the

Defendant's Accountant, Mr. Arthur Carlson to go over and confirm statements and money funded by him towards the Resort and his interest; that Mr. Arthur confirmed that he had spent the sum of One Million Four Hundred and Fifty Five Thousand Three Hundred Dollars and Sixty Two Cents ($1,455,300.62) on the Resort in cash and material purchases. Also that on or about the 9th July, 2007 Kevin Williams asked Russell Yarema to get a line of credit for the Resort; that Mr. Yarema set up a meeting with George Thompson from the Bank of The Bahamas. It is the Plaintiff's evidence that on or about the 3rd May, 2008 his US attorney sent a letter to Brian Glinton requesting a refund of the Thirty Five Thousand Dollars ($35,000.00) that he paid his firm but he never received Bahamian business approval nor an acceptable Bahamian contract to protect his investment; that on or about the 20th December, 2008 he went to the Registrar General's Department in Freeport and recorded the said note.

25. During cross-examination the Plaintiff was shown a document entitled "Letter of Intent" found at page 1 of the Plaintiff's Bundle of Documents and stated that he instructed his US attorney to prepare the same; that it stated he offered to pay $2 million dollars for a 50% ownership of the resort. Further he stated that he and Edward Campany were business partners; that Campany did not get the money so he backed out of the agreement; that the three signatures on the said letter was his and Campany as purchasers and Carlos Williams as seller but nowhere on the document refers to the Defendant as the seller. He continues that he spoke to Kevin Williams and Carlos Williams about his intention to purchase; that the letter of intent did not say anything about renovations; that it only spoke to purchasing all of the assets.

26. The Plaintiff was shown a document entitled "Agreement" found at pages 2 to 6 of the Defendant's Bundle of Documents filed on the 23rd March, 2020 and states that the said agreement was also prepared by his US attorney, Jack Cox; that the Defendant's name does not appear on the agreement. The Plaintiff was shown a document entitled "Memo" dated the 8th May, 2006 found at pages 2 to 6 of the Plaintiff's Bundle of Documents and agreed that the Memo reflects both the letter of intent

and agreement signed in January of that year; that when referred to page 5 of the Memo where it states "Purchase Agreement for Class B Preference Shares" that he never approved the Class B shares because they had no voting or ownership rights. Further, that he understood that he needed Central Bank approval to acquire the shares, that attorney Bryan Glinton advised him that he needed the National Economic Council's approval to acquire the shares; that he paid Mr. Glinton to get the approvals but he never did. He states that he never paid the $2 Million Dollars for the preference B shares and he never got those shares from Riding Rock Holdings Limited.

27. The Plaintiff states that the agreement and Memo does not refer to renovations and repairs; that the additional $2 Million Dollars Russell Yarema was to raise as stated in his Witness Statement was not the same $2 Million Dollars that he was to pay for the 50% interest in the resort; that the additional $2 Million Dollars was for improvements to the resort after the approvals; that the $2 Million Dollars was what he predicted it would cost to get the place up and running. Additionally, that the purchase price and the repairs were two separate set of monies; that in August 2006 it was recognized that there was a need for renovations to the resort; that it was to be a 50/50 split for the repairs but this was never reduced to writing. The Plaintiff also states that the additional $2 Million Dollars was never raised because they did not get to that level; that by August 2006 he had committed to spending a total of $3 Million Dollars on the resort with a breakdown for $2 Million Dollars in respect of the shares and $1 Million Dollars for the repairs; that he was purchasing the resort "as is" and he agreed that at the end of it all the Williams family would have their 50% share remaining, a renovated resort and $1 Million Dollars cash in hand.

28. The Plaintiff continues that he attended the offices of Bryan Glinton on the afternoon of the 17th April, 2007 along with Kevin Williams, Carlos Williams, and Russell Yarema but he did not recall if Michelle Williams was there; that up to that point he had not paid the $2 Million Dollars to acquire the 50% interest; that he paid a total of probably $1.5 Million Dollars that Kevin Williams used for repairs and that he did not recall how long the meeting lasted. He stated that he told Mr.

Glinton that he wanted the promissory note to protect his investment and to keep funding the improvements at the resort; that he paid a total of $1.5 Million Dollars and that the purpose of doing so was to acquire a 50% interest in the resort and it was done by major improvements to the resort. Further that most of the money came from his US attorney's trust account, that he gave $50,000-$70,000 in case, wire transfers and corporate cheques in the amount of $718,734.57 and that he has receipts for all of those payments. The Plaintiff stated that although the amount of his investment at the time of the making of the note was $1.5 Million Dollars the attorney made it for $2 Million Dollars because he told him that they needed to spend another $500,000 Dollars to have the resort ready and he spent that amount up to November of that year. The Plaintiff when shown the signatures on the promissory note could still not say whether Michelle Williams was present; that the payment of the $1.5 Million Dollars was spent on improvements to the resort and paid under the agreement to buy shares and that to him the Defendant and the Williams family is all the same. Further, that he agreed that the promissory note was unusual, that it contained strange provisions for the obligation to pay money to be converted into the acquisition of shares in the company. That when shown the cover note at page 9 in the Plaintiff's Bundle of Documents stated that it is incorrect to suggest that a teleconference occurred between the parties on the 17th April, 2007; that they met in Mr. Glinton's office that day; that he disagrees with the suggestion that the note was a draft as stated in the cover note; that the promissory note was written while he was in Mr. Glinton's office, that he signed it, it was notarized and the letter was sent out that night. Further, that Mr. Glinton terminated his services with him that afternoon; that he did not agree that Mr. Glinton's use of the words "Please let me have your comments" was not him asking for feedback; that the document was not e-mailed to him but it was sent to Kevin and Carlos Williams and Russell Yarema. Additionally, that the reason the promissory note did not speak to renovations and repairs is that it was to be security for what he spent on renovations and repairs; that he agrees that the promissory note was not connected to the Agreement/arrangement to

do the repairs and renovations at the resort; that he accepts that the Agreement to acquire a 50% stake in the Resort was never consummated and that the promissory note was not prepared for the purpose of helping him raise the money he needed to acquire the shares in the resort.

29. During re-examination the Plaintiff stated that at the time the Memo was prepared the parties concerned in the transaction were Kevin, Michelle, Carlos, Jamal and Jayson Williams; that he did not receive any indication in writing or otherwise from Mr. Glinton that there were incorporation of new companies on his behalf nor that there was a transfer of property from the Defendant to Riding Rock Landholding Company Limited, nor that the Attorney took any steps to carry out those takes. Further that he was funding things from January 17, 2006; that he spent almost $1.5 Million Dollars on the resort as at the date of the promissory note and by the time of writing the note he continued to do the work, funded it and invested the full $2 Million Dollars. Additionally, that during the meeting the Williams family did not complain about anything they just wanted the rest of the funding; that he became aware of the email cover note for the promissory note when he saw it in the Bundle of Documents from his former attorneys; that he was not sure if Mr. Glinton terminated his services before or after he signed the promissory note but that he terminated his services prior to the time the said email was sent.

Lisa A. Mitchell

30. The evidence-in-chief of Lisa A Mitchell in support of the Plaintiff's case is found in her Witness Statement. Her evidence is that on or about December 2006 she met with Russell Yarema in Winter Park, Florida and he mentioned a business opportunity at the Riding Rock Marina and they needed help to get it started. Additionally, that on or about the 8th January, 2007 she met with the Plaintiff, Russell Yarema, Kevin Williams and Carlos Williams acting on behalf of the Defendant at Bass Pro Shops in order to have a face to face meeting with all the parties involved and discuss her possible involvement; that during the next week it was agreed that she would visit the property and assess

what was needed. She continues that on or about February 2007 she flew to the Resort and met with Carlos Williams, Kevin Williams, Michelle Williams and Russell Yarema to look at the dive operations and what was needed; that between the 23rd and 25th March, 2007 she attended the Beneath the Sea consumer dive show in Secaucus, New Jersey for the purpose of promoting business at the Resort and that she helped with marketing materials and the promotion of the Resort. Further, she states in part that between the months of April and August 2007 she made additional trips to the Resort in order to make improvements to the property and the operation and that she conducted a thorough property inspection along with Carlos Williams and Michelle Williams to create a list of upgrades, repairs and operation functions and created a strategy to market diving on and off island. She also states that on or about the 7th July, 2007 she brought in travel wholesalers to tour the property; that on or about August to November 3rd, 2007 she made preparations for DEMA and that from October 31st to November 3rd, 2007 she worked on behalf of the Resort at the DEMA show in Orlando along with Russell Yarema and they brought in $250,000.00 in bookings and reservations. It is also her evidence that from November 2007 to January 2008 she continued working for the Plaintiff to assist and review the ongoing discussions and documents to transfer ownership percentage to him as agreed by the Defendant and that during the course of her involvement with the Resort she provided services to the Plaintiff and Defendant.

31. There was no cross-examination of her evidence.

Ed Campany

32. The evidence-in-chief of Mr. Edward Campany is found in his Witness Statement. He states that on or about the 9th January, 2006 the Plaintiff invited him to invest in the Riding Rock Marina; that a Letter of Intent was executed by himself, the Plaintiff along with Kevin and Carlos Williams acting on behalf of the Defendant to purchase fifty percent (50%) of the marina, hotel and all business included on the approximately twenty-six acres of the Resort. Further that on or about March 2006 he personally spent the sum of Two Hundred Thousand

Dollars ($200,000.00) in shipping two forty foot containers full of building materials intended to be used for repairs and improvements for the Resort at the request of Kevin Williams; that he ended his financial involvement in the Resort after paying for the said containers of building materials.

33. There was no cross-examination of his evidence.

Russell Yarema

34. The evidence of Mr. Yarema is found in his Witness Statement. He states that on or about June 2006 he agreed with the Plaintiff to act as a Consultant and Business Manager as it concerned his interest in Riding Rock Marina; that at a meeting with the Defendant's representatives on or about the 2nd August, 2006 he was personally asked by Kevin Williams to raise an additional Two Million Dollars ($2,000,000.00) for the Resort. Further that on or about December, 2006 he met with Lisa Mitchell in Winter Park, Florida to discuss a business opportunity at the Resort and where they needed her help to get it started; that on or about the 5th January, 2007 he engaged the services if Russell Nesbit to create a business plan for the bank and/or other lending institution from where they were intending to secure financing. He continues that on or about the 8th January, 2007 he met with the Plaintiff, Lisa Mitchell, Kevin Williams and Carlos Williams acting on behalf of the Defendant at Bass Pro Shops, the purpose of the meeting was to have a face to face meeting with all the parties and to introduce Lisa Mitchell and to look at the way forward. Additionally, on or about February 2007 he met with Carlos Williams, Kevin Williams, Michelle Williams and Lisa Mitchell at the Resort to look at the dive operations and what was needed; that on or about the 17th April, 2007 he was present at Brian Glinton's office in New Providence when the promissory note was written and executed by the parties. He further states that he can speak to his personal observations as to the conduct of the parties and it was clear to him that the Defendant's representatives were fully aware of the obligation to repay the Plaintiff that the Defendant was assuming by executing the said note. It is his was evidence that on or about the 7th September, 2007 he had a

meeting with George Thompson at The Bank of The Bahamas to discuss opening a line of credit for the Resort; that from the 31st October to the 3rd November, 2007 he worked on behalf of the Resort at the DEMA show in Orlando in marketing, sales and closing along with Lisa Mitchell and they brought in Two Hundred and Fifty Thousand ($250,000.00) Dollars in bookings and reservations. He states that during the course of his involvement with the Resort he provided services to the Plaintiff and Defendant.

35. During cross-examination he stated that he was first approached to be a witness in this case in 2012 by the Plaintiff; that he was present in Bryan Glinton's office on the 17th April, 2007 in Nassau; that he recalls Kevin, Carlos and Michelle Williams were also present. Further, that in response to his evidence that he could speak to his personal observation as to the conduct of the parties during the meeting he stated that the parties were aware that to continue going forward they needed to sign the promissory note; that they were not happy with him pushing to make the promissory note before he did any more work. Lastly, that he read the promissory note on that day in the office prior to noon.

36. During re-examination he recalls that the parties executed the promissory note in his presence.

The Defendant's Case

37. The Defendant relies on the evidence of Michelle Williams as found in her Witness Statement filed on the 31st March, 2022; the evidence of Kevin Williams as found in his Witness Statement filed on the 19th March, 2014 and the evidence of Carlson Arthur as found in his Witness Statement filed on the 19th March, 2014.

38. The Defendant also relies on the Defendant's Bundle of Documents filed the 23rd March, 2020.

Michelle Williams

39. The evidence of Ms. Michelle Williams as found in her Witness Statement in part is that she is a shareholder and Director of the Defendant Company and the owner and operator of Riding Rock Resort

located at Cockburn Town, San Salvador. Further that the resort is a small family-operated tourist resort established by her parents who are now deceased; that the other shareholders and directors of the Defendant company are her four brothers, Kevin Williams, Carlos, Williams, Jamal Williams and Jayson Williams and that she has been responsible for the day to day management of the resort for the past twenty-five years. She continues that she came to know the Plaintiff more than seventeen years ago, he was an annual visitor to the island and a regular guest at the resort. Further that prior to 2005 she and her family were considering selling the resort; that in or about 2005 the Plaintiff along with her brother shared the contents of a discussion they had earlier; that the Plaintiff stated he enjoyed coming to the island and in particular the resort due to the smallness of the island and friendly atmosphere; that he said he did not think they should sell the resort and he would like to purchase a fifty percent (50%) interest in the business. She continues that during that initial meeting the Plaintiff said he did not have the Two Million Dollars ($2,000,000.00) which they were asking to purchase fifty percent (50%) of the business outright but he felt he would be able to convince either his business partner "Steve" or his friend "Tim Atterberry" to joint-venture with him in purchasing fifty percent (50%) of the resort. Additionally, that following their initial meeting it became apparent that neither "Steve" or "Time Atterberry" would be parties to an agreement to purchase shares in the resort; however the Plaintiff said that he had other options whereby he could obtain the necessary funding that would enable him to purchase fifty percent (50%) interest; that while the Plaintiff was seeking to raise the said funds her brother introduced him to their Attorney Bryan Glinton who explained to him the requirements for a foreigner doing business in The Bahamas.

40. She states that she recalls that at one point during the early stages of their discussions the Plaintiff stated he needed a "Letter of Intent" signed by "both parties" indicating what it was that he would be purchasing; that she is also aware that in or about January 2006 a document headed "Agreement" was prepared by the Plaintiff or his Attorney containing the terms on which the Plaintiff was willing to

purchase a 50% interest in the resort; that she was not present at the time the document was signed but she recognizes the three signatures on the documents as the Plaintiff and her two brothers Kevin Williams and Carlos Williams. Further that Bryan Glinton, the Attorney advised them including the Plaintiff that if they intended to involve the Plaintiff as a "new Partner" it would be a good idea to restructure the operating and separate each entity comprising the resort for accounting and legal purposes. She continues that she is aware of the circumstances in which a "Promissory Note" dated the 17th April, 2007 was executed in the name of the Defendant in favour of the Plaintiff; that the Plaintiff had first expressed an intent in purchasing 50% of the Resort in the early months of 2005; that on the 9th January, 2006 he had signed a "Letter of Intent" but at the beginning of 2007 the Plaintiff admitted that he was having difficulty raising the sum of Two Million Dollars ($2,000,000.00) to purchase the 50% interest in the resort and said that he needed a document to demonstrate to a "lender" that he had an "Agreement" with the seller.

41. It is her evidence that the said note was prepared by Attorney Bryan Glinton, that it was signed by her brother Kevin and she witnessed it; that the said note was prepared solely for the purpose of assisting the Plaintiff in his attempt to raise the funds to enable him to purchase the 50% interest in the resort; that it was not prepared for the purpose of creating an obligation on the part of the Defendant to pay the sum of Two Million Dollars ($2,000,000.00) or any other sum to the Plaintiff; that the cover note from Mr. Glinton partially explains that the said note was not intended to create an obligation on the part of the Defendant to pay the said sum or any sum to the Plaintiff and the two documents should be read together. She continues that the Plaintiff did not succeed in raising the sum of Two Million Dollars ($2,000,000.00) required to purchase a 50% interest in the resort and the beneficial owners of the resort never transferred any interest in the resort to him. She also states that she is aware that there was also an agreement made by word of mouth between the Plaintiff and her brothers and herself that once the Plaintiff acquired a 50% interest in the resort the two parties would share the cost of renovation and refurbishment of the

resort equally and that she is also aware that in anticipation of the Plaintiff acquiring a 50% interest in the resort the Plaintiff made advances in cash and materials towards the refurbishment of the resort. She states that she is absolutely certain that the total value of the cash and material provided by the Plaintiff was nowhere in the region of Two Million Dollars ($2,000,000.00).

42. During cross-examination she stated that she is the operations manager of the resort and her duties include the day to day operations, booking of reservations, payment of bills, interacting with guests; that she was not initially a part of the discussion with the Plaintiff concerning his purchase of 50% of the resort; that she did not know Steve personally and knew Tim Atterberry because he would visit the island with the Plaintiff but the Plaintiff told her sometime later that Steve and Tim Atterberry would no longer be investing. She continues that Bryan Glinton was her family's attorney before any involvement with the Plaintiff; that she was not aware if the Plaintiff had prior dealings with Mr. Glinton before their introduction; that she did not recall if by the time they had introduced the Plaintiff whether he had expended funds to the Defendant. That when referred to the Letter of Intent that she did not see it before it was signed; that as far as she was aware the agreement to purchase the shares was not consummated; that the Defendant did not receive $250,000 as spoken in the document? She confirms that one of the related businesses/companies is known by the Defendant and has been known as that in 2006 when the agreement was signed; that the legal owner of the resort at that time was the Defendant. She states that she cannot say how long after the agreement was signed that she became aware of it; that no funds were ever paid for his shares; that she was aware that cash and materials were given but cannot say specifically when they received it after the agreement was signed; that she was involved with what was taking place but the meeting with Mr. Glinton was in the early stages. Further, that she saw the Memo after it was prepared; that she accepts what the Memo sets up; that after they had the discussion with the Plaintiff they instructed Mr. Glinton to incorporate the landholding company; that as far as she was aware the company was incorporated; that the

company was formed but just remained incorporated, no shares were ever transferred. She states that the resort is still owned by the Defendant; that the company Riding Rock Land Limited/Riding Rock Holding Limited were formed and incorporated; that she agrees to certain sections in the Memo that speaks to preference shares being created and how they were to be transferred to the Plaintiff. Further, that she did not instruct the attorney to prepare the purchase agreement for the shares because they never got the money for the shares; that in combination with the letter of intent, the promissory note was comprised for the Plaintiff to facilitate the letter of intent by securing funds necessary to pay for it. She rejected the suggestion that they did not instruct their attorney to prepare the purchase agreement because they never intended to transfer it to him; that she was not sure if the attorney ever applied for the Plaintiff's approvals but recalls the attorney was waiting on information from the Plaintiff; she rejected the suggestion that they did not instruct the attorney to get the approvals for the Plaintiff because they never intended to transfer the shares to the Plaintiff. Additionally, that the Defendant did not pay back the $2 Million Dollars or any sum to the Plaintiff on or before the 31st January, 2008 because they did not receive any money from the Plaintiff; that she denies the proposition that the Defendant received $1 Million Dollars from the Plaintiff by the 17th April, 2007; that they received some money from the Plaintiff for refurbishing the resort. She states that she cannot recall what all was done but the Plaintiff also had a construction company whereby he said he could buy in volume and bulk at better prices; that at that time the parties had a good relationship until he decided not to go through with the purchase agreement. She also states that she was physically present to sign the promissory note; that she signed it in San Salvador at the resort; that it was not all done at the same time; that she recalls that the Plaintiff was on the island and had discussions regarding moving forward and the Plaintiff indicated he needed time to gather funds. Further, that the promissory note was not executed at the lawyer's office; that there was no objection to what as written; that the items in the promissory note are in chronological order as to give the Plaintiff a level of surety in the

event the previous points had taken place but they never took place as he never purchased. Additionally, that the promissory note was legally binding to the extent that it was executed; that many years later the transactions outlined in the document was never executed; that they never received $1.45 Million Dollars for renovations to the property; that she cannot recall what was specifically said on the 17th April, 2007 as the same subject matter was discussed in several teleconference meetings. She continues that they had a teleconference, the document was emailed, and she went back to Riding Rock and executed it with the Plaintiff being present. She does not accept that there was a parallel agreement between the parties that they were to assume the costs of renovation equally; that the discussion was once he was owner and the purchase was done they would share renovation; that they accepted the money because he initiated and because of the advantage he had in acquiring; that she believes that they had a discussion about waiting to complete the purchase first and that the attorney also advised him to wait and that he needed to get his approvals. Further, that she was not closely involved with the refurbishing process; that she was not the financial overseer because the Plaintiff went ahead and purchased with the intention to review; that she does not accept that the Plaintiff advanced no less than $1.45 Million Dollars to the Defendant in cash and materials; that before they could reconcile they fell out; that it could not be more than $500,000 the Plaintiff forwarded to the Defendant.

43. There was no re-examination of her evidence.

Carlson Arthur

44. The evidence of Mr. Carlson Arthur is found in his Witness Statement. His evidence is that he has been an Accountant for the Defendant Company since 1993; that despite living on the island of New Providence he travels to San Salvador regularly to compile accounts and carry out any further duties. He states that sometime in 2007 Kevin Williams introduced him to the Plaintiff as an investor; that he told him that the Plaintiff was going to inject Two Million Dollars ($2,000,000.00) in exchange for 50% shares in Riding Rock Limited.

45. He continues that there were purchases by the Plaintiff for the resort and was told by Mr. Williams (Kevin) that these purchases were made based on an oral agreement they had to equally split the cost of renovating the resort; that he asked Mr. Williams to provide him with documentation of the purchases so they could come up with a figure; that Mr. Williams stated the Plaintiff would have documentation of some of the purchases and that Mr. Williams also did some renovations. Further, that at the end of June 2007 he was told by Mr. Williams that he should come to San Salvador to receive the receipts from the Plaintiff; that he received the receipts from the Plaintiff which were in a box and disorganized; that he mentioned to him that some of the receipts would be duplications, others pertained to himself and his business and some were from his lawyer; that he presented him with a ledger from his lawyer in the United States; that they later agreed they would come together to discuss which items belonged to the resort and which did not. He states that as he went through the receipts some had dates, others did not, some were duplications, many were not in the resort's name and some had the Plaintiff's name or personal business on it; that he had a conversation with the Plaintiff and Mr. Williams and he made it clear that the receipts were unclear; that in order to ensure that a review of the receipts were done in an effective manner he placed every receipt that was in given in a spreadsheet and labeled it "Payments made by Kenny" and then totaled everything. He states that the Plaintiff never came to him to discuss the list of alleged payments despite numerous requests being made to do so.

46. During cross-examination he stated that he has been qualified since 1990; that his duties include preparing annual financial accounts of the company, recording and maintaining annual financial statements and cash transactions; that he was only aware of the purchases for the resort because of the receipts handed over to him; that he was told the Plaintiff made those purchases; that he was aware of an oral agreement for renovation costs to be split equally. He states that he was ordered to make detailed statement account to identify the amount of purchases made by the Plaintiff for the resort up to that date; that he met with the Plaintiff personally. That he was shown the document entitled

"Payments Made by Kenny" as found at pages 31 to 33 of the Plaintiff's Bundle of Documents and confirmed the figures as correct on the document; that he did not agree with the suggestion that the document was an accurate record and financial account of all of the purchases made by the Plaintiff towards the resort. Further, that he went through the receipts handed to him; that he could not say if all were paid on behalf of the resort; that the Plaintiff told him that some of the invoices were duplicate, some were in the name of the Plaintiff's company and purchases he made personally; that they were supposed to meet with the Plaintiff to confirm and clarify the purchases but that never happened. He accepts that he did not indicate on the document that it was subject to revision; that he agrees that some of the payments depict items that he saw receipts for and verified the same; that it took him about two days to complete the document; that when he visited the island he saw some renovations being made and that he rejected the suggestion that the document was final.

47. There was no re-examination of his evidence.

Kevin Williams

48. The evidence of Mr. Kevin Williams is found in his Witness Statement. It is his evidence that he is a Managing Director and Owner of Riding Rock Resort and Marina; that in 2005 the Plaintiff along with his friend Tim Atterberry visited and stayed at the resort as they had done so many times before; that during this time he told them he was going to put the resort up for sale and they stated they would be interested in becoming investors of the resort and they would each give One Million ($1,000,000.00) Dollars in exchange for fifty percent (50%) shares in the resort and they would divide the cost of improvements for the property after that was done; that they told him not to sell the resort and he agreed and in reliance of that he did not sell the resort. He continues that there were numerous meetings in The Bahamas and the United States to discuss the resort; the Plaintiff told the Defendant that Mr. Atterberry would no longer be able to give his One Million ($1,000,000.00) Dollars; the Plaintiff assured him that he would find the additional One Million ($1,000,000.00) Dollars which would then give

him Two Million Dollars ($2,000,000.00) for his fifty percent (50%) shares and they would divide the cost of improvements after the sum was paid.

49. It is his evidence that the Plaintiff and himself then went to Bryan Glinton, Counsel and Attorney-at-Law of Glinton, Sweeting, O'Brien to discuss the Riding Rock proposals at the Plaintiff's request; that Mr. Glinton advised the Plaintiff of what he needed to do such as getting the Investment Board and Central Bank approval along with the necessary documents to be able to pay the money and receive the shares. Further, while the approvals were pending the Plaintiff stated the approvals were taking too long and that he would start putting money into the improvements they stated they would equally divide; while he purchased some of the items he went around to different banks in The Bahamas to get loans but said he was refused because he was a foreigner. He states that at the beginning of 2007 the Plaintiff and Defendant wanted to know how much money had been spent on the improvements; the Plaintiff went to the Defendant's Accountant and gave him a box of disorganized receipts and told him those were the receipts he possessed and he would come back and clarify which receipts are the resort; that Mr. Arthur composed a spreadsheet labeled "Payments made by Kenny" making it easier to go through which items belonged to the resort and which did not. However, the Plaintiff never came to discuss the same with Mr. Arthur or the Defendant despite numerous requests.

50. He continues that the Plaintiff hired Lisa Mitchell as the marketing agent for the resort; that he mentioned to her that he was looking for financing to pay him the sum and she told him that her father had connections with Chinese banks in China; that after speaking to her father he told her that if the Plaintiff had an Agreement with the resort he would be able to get the financing for him; that he also stated that a promissory note would be sufficient; therefore they asked Mr. Glinton to draft a promissory note to assist the Plaintiff in getting financial assistance from China. He states that as time progressed the Plaintiff realized that Ms. Mitchell's father's connections were not legitimate; that the business relationship between he and the Plaintiff deteriorated

and Mr. Glinton informed the Plaintiff that he would have to retain his own attorney.

51. Mr. Williams states that the letter referred to by the Plaintiff in his Statement of Claim dated the 7th July, 2007 and prepared by his Accountant is forged; the Plaintiff would not be able to produce the original letter; there are blatant inconsistencies. He continues that all of the funds that the Plaintiff gave were given for the purpose of renovating the resort; that this was an agreement they had from the onset; the Two Million Dollars ($2,000,000.00) was to be paid by the Plaintiff for the 50% shares in the resort once approvals by the Investment Board and Central Bank were made; that the Investment Board approval was granted on the 17th November, 2008 ten months after the time the Plaintiff claims the promissory note was to be enforced; that the Central Bank approval never came into fruition; that this reaffirms that the purpose of the promissory note was to acquire finances from Chinese businessmen.

52. It is his evidence that the Plaintiff never gave him the money for his shares in the resort; that this posed a major problem for him as some of those funds were going to be used by the resort to pay their share of the 50% of the renovations.

53. During cross-examination he stated that he is the manager of the resort; that his duties include managing the operation, oversee different projects and carry out the daily charge of managing. He states that the owner of the resort is the Defendant; that their family of five siblings have shares of the Defendant as owners; that what he said in paragraph one of his Witness Statement that he is the owner of the resort is false; that they decided to sell the resort due to the recession and 9/11 and had difficulties with people coming to the island. Further, that repairs and renovations were necessary for the resort; that at the time the conversation took place Riding Rock Holdings Company did not exist; that it was discussed what they agreed to but it was based on the Plaintiff buying the shares and then they would go ahead with the renovation; that at their second meeting with the attorney he was made aware that Atterberry would no longer be able to invest the $1 Million Dollars and that the Plaintiff told him that Atterberry did not have the

funds to do so. He did not agree with the suggestion that they were already receiving moneys when they were advised that Atterberry was no longer investing; that he recalls the content of the Memo and what was set out; that he was aware of the necessity of approvals from the Central Bank and the Investment Board for the Plaintiff; that he was aware that without the approvals the Plaintiff could not lawfully give him the money and receive 50% of the shares. Further, that he did not instruct Mr. Glinton to make applications for the Plaintiff's approval; that the Plaintiff was told that he had to have the necessary documents to make the applications for the approvals; that he did not personally render assistant to the Plaintiff for his applications.

54. He states that it was about two months after meeting with their attorney that the Plaintiff communicated to them that the approvals were taking too long; that he inquired with their attorney and the response was that he needed more documents from the Plaintiff; that he did not refuse the Plaintiff's proposal to put money into the property; that he told the Plaintiff that more information was need for the applications to obtain the approvals but the Plaintiff said it was taking too long; that the Plaintiff said he would go ahead with the improvements and that he told him if he was happy about it go ahead. Additionally, that he did not personally receive money from the Plaintiff; that the money was for materials, the Plaintiff paid some bills and whatever was necessary to work with; that the Defendant received some benefits from the Plaintiff to improve the resort and not a significant financial and material benefit as suggested. He states that at that time (the beginning of 2007) purchases had been done; that he was concerned to know where they were at financially because the Plaintiff had not gotten his approval.

55. He was shown the letter at page 30 in the Plaintiff's Bundle of Documents and states that he does not recognize the letter; that the company's letterhead does not exist; that he never wrote that correspondence; that it was his signature on the letter but he stated in his Witness Statement that his signature was forged. Further, that the letter dated the 7th July was not written by him or anyone else; that he would not call his accountant the way he was called in the letter; that

the spreadsheet that accompanied the letter was not a fraud but the cover letter was a fraud; that he gave the spreadsheet to the Plaintiff with a cover letter. He rejected the suggestion that the purpose of the promissory note and the reason behind it was that the Defendant wanted additional money from the Plaintiff and the Plaintiff refused to advance any additional funds until it was signed; that he rejected that the Plaintiff spent $1.45 Million Dollars on improvements.

56. He continues that he was not at the meeting in Mr. Glinton's office on the 17th April, 2007; that the signing of the promissory note did not take place in Mr. Glinton's office; that the promissory note was emailed to them and they signed in San Salvador; that he read the contents of the document before signing it; that Michelle Williams as Secretary of the Defendant witnessed him signing it as President of the Defendant; that the promissory note was the final version of the document. He states that the promissory note was to help the Plaintiff find funding to obtain and/or buy shares in the resort; that they did not pay any funds to the Plaintiff before the 31st January, 2008; that he rejected the suggestion that the Defendant was obligated under the promissory note to pay the $2 Million Dollars back to the Plaintiff. Further, that he never gave the Plaintiff anything in return for the money, materials, goods, improvements and repairs; that he feels justified not to do so because the Plaintiff never paid his $2 Million Dollars for the shares; that he did not have the $2 Million Dollars so he could not pay the $1 Million Dollars towards improvements; that the amount spent by the Plaintiff was not agreed, it was not the term of the condition of the agreement. Additionally, that he did not recall how he became aware that the Investment Board approval was granted on the 17th November, 2008; that he does not recall why he did not take steps to consummate the share transfer agreement and that he took no further steps to do the same; that he rejects the suggestion that he never intended to transfer any shares to the Plaintiff even after finding out that the approval was granted and that he rejects the suggestion that instead his intention was to collect the Plaintiff's money, use it to repair the buildings of the resort and leave the Plaintiff with nothing.

57. There was no re-examination of his evidence.

Issues

58. The Plaintiff maintains that the issues for the Court to consider are:-
    a. Whether the Court accepts as fact that the Defendant on the 17th April, 2007 made a promissory note in the sum of $2,000,000.00 Dollars with re-payment to be made to the Plaintiff on the 31st January, 2008;
    b. Whether the Plaintiff agreed to assist the Defendant with the financing with the purchase of goods it intended to import in the Bahamas for the purpose of renovating the Resort and in exchange for the Defendant executing the said promissory note;
    c. Whether the intention behind the execution of the promissory note was to secure the repayment of the money advanced by the Plaintiff to the Defendant for the purchase of goods and materials for the renovation of the Resort;
    d. Whether the intention of the promissory note on the default of the repayment of the amount owed a mortgage would be placed over the Defendant's land;
    e. Whether the Plaintiff was entitled to request the repayment of the sums due under the promissory note;
    f. Whether the Plaintiff after having spent a sum in excess of $1,455,399.62 on the Defendant's property is entitled to have his money repaid by the Defendant;
    g. Whether the Plaintiff after having spent a sum in excess of $1,455,399.62 on the Defendant's property is entitled to have an interest in the said property.

59. The Defendant however maintains that the issues before the Court to consider on the state of the pleadings are:-
    a. Whether the promissory note was created by the Defendant for the purpose of securing the payment to the Plaintiff of the cost of building materials which were used to renovate the resort;
    b. Whether the Defendant defaulted on its obligation to make payment under the promissory note dated the 17th April, 2007.

The State of the Pleadings

60. As the Court understands the case before it, the Plaintiff by way of his Statement of Claim asserts that there was only one agreement between the parties which was reduced to writing by way of the promissory note dated the 17th April, 2007. Further that it was the Plaintiff agreeing to assist the Defendant with financing to purchase goods and materials to renovate the Resort and the intention behind the execution of the said promissory note was to secure the repayment of all moneys advanced by the Plaintiff for the purchase of materials and furnishings for the renovation of the Resort. The Plaintiff also asserts that as at the 7th July, 2007 it was confirmed by a representative of the Defendant Company that he had expended $1,455,300.62 towards the renovations. Therefore, he claims that the Defendant breached the terms of the promissory note by failing to pay the principal sum of $2,000,000.00 and interest to the Plaintiff on the 31st January, 2008 as identified in the promissory note as the maturity date. Additionally, he claims the sum of $1,455,300.62 with interest for the total sum as due and owing as $2,238,916.82.

61. However, the Plaintiff's Statement of Claim does not assert that the Plaintiff was to receive any interest in the said resort as a result of any monies advanced to the Defendant.

62. The Defendant in its Supplemental Submissions submits in part that a careful review of the Plaintiff's Statement of Claim shows that the Plaintiff's claim against the Defendant is based exclusively on the averment that the Defendant failed to honor the terms of the promissory note; that the Plaintiff does not plead that there was a breach or repudiation of the agreement for the sale of 50% of the shares in the resort by the Defendant nor does the Plaintiff plead there was a breach or repudiation of the agreement to renovate the resort by the Defendant; that in his Closing Submissions the Plaintiff seeks to merge his claim "as pleaded" with a claim for "breach of contract" which was not pleaded in his Statement of Claim; that the Plaintiff is bound by his pleadings and should not be permitted to raise a claim for breach of contract for the first time in his Closing Submissions (See **Farrell v Secretary of State for Defence [1980] 1 WLR 172**; Order 18, Rule 6 of the Rules of the Supreme Court); and that at the

trial the Plaintiff did not lead evidence to support a claim that the Defendant was in breach of the agreement for the sale of 50% of the shares in the resort nor did the Plaintiff lead evidence to support a claim that the Defendant was in breach of the agreement to renovate the resort.

63. As it is noted in the decision of **Glendon E. Rolle t/a Lord Ellor & Co. v. Scotiabank (Bahamas) Limited 2017/Cle/Gen/01294,** authored by Madam Justice Indra Charles (as she then was) observing at paragraphs 37 through 40 the Bank raised a preliminary issue that parties are bound by their pleadings and therefore the Plaintiff was precluded from advancing issues not expressly advanced in his pleadings. Paragraphs 38 and 39 are provided as follows:-

> "[38] It is therefore necessary for me to say something on pleadings. The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action. Evidence need not be pleaded because that will come from the affidavits and cross-examination thereon or by oral evidence.
>
> [39] In **Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018,** our Court of Appeal held that the starting point must always be the pleadings. At paras. 29-33 and 37-39 of the judgment, Sir Michael Barnett JA (as he then was) stated:
>
> > *"29. The real difficulty in the judgement of the court below is that the finding of negligence was not one that was pleaded by the respondent. This is ground 10 of the appellant's grounds of appeal.*
> >
> > *30. The trial judge rejected the particulars of negligence pleaded and founded liability on a ground not pleaded in the statement of claim.*
> >
> > *31. In our judgment this is not proper and manifestly unfair to the appellant.*
> >
> > *32. Negligence was clearly pleaded and particularized as set out in paragraph 6 above.*

33. That was the case the appellant had to meet. There was no assertion that it was negligent in failing to delay boarding because of the rain. If that had been the case the appellant may have been able to lead evidence explaining why it did not delay further the boarding process or stop the respondent from attempting to board. .....

37. This is not an arid pleading point..."

38. In **Nada Fadil Al Medenni vs. Mars UK Limited [2005] EWCA Civ 1041** Dyson LJ giving the decision of the English Court of Appeal said:

> *"It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting then in certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."*

39. The starting point must always be the pleadings. In **Loveridge and Loveridge v Healey [2004] EWCA Civ. 173**, Lord Phillips MR said at paragraph 23:

> *"In Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775 Lord Woolf MR observed at 792–793:*

'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.'" [Emphasis added]

At paragraph 40 of the Judgment, Sir Michael went on to state:

"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."

64. Additionally, Senior Justice Indra Charles (as she then was) in the case of **George Damianos d/b/a/ Damianos Sotheby's International realty and Bank of The Bahamas limited et al. 2018/CLE/gen/01129** said, at paragraph 128 the following:

"The purpose of pleadings is not to play a game at the expense of the litigants but to enable the opposing party to know the case against him. So, in a claim based on conspiracy, as in this case, Mr. Damianos was bound to set out the particulars of claim including details of who is alleged to have acted and what they did...."

65. The Court has considered the submissions of Counsel and the authorities above and remind the parties that a party is bound by his/her/its pleadings.

66. Therefore, the issues for the Court to consider in the instant action are:-

a. Whether the promissory note dated the 17th April, 2007 is a legally binding document and therefore enforceable; and if so;
b. Whether the Defendant defaulted on its obligation for repayment under the promissory note.

The Promissory Note

67. The Promissory Note is found at page 9 in the Plaintiff's Bundle of Documents (which was an agreed document between the parties). The Court reproduces the said Promissory Note below:-

" ***PROMISSORY NOTE***

PRINCIPAL AMOUNT
$2,000,000.00

17 April 2007
Nassau, The Bahamas

FOR VALUE RECEIVED, the undersigned CARTER ENTERPRISES LIMITED, a company incorporated under the laws of the Commonwealth of The Bahamas (hereinafter referred to as the "Maker") having an address at Cockburn Town, San Salvador, The Bahamas, does hereby promise to pay to the order of KENNETH SCHWEITZER, c/o Jack Schramm Cox P.A., 9002 S.E. Bridge Road, Hobe Sound, Florida 33455, USA (hereinafter referred to as "Lender") without setoff at Lender's address above or at such other address as the Lender shall, from time to time, designate, the principal sum of TWO MILLION AND 00/100 DOLLARS ($2,000,000.00), together with interest accruing thereon from the date hereof at the rate hereinafter provided calculated on the daily principal balance outstanding from time to time on the basis of a three hundred sixty (360) day year counting the actual number of days elapsed, subject to the following terms and conditions:-

1. Payment. The principal and interest under this note shall be repaid by Maker to Lender on the 31st day of January 2008 (hereinafter the "Maturity Date") or such other date as may be mutually agreed by Maker and Lender, unless this Promissory Note is sooner terminated as provided hereunder.

2. Currency of Payment. Subject to the approval of the Central Bank of The Bahamas, Maker shall make all payments hereunder in the currency of the United States of America.

3. Interest Rate. This Note shall bear interest at the rate of Ten (10%) percent per annum. Interest shall accrue on the

unpaid principal balance of this Note from the date hereof until payment in full of the unpaid principal amount hereof.

4. Default. Maker shall be in default hereunder if fails to pay the sums due under this Note within 30 days of the Maturity Date, unless Lender grants an extension of time for repayment.

5. Power of Attorney. Maker hereby irrevocably and by way of security for payment and performance of the terms of this Note appoints Lender as its true and lawful attorney (with full power to appoint substitute and to sub-delegate) on behalf of Maker and in Maker's name or otherwise, to sign, seal, deliver and complete an Indenture of Mortgage in favour of Lender over the real property more particularly described in an Indenture of Conveyance dated the 29th day of November 1985 and made between Columbus Landings Limited and Carter Enterprises Limited and recorded in Volume 4462 at pages 369 to 373 of the Registry of Records (hereinafter the "Property"); provided that, such Power of Attorney shall not be exercisable unless there is a default hereunder; and provided further that, such Indenture of Mortgage shall expressly provide for the waiver of Lender's right of foreclosure as a mortgagee with the intent that Lender's sole remedy thereunder shall be the exercise a power of sale.

6. Conversion of Note. Subject to the receipt of the approvals of the Investments Board and the Central Bank of The Bahamas, this Note and the sums due hereunder shall be convertible into Fifty percent (50%) of the Preference Shares in Riding Rock Holdings, Ltd., a company formed under the laws of the Commonwealth of The Bahamas for the purpose of holding the assets forming apart of the Riding Rock Resort & Marina situate in Cockburn Town, San Salvador (including the Property). The Maker hereby undertakes to transfer the Property from the Maker to a subsidiary of Riding Rock Holdings, Ltd and assist the Lender with its applications to the Investments Board and the Central Bank of The Bahamas.

7. No Waiver. No waiver or consent by the Lender with respect to this Note shall be valid and binding unless in writing and signed by the Lender. Any such waiver or consent by the Lender which may be granted shall be effective only within the limitations stated in such waiver and only for the particular event for which such waiver is given.

8. Maker Undertaking to Cooperate. Maker shall cooperate and take such actions, including the execution of additional notes, as Lender or such subsequent holder or participant may reasonably request.

9. Governing Law. This Note shall be governed by and construed in accordance with the laws of the Commonwealth of The Bahamas, without giving effect to its choice of law provisions.

10. Amendment. This Note may not be amended or modified except by an instrument in writing executed by the Lender and Maker.

11. Binding Effect. This Note shall bind the Maker and the legal representatives, successors and assigns of Maker, and shall inure to the benefit of Lender, and Lender's heirs, legal representatives, successors and assigns."

68. The evidence of the Plaintiff and the Defendant is that the Promissory Note appearing at pages 9 and 10 of the Plaintiff's Bundle of Documents is the Promissory Note executed by Kevin Williams on behalf of the Defendant and witnessed by Michelle Williams, a Director of the Defendant Company.

69. Counsel for the Plaintiff, Mr. Osman Johnson makes the following submissions, contentions and assertions in part relating to the said Promissory Note:-

    a. That the language used in the Promissory Note entails an unconditional promise on the Defendant's part to pay the sum of Two Million Dollars ($2,000,000.00) to the Plaintiff by a fixed and determinable future time (i.e. on the 31st day of January, 2008) as

opposed to any option to pay this sum on any day of the Defendant's choosing prior to the 31st January, 2008;

b. That there never arose any contingency as to repayment and there is no evidence that the Promissory Note was either terminated prior to the 31st January, 2008 specifically because the Defendant never took any step necessary under clause 6, to convert the note into 50% preference shares to the benefit of the Plaintiff;

c. That the Plaintiff's document must be considered as a valid and enforceable Promissory Note under the law for the reasons stated above (See. **Claydon and another v Bradley and another [1987] 1 All ER 522; Williamson v Rider [1962] 2 All ER 268**);

d. That the Plaintiff's Promissory Note satisfies the requirements for validity under Sections 11 and 83 of the Bills of Exchange Act 1882 and the Plaintiff is entitled to the enforcement of the terms.

70. Counsel for the Defendant, Mr. Harvey Tynes, KC made the following submissions, contentions and assertions in part relating to the said Promissory Note:-

a. Firstly that on the state of the pleadings the core issues in dispute are issues of fact and they are whether the promissory note was created by the Defendant for the purpose of securing the payment to the Plaintiff of the cost of building materials used to renovate the resort and whether the Defendant defaulted on its obligation to make payment under the promissory note;

b. That the Plaintiff's claim as pleaded in paragraph 8 of the Statement of Claim is based solely on the averment that the Defendant is in breach of its obligations under the promissory note dated the 17th April, 2007;

c. That as it relates to the promissory note adduced during the trial via each party's respective bundles, the said note is accompanied by a "Cover note" from Attorney Bryan Glinton and when the promissory note and cover note are read together one can conclude that the promissory note was not signed in the office of Bryan Glinton on the 17th April, 2007 as suggested by the Plaintiff

in his evidence, that it was not signed for the purposes of creating an obligation for the Defendant to pay the Plaintiff the sum of $2,000,000.00, that the promissory note was not intended to secure the repayment of monies or materials supplied by the Plaintiff for the renovation or repair of the resort;

d. That the use of the words found in the cover note "our telephone conference" suggest that there was no meeting in Mr. Glinton's office earlier that afternoon as stated by the Plaintiff in his evidence;
e. That the word "draft" suggests that the promissory note was not yet in its final form, that the word "proposed" suggested the promissory note was being sent to the parties as a mere suggestion for their consideration;
f. That the second sentence in the cover note and the words "held in escrow" are a clear indication that the draft note was not to have binding effect until two specific conditions were met that is approval was given for the Defendant to borrow US Dollars and for the registration of the Plaintiff's US Dollar loan;
g. That no evidence was led at the trial to establish that the two conditions were ever met or that the draft promissory note was ever released from escrow;
h. That the items referred to at items 1, 2 and 3 referred to in the cover note show clearly that the purpose of the promissory note was to facilitate the acquisition of 50% of the preference shares in the resort by the Plaintiff;
i. That the obligation to pay the sum of $2,000,000.00 as stated in the promissory note was expressly made subject to a total of 11 "terms and conditions";
j. That the first condition provides for the "termination" of the note prior to the maturity date and the sixth condition provides for both the note and the sums payable thereunder to be converted into 50% of the preference shares in the resort;
k. That there is nothing in the cover note or the promissory note itself that supports the averment at paragraph 4 of the Statement

of Claim that it was executed in exchange for the Plaintiff's oral agreement to assist with the renovation of the resort;

l. That there is nothing in the cover note or the promissory note itself which supports the averment at paragraph 6 of the Statement of Claim that the promissory note was intended to secure the repayment of all monies advanced by the Plaintiff for the purchase of materials and furnishing relative to the renovation of the resort;

m. That the entire contents of the cover note and the promissory note suggest that the note was referable to the agreement to purchase 50% of the resort only and the promissory note was not intended to create an obligation for the Defendant to pay the sum of $2,000,000.00 to the Plaintiff;

n. That by the words "Please let me have your feedback" at the end of the cover note was Mr. Glinton seeking "feedback" from the parties and is consistent with Mr. Glinton's reference to the promissory note as a "draft" and a mere proposal which was intended to be considered by the parties but not intended to be legally binding;

o. That the reference by Mr. Glinton is consistent with the Plainitff's evidence that he was told not to record the note and such advice appears to be an oblique reference to the effect of Section 10 of the Registration of Records Act.

Discussion/Analysis

Findings of Fact

71. The evidence on behalf of the parties consisted of Witness Statements, each witnesses' respective oral testimony from the witness box and the documentary evidence as found in the Plaintiff's Bundle of Documents which for the most part was agreed between the parties (documents found at pages 1 to 17).

72. The Court having heard the evidence of both the Plaintiff and his witnesses finds that his evidence to be wholly unreliable and appears to be somewhat confused as to the nature of his agreement. It would appear that the Plaintiff either did not appreciate the nature of the

agreement that was being proposed or has simply chosen to appear to be ignorant and the Court finds this unlikely given the multiple businesses the Plaintiff indicated he was a part of. As for the evidence of the Defendants and their witnesses they too are not naïve and appeared to earnestly be seeking a foreign investor in their properties. However the Court finds their evidence to be more credible than that of the Plaintiff.

73. Therefore having considered the evidence of the parties and noting that in a civil case the burden of proof is always on a balance of probabilities the Court's findings of fact are listed below:-

a. That in or around 2005, the Plaintiff expressed his interest to members of the Williams family to purchase the Resort;
b. That the Plaintiff was to pay the total sum of Two Million ($2,000,000.00) Dollars to purchase a fifty percent (50%) interest in the Resort;
c. That the Plaintiff and members of the Williams family agreed that they would split the cost of renovating and refurbishing the resort;
d. That the agreement to split the cost of renovating and refurbishing the resort was not contained in the promissory note;
e. That the agreement to split the cost of renovating and refurbishing the resort was an oral agreement and was not reduced to writing;
f. That by or around the 17th April, 2007 the Plaintiff had forwarded money and materials towards the refurbishing of the resort;
g. That in or around June 2007, some renovations and refurbishment of the resort were made;
h. That the Plaintiff never paid the sum of Two Million ($2,000,000.00) Dollars to the Defendant, the Williams family and/or to any of the entities owned by the Williams family for the purchase of a fifty percent (50%) ownership of the resort;
i. That to date no shares of the Defendant Company were issued to the Plaintiff for his payment of Two Million ($2,000,000.00) Dollars for the purchase of a fifty percent (50%) ownership of the resort.

The Law on Bills of Exchange

74. This case is essentially predicated on the issues arising from the law of contract. Halsbury laws 4th edition volume 9(1) paragraph 201 notes that whilst it is impossible to give one absolute and universal correct definition of a contract the most commonly accepted definition is a promise or set of promises which the law will enforce. Further, to constitute a valid contract there must be two or more separate and definite parties to the contract, those parties must be in agreement that there must be a consensus ad idem, those parties must intend to create legal relations in the sense that the promise of each side are to be enforceable simply because they are contractual promises , the promises of each party must be supported by consideration or by some other factor which the law considers sufficient generally speaking, the law does not enforce a bare promise(nadum pactum) but only a bargain.

75. Additionally, a promissory note is defined by Halsbury Laws 4th edition paragraph 306, as an unconditional promise in writing made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or bearer. Documents such as promissory notes are considered Bills of Exchange and are subject to the Bills of Exchanges Act, 1882 ("the Act"). Section 84 (1) of the Act also defines a promissory note as an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

76. Additionally, Section 3 of the provides:-

"3. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to

the payment of money, is not a bill of exchange." (The Court's emphasis)

77. Counsel for the Plaintiff has submitted that the said Promissory Note must be considered as a valid and enforceable Promissory Note under the law and that it satisfies the requirement for validity under Sections 11 and 83 of the Bills of Exchange Act 1882 and the Plaintiff is entitled to the enforcement of the terms.

78. However, as submitted by Mr. Tynes, KC on behalf of the Defendant, the promissory note was subject to some 11 terms and conditions.

79. The promissory note as evidenced in the Plaintiff's Bundle of Documents contains several conditions that in addition to the repayment of the $2,000,000.00 Dollars to the Plaintiff, that the said sum would be convertible into 50% of preference shares in Riding Rock Holdings, Ltd. subject to the receipt of the approvals of the Investments Board and the Central Bank of The Bahamas; the Defendant was to also transfer the property (i.e. the resort) to a subsidiary of Riding Rock Holdings, Ltd.; and assist the Lender with its applications to the Investments Board and the Central Bank.

80. Moreover, according to the terms of the promissory note the Defendant was to repay the said sum in the currency of the United States of America subject to the Central Bank's approval.

81. While Mr. Tynes, KC has submitted that the language found in the accompanying cover note supports his assertion that the promissory note before the Court was a draft and did not legally bind the Defendant, the evidence of the Defendant's witnesses when shown the promissory note in the Plaintiff's Bundle of Documents was that it was indeed the document they executed.

82. The Court in its contemplation of the provisions of the Bills of Exchange Act and the inclusion of some 11 terms and conditions in particular the conditions found at clauses 2 and 6 of the promissory note to the Court's mind evidences that the said promissory note does not satisfy the requirements of the Act. A promissory note is an unconditional promise to repay and as such the inclusion of these 11 terms and condition in the said promissory note places conditions on the parties in addition to the repayment of the said sum.

83. Therefore, the Court finds that the promissory note dated the 17th April, 2007 is invalid as it fails to meet the requirements of a bill of exchange and is therefore unenforceable. The Court having made its finding that the promissory note is invalid and unenforceable the Court finds that the Plaintiff's pleaded case therefore has to fall away.

Ancillary Agreement

84. However, what remains of this case as alleged by the Plaintiff is that he is entitled to damages as a result of what he alleges was a breach of contract. The Plaintiff therefore, claims that some $1,455,399.62 was advanced in cash and materials to the Defendant for the refurbishing and renovation of the resort. The parties during the course of the trial have both admitted that there was an oral agreement that the Plaintiff would provide monies towards the refurbishing and renovation of the resort. The parties also gave evidence that the Plaintiff did indeed provide monies and materials towards the refurbishing and renovation of the resort.

85. While the Defendant accepts that it received monies and materials towards the refurbishing of the resort the Defendant refutes the sum alleged by the Plaintiff and also refutes whether the Plaintiff's payment of monies and materials were to occur before he obtained his investor approvals and received his 50% shares in the resort or after.

Submissions

Plaintiff's Submissions

86. Counsel for the Plaintiff, Mr. Osman Johnson made the following submissions, contentions and assertions in part in support of the Plaintiff's case as follows:-

a. That the legal principle of equity and the Plaintiff's entitlement to equitable relief by way of the present action is a fundamental consideration for the Court;

b. That the Court has to determine whether equity will allow a party in the Plaintiff's circumstances after spending significant sums of their personal funds for the financial benefit of the Defendant;

See **Westdeutsche Bank v Islington London Borough Council [1996] AC 669.;**

c. That the fundamental principles of equity apply;
d. That it is clear that the Defendant gained significant financial and material benefit from the Plaintiff expending his personal finances and efforts in funding the renovation and improvement of the resort without any corresponding benefit;
e. That the Court is to decide whether the principle of equity would entitle the Plaintiff to remedies and/or damages independently of his claims for breach of contract and breach of the promissory note;
f. That a claim/claims for breach of contract exist as borne out by the evidence before the Court;
g. That the Court having been apprised with reference to the evidence of the Plaintiff and Defendant of such claims in breach of contract against the Defendant, the Court has the discretion to adjudicate and provide judgment on such claims notwithstanding they were not explicated pleaded in the Statement of Claim;
h. That the evidence of Michelle Williams as found in her Witness Statement speaks to two written agreements dated the 9th January, 2006 which was acknowledged as signed by representatives of the Defendant;
i. That the terms of those agreements are before the Court in evidence and therefore enforceable, the Defendant by its own admission never took any steps to the execution of the said agreements to transfer any interest in the resort or instruct its Attorney to apply for approval neither have they refunded the Plaintiff any sums advanced;
j. That by any interpretation of the facts and evidence there existed an enforceable contract between the parties for which the Plaintiff is entitled to seek damages as a result of a breach on the Defendant's part;
k. That the uncontroverted evidence is that the Plaintiff sometime in 2005 made an offer for the purchase of a fifty percent (50%) interest in the Defendant's resort which was accepted by the

Defendant and consideration in the form of cash advances and material purchases was provided by the Plaintiff in pursuance of the said contract;

l. That the Plaintiff's entitlement to a refund and damages is the result of the breach of contract and subsequent termination and/or repudiation of the contract;

m. That the Court has considered various legal principles pertaining to breach of contract, a party's right to rescission ab initio and the right to damages of a party suffering such a breach (See. **Howard-Jones v Tate [2011] EWCA Civ 1330**; **Johnson v Agnew [1980] AC 367**; **Photo Productions v Securicor Transport Ltd [1980] AC 827**; **Gunatunga v DeAlwis (1995) 72 P & CR 161**; **White and Carter (Councils) Limited v McGregor HL/PO/JU/4/3/1094**);

n. That the decision in **Howard-Jones v Tate [2011]** and the dictum of Kitchin, LJ is applicable in the circumstances where the Defendant's admitted failure to take any steps further to the execution of the agreements to transfer any interest in the resort or instruct its Attorney to apply for approval for a share transfer or draft an Agreement respective of the same represents a "refusal or failure to perform something which goes to the root of the contract" which entitles the Plaintiff to damages;

o. That the evidence placed before the Court and the admissions of the Defendant's witnesses establish that the Defendant never carried out a corporate restructuring to the resort and marina, transferred any shares to Guanahani Dive Limited as specified in the Memo, carried out any further preparatory steps necessary to transfer shares to the Plaintiff and/or give any instructions to its Attorney to prepare a share transfer agreement and/or obtain the necessary approvals from the Central Bank or NEC for the receipt of the Plaintiff's money and transfer of shares to the Plaintiff;

p. That these acts and/or omissions on the Defendant's part made the contract incapable of being performed and made it impossible for the Plaintiff to receive a fifty percent (50%) interest in the

resort notwithstanding his significant financial and material contributions;

q. That this constituted a clear refusal to perform and/or a contrived situation in which the Defendant placed itself in a position where it would be unable to perform the contract in an essential way;

r. That the evidence of the Defendant's witnesses at trial in particular:-

   i. The statements and admissions by Michelle Williams under cross-examination represent fundamental concessions on the Defendant's part and the Plaintiff's claim that funds and material advancements were taken by the Defendant in bad faith, used to the Defendant's material benefit, that documents were executed between the parties including a Letter of Intent to Purchase dated the 9th January, 2006, Agreement dated January 2006 and Promissory Note dated the 17th April, 2007 irrespective of the obligations created thereunder continued in bad faith and failed to take any step to instruct its Attorneys to prepare the share transfer agreement and/or otherwise cause for any transfer of shares in the resort to the Plaintiff and that in her estimation the Defendant received approximately Five Hundred Thousand Dollars ($500,000.00) in cash and material advances from the Plaintiff;

   ii. The concessions found in the evidence of Kevin Williams that there were written and verbal agreements between the Plaintiff and Defendant concerning the Plaintiff's purchase of 50% interest in the Defendant's resort and marina, a further agreement that the parties would split the cost of renovations to the resort, that the Plaintiff advanced sums of money and materials to the Defendant in anticipation and/or furtherance of acquiring the said 50% interest in the Defendant's resort which were used for renovations and that the Defendant's representatives voluntarily executed a Promissory Note for Two Million Dollars ($2,000,000.00) to the benefit of the Plaintiff on or about the 17th April, 2007,

that no steps were taken by the Defendant to instruct its Attorney to incorporate any company and/or companies to the corporate restructuring, to transfer any property from the Defendant to Guanahani Dive Limited, to prepare a share transfer agreement with the Plaintiff or apply for Central Bank and National Economic Council approval, that despite having received significant sums in cash and materials from the Plaintiff no interest in the resort was transferred to the Plaintiff and the Plaintiff was not entitled to have any sum refunded by the Defendant, the Plaintiff's claim that funds and material advancements were taken by the Defendant in bad faith, used to the Defendant's material benefit;

iii. That the evidence of Kevin Williams supports the Plaintiff's claim that the funds and advancements were taken by the Defendant in bad faith, used to the Defendant's material benefit, that documents were executed between the parties including a Letter of Intent to Purchase dated the 9th January, 2006, Agreement dated January 2006 and Promissory Note dated the 17th April, 2007 irrespective of the obligations created thereunder the Defendant failed to take any step to instruct its Attorneys to prepare the share transfer agreement and/or otherwise cause for any transfer of shares in the resort to the Plaintiff;

iv. That the evidence of Arthur Carlson establishes that the amount of One Million Four Hundred and Fifty Five Thousand Three Hundred and Ninety Dollars and Sixty Two Cents ($1,455,399.62) was spent in both cash and material advances by the Plaintiff to the Defendant up to the 4th July, 2007, establishes the existence of an agreement that the parties would split the cost of renovations to the resort, that the Plaintiff advanced considerable sums of money and materials to the Defendant in anticipation and/or furtherance of this agreement and that the Defendant acknowledged the amount as reflected in the spreadsheet

prepared by the witness dated the 4th July, 2007 and labeled "Payments Made By Kenny".

Defendant's Submissions

87. Counsel for the Defendant, Mr. Harvey Tynes, KC made the following submissions, contentions and assertions in part in support of the Defendant's case as follows:-

s. Additionally, that the burden rests on the Plaintiff to adduce evidence which would satisfy the Court as to the existence of the core issues on a balance of probability;

t. That based on the evidence adduced at the trial there are several facts not in dispute which are:-

i. That sometime during July 2005 the Plaintiff informed Kevin Williams, a director and beneficial owner of the resort that he was willing to invest the sum of $2,000,000.00 to acquire a 50% ownership stake in the resort;

ii. That on or about the 9th January, 2006 the Plaintiff's American Attorney drafted a "Letter of Intent" pertaining to the said purchase of 50% interest in the resort by the Plaintiff and Ed Campany and the same was signed by the Plaintiff, Ed Campany and Carlos Williams;

iii. That on an unspecified date in January 2006, the Plaintiff's American Attorney, Jack Cox prepared an agreement for sale of 50% of the resort for the sum of $2,000,000.00, the agreement was signed by the Plaintiff, Kevin Williams and Carlos Williams;

iv. That on or about the 6th May, 2006 the Plaintiff paid Attorney Bryan Glinton the sum of $35,000.00 to obtain Bahamian investment approval and to form several companies to run the businesses referred to in the letter of intent;

v. That on or about the 8th May, 2006 Attorney Bryan Glinton prepared a "MEMO" addressed to the Plaintiff's

American Attorney, Jack Cox and copied to Michelle Williams, Kevin Williams and Carlos Williams;

vi. That the MEMO was captioned "Kenneth Schweitzer and Edward Campany-Proposed Acquisition of an Equity Interest in Riding Rock and Marina";

vii. That the MEMO set out the existing structure of the Resort, the proposed new structure of the Resort, the steps required to restructure the Resort, the steps required to be taken in order for the Plaintiff to acquire a 50% interest in the Resort which Mr. Glinton proposed that a company should be formed under the name "Riding Rock Holdings Limited" to hold title to the property comprising the resort and the Plaintiff should acquire all of the Class B Preference shares in the said company;

viii. That on or about the 2nd August, 2006 Russell Yarema was asked to raise an additional sum of $2,000,000.00 for the resort and according to the Plaintiff the additional sum was intended to be used to pay the estimated cost of renovations and repair to be carried out at the resort and the parties agreed to share the costs of renovations and repairs equally, this agreement however was never reduced to writing.

u. That based on the evidence (as stated above) by the end of August, 2006 the Plaintiff had entered into two separate and distinct agreements relating to the resort;

v. That the first agreement was that the Plaintiff would acquire a 50% interest in the resort in exchange for the payment of $2,000,000.00 which was reduced to writing, the terms found in the Letter of Intent and prepared by the Plaintiff's Attorney, Jack Cox in January, 2006;

w. That the second agreement provided that the Plaintiff would pay 50% of the estimated cost of $2,000,000.00 for renovations and repairs or an additional $1,000,000.00 and this agreement was made orally and never reduced to writing;

x. That the Plaintiff was required to find the combined sum of $3,000,000.00 to discharge his obligations under the two agreements;

y. That the Williams family were not required to find any money whatsoever to discharge their obligations under the two agreements as on the sale of 50% of the resort to the Plaintiff they would receive $2,000,000.00 and upon payment of $1,000,000.00 of the costs of renovations and repairs they would be left with $1,000,000.00 in their hands;

z. That during cross-examination the Plaintiff admitted that he never paid the sum of $2,000,000.00 under the agreement to purchase a 50% interest in the resort and that he never received a 50% interest in the resort;

aa. That the Plaintiff's claim as pleaded does not allege a breach of the written agreement for the sale of a 50% interest in the resort nor does the Plaintiff allege a breach of the oral agreement to renovate the resort;

bb. That based on the evidence adduced at trial there were three potential bases upon which an action could be brought by the Plaintiff the written agreement to purchase a 50% interest in the resort, the oral agreement to repair and renovate the resort or the promissory note;

cc. That the Plaintiff does not allege that the Defendant is in breach of the written agreement to purchase a 50% interest in the resort nor does the Plaintiff allege that the Defendant is in breach of the oral agreement to repair and renovate the resort;

dd. That the Plaintiff's claim is based solely on an allegation that the Defendant is in breach of its obligations under the promissory note.

88. Mr. Tynes, KC also makes the following supplemental submissions and contentions as follows:-

ee. That a careful review of the Plaintiff's Statement of Claim shows that the Plaintiff's claim against the Defendant is based exclusively on the averment that the Defendant failed to honor the terms of the promissory note;

ff. The Plaintiff does not plead that there was a breach or repudiation of the agreement for the sale of 50% of the shares in the resort by the Defendant nor does the Plaintiff plead there was a breach or repudiation of the agreement to renovate the resort by the Defendant;

gg. That in his Closing Submissions the Plaintiff seeks to merge his claim "as pleaded" with a claim for "breach of contract" which was not pleaded in his Statement of Claim;

hh. That the Plaintiff is bound by his pleadings and should not be permitted to raise a claim for breach of contract for the first time in his Closing Submissions (See **Farrell v Secretary of State for Defence [1980] 1 WLR 172**; Order 18, Rule 6 of the Rules of the Supreme Court);

ii. That at the trial the Plaintiff did not lead evidence to support a claim that the Defendant was in breach of the agreement for the sale of 50% of the shares in the resort nor did the Plaintiff lead evidence to support a claim that the Defendant was in breach of the agreement to renovate the resort.

Analysis and Discussion

89. The Court at paragraphs 59 to 63 above has summarized firstly, the Defendant's position that a party is bound by its pleadings and the Plaintiff cannot attempt to introduce a new cause of action such as breach of contract by way of submissions and secondly, the relevant case law on the nature of a party's pleaded case.

90. Therefore, the Court is of the view that the Plaintiff's pleaded case does not make any reference to any ancillary agreement as it relates to the parties obligations for the renovation and refurbishing of the resort; and that the Plaintiff's pleaded case in his Writ of Summons and Statement of Claim was based on what he alleged as a breach of the said promissory note and not a breach of any other agreement or arrangement between the parties. In that regard the Court accepts the submissions of Mr. Tynes, KC on this part that the Plaintiff cannot now seek to introduce any additional claims for breach of contract and/or subsequent agreements and that the Plaintiff is bound by his pleadings.

91. Additionally, even if the Court was to make a determination in the alternative that such breach of the "ancillary agreement" occurred, the Plaintiff failed to adduce any evidence to corroborate the sum of monies and materials forwarded to the Defendant for the refurbishing and renovation of the resort.

92. As the Court has made a finding above that the promissory note is invalid and unenforceable the Court also finds that there are no other agreements as pleaded to which the Court is to make a finding as to whether a breach of the same has occurred.

DISPOSITION

93. Therefore, it is the opinion of this Court the Plaintiff has failed to show that the initial agreement complied with the legal meaning and definition of a promissory note and as such it is unenforceable. Furthermore, that while the parties accept that there was indeed an oral agreement for the refurbishing and renovation of the resort, and the Court accepts that there was an oral agreement there is no consensus as to the terms and further there is no consensus as to the amounts of the intended consideration in this oral agreement.

94. Having considered the evidence adduced inclusive of the Witness Statements, oral testimony, documentary evidence, the submissions of Counsel and the applicable law the Court finds that the Plaintiff has failed to prove his claim against the Defendant.

Costs

95. On the issue of costs, the Court is of the view that the usual costs order should be made as the Plaintiff being unsuccessful on his claim the Court will award cost to the Defendant to be taxed if not agreed.

Dated the 14th day of July 2023

Andrew Forbes
Justice