

- ii) An Order that the 1st Defendant pay forthwith to the Claimant the sum of \$1,340,126.76 being the balance due under the Agreement of Sale dated August 20th, 2008;
- iii) Alternatively, that the 3,800 shares in the 2nd Defendant be valued and transferred to the Claimant and that the Second Defendant pay to the Claimant the difference (if any) between the sums owing and the current value of the shares;
- iv) Interest pursuant to sections 166 and 167 of the Supreme Court of Judicature Act;
- v) Costs;
- vi) Any other relief.

The Facts

2. The Claimant, Bernard Dueck, and the First Defendant, Cornelius Dueck, were joint shareholders in the Second Defendant Company, General Automotive Ltd. At the time of incorporation of General Automotive Ltd., Bernard Dueck held 4000 shares and Henry Friessen held 2,500 shares; Gladys Dueck held 1000 shares and Cornelius Dueck held 2,500 shares. The company was incorporated on July 1st, 1994, pursuant to the Companies Act

Chapter 250 of the Laws of Belize and having a share-capital of \$10,000 divided into 10,000 ordinary shares of \$1.00 each.

3. In November 2000, Bernard Dueck and Cornelius Dueck bought out Henry Friessen's shares. Two transfer instruments dated November 23rd, 2000, were executed by Henry Friessen transferring 1,300 of his shares to Bernard Dueck and the remaining 1,200 to Cornelius Dueck. Bernard Dueck and Cornelius Dueck then proceeded to run General Automotive Ltd. in three locations: Spanish Lookout, Belize City and Orange Walk Town.
4. Bernard and Cornelius parted company as business partners in General Automotive Ltd., and on August 20th, 2008, they entered into an Agreement for Sale whereby Bernard agreed to sell his shares in General Automotive Ltd. to Cornelius for \$1,826,923.00 BZD. It was a term of this agreement that the First Defendant would pay this sum in accordance with an attached schedule. Bernard Dueck immediately transferred his 3,800 shares to Cornelius Dueck on the same day the agreement for sale was executed.
5. Cornelius Dueck did not make his initial payment of \$365,384.61 BZD to Bernard until November 20th, 2008. That payment had been due on September 1st, 2008 according to the payment schedule. This payment was made only after Bernard secured a loan from Scotia Bank (Belize) Ltd. for

the sum of \$455,000.00. The assets of General Automotive Ltd. were used as collateral to secure this loan.

6. Cornelius Dueck and General Automotive then borrowed the sum of \$100,000.00 out of this same amount that they paid to Bernard Dueck which amount remains unpaid to date.
7. After selling his shares in General Automotive Ltd., Bernard sought employment with Belize Tire Depot as Sales Manager at Spanish Lookout. During this time, Cornelius continued to make payments to Bernard and it is the Claimant's case that Cornelius never raised any objection to Bernard's being employed at Belize Tire Depot. Cornelius made payments of \$14,615.38 per month to Bernard from October 1st, 2008 to January 1st, 2010 in keeping with the terms of the Agreement.
8. On February 1st, 2010 Bernard defaulted on his monthly payments of \$14,615.38 and has not made any further payments. The balance outstanding is now \$1,340,126.78. Bernard has demanded payment from Cornelius, but Cornelius claims he does not have the money to pay.

9. On the part of the Defence, Cornelius agrees that the Agreement exists and that Bernard's shares were transferred to him. He also admits that he made monthly payments from October 1st, 2008 to January 1st, 2010. However, Cornelius argues that he is not liable for the balance which remains because Bernard breached the agreement by going to work for Belize Tire Depot, a competitor of General Automotive Ltd. and by lending money to another competitor Prime Parts. He also argues that since the stamp duty paid on the share transfer form was not reflective of the actual value of the shares, the share transfer form and the agreement is illegal as being in violation of the Stamp Duties Act Chapter 64 of the Laws of Belize. The Defence of the General Automotive Ltd. is that it is not bound by the agreement since Cornelius Dueck had no authority to bind General Automotive Ltd. to any agreement.

The Issues

10. 1) Did the Claimant, Bernard Dueck, breach the Agreement by going to work for Belize Tire Depot and by lending money to Prime Parts?
- 2) Did the undervaluation of the shares and the non-payment of the proper amount of stamp duty to the Government of Belize render the agreement void?

3) Is the Second Defendant General Automotive Ltd. bound by the Agreement?

11. Did Bernard Dueck breach the Agreement by going to work for Belize Tire Depot and by lending money to Prime Parts?

The Defendant asserts that it is the Claimant who has violated the Agreement and he is therefore no longer bound to pay the outstanding balance. I agree fully with the submission of Learned Counsel for the Claimant that the evidence certainly does not bear out this allegation. Having heard the testimony of Ernie Braun called by the Defence, I find that there is not one iota of evidence that Prime Parts sold truck parts or was a competitor of General Automotive Ltd. There was no documentary evidence e.g. invoices, customs entry forms to prove that Prime Parts sold truck parts and was a competitor of General Automotive Ltd. Mr. George Dueck, another witness called by the Defence, did nothing to advance their case. He merely stated that Bernard went to work for a competitor and thus breached the agreement but he was confused as to the nature of the agreement and was not sure that he had even seen it. He also could not explain which clause in the agreement had been breached and just said he did not know. Suffice it to say that I did not find George Dueck's testimony to be helpful in proving anything.

12. On this first issue, I find that there was no breach of the agreement by Bernard Dueck. On a balance of probabilities, I find that neither Bernard's going to work for Belize Tire Depot for one year nor his lending money to Prime Parts amounted to a breach. I am not satisfied on the evidence before me that either of these businesses were competitors of General Automotive Ltd.

13. **Did the under value of the shares and non-payment of the proper amount of stamp duty render the agreement illegal and void?**

Section 36 of the *Stamp Duties Act* Chapter 64 states as follows:

“If, with intent to evade the payment of duty under the Act, a consideration or sum of money shall be expressed to be paid on any instrument less than the amount actually paid or agreed to be paid, every such instrument shall be void.” (Emphasis mine)

I refer now to the evidence as it unfolded in court, when Learned Counsel for the Defence Michel Chebat, S. C., cross-examined the Claimant Bernard Dueck:

“Q. ...What is that document, sir?”

A. A transfer of shares.

Q. And by whom? Who is transferring shares there?

A. Bernard Dueck

Q. To whom?

A. To Cornelius Dueck.

Q. And did Bernard Dueck sign that document?

A. Yes.

Q. Did Cornelius Dueck sign that document?"

A. Yes.

Q. How much is it being transferred for?

A. For the sum of \$3,800.00 but the purpose was --

Q. Uh huh, what was the purpose?

A. The purpose was that because of lower taxes, they put a lower amount.

Q. So you put it at a lower amount so as not to pay taxes on it?

A. I didn't do that. Cornelius did.

Q. Mr. Dueck, did you sign this document?

A. Yes.

Q. You signed this document. Mr. Dueck, do you know that it is an offence to understate the actual amount being paid on a transfer?

A. No.”

14. Under re-examination by Learned Counsel for the Claimant, Mrs. Segura-Gillett valiantly tried to rehabilitate this aspect of the witness' testimony by getting him to state that it was his attorney and not he who prepared the share transfer form and took it to Belmopan for processing. But to my mind the damage to his credibility had already been done.
15. Learned Counsel Mrs. Segura-Gillett for the Claimant also cross-examined Cornelius Dueck extensively on the issue of payment of Stamp Duty on the share transfer form:

“Q. And in this document it says that Bernard is transferring his 3800 shares in consideration for \$3,800.00, right?

A. Yeah.

Q. On whose instruction was this document prepared? Who told Mr. Cardona to prepare this document?

A. I was shocked to hear this last time. I didn't know about this. I know I have signed it but it was new thing to me.

Q. What was new to you? The document your lawyer prepared?

A. Yes. I didn't know we had made this. I had forgotten about this."

Later on in cross-examination, Cornelius Dueck proceeded to place all the blame on his attorney as follows:

"A. It was our lawyer.

Q. Your lawyer?

A. Yes.

Q. But the amount stated here in the consideration \$3,800.00, right?

A. Yes.

Q. That wasn't in fact what was the consideration for these shares, right?

A. That's what was recommended by the lawyer.

Q. The lawyer told you to put that number?

A. That's what he recommended ...

Q... Do you know that when you transfer shares, you have to pay tax on the value of those shares?

A. Who? The buyer or the seller?

Q. Who is buying the shares?

A. Well, I was buying.

Q. The buyer has to pay tax.

A. Okay.

Q. And I put it to you that that is the reason why. You full well know why \$3,800.00 was put here instead of the \$1.8 million dollars that should have gone there. It was in an effort to avoid you paying tax on the \$1.8 million dollars.

A. Well, I know that the memorandum it has ten thousand shares."

16. These parties were not strangers to each other or to General Automotive Ltd.; they had been business partners for several years, intimately involved in the affairs of the company since its incorporation in 1994 and fully aware

of the true value of those shares. On August 20th, 2008, the same day that Bernard Dueck and Cornelius Dueck signed the share transfer form which stated that the consideration for the transfer of shares was \$3,800.00, they also executed the agreement for sale of the shares for BZ\$1,826,923.00. I find that this undervaluation of shares on the share transfer form was done by both parties with the intent to defraud the Government of Belize of the proper amount of stamp duties. I therefore find that no shares were transferred under that share transfer form and that there was a total failure of consideration. I agree fully with the submission made by Mr. Chebat, S. C., that the Claimant cannot benefit from this illegality.

17. Mrs. Gillett urges this court to simply order that the true value of the shares be assessed and the proper amount of stamp duty be paid to the Government of Belize since the Agreement for Sale itself is not illegal. However, it is well known that the court will not assist in the performance of an illegal contract:

Halsbury Laws of England Contract Vol. 22 (2012) 5th Ed. paragraph 458:

“Wherever by reason of statutory provision or illegality at common law a party may not directly enforce a contract, the general rule is that neither may he indirectly enforce it.”

Halsbury Laws of England Vol.22 (2012) 5th Ed. paragraph 460 *Related Agreements:*

“A contract or security not in itself illegal will be tainted with illegality and hence be unenforceable if it is founded upon another illegal contract.

I find that while the Agreement for Sale is not illegal, that agreement is founded upon the share transfer form which is illegal because both Bernard and Cornelius deliberately undervalued the shares in order to deprive the Government of the proper amount of stamp duty. The Agreement for Sale is therefore tainted by illegality and unenforceable.

18. I must also state that the Defendant also cannot benefit from this illegality. Perhaps the fact that there has been no counterclaim by the Defendant for the BZ \$615,962.44 already paid to the Claimant reflects a tacit recognition of this position.

19. Having found that the resolution of these first two issues is dispositive of the entire matter, I need not address the third issue.
20. The Claim is therefore dismissed. Each party to bear own costs.

Dated this 28th day of November, 2013.

Michelle Arana
Supreme Court Judge