

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.GDAHCV 2010/0325

BETWEEN:

ALTANTIC PARTNERSHIP ARTICHECTS INC.

Claimant

and

GRENADA AND CARRIACOU INVESTMENT LIMITED

Defendant

Appearances:

Mr. Alban John and Ms. Thandiwe Lyle for the Claimant
Mr. Ruggles Ferguson and Ms. Amy Bullock for the Defendant

2015: March 3;
April 1.

JUDGMENT

OVERVIEW

[1] **ASTAPHAN, Q.C.J.:** I cannot resist commencing this judgment with a well-known poem of Robert Frost, “The Road Not Taken”:

*“TWO roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;*

5

Then took the other, as just as fair,...

[2] At its core, this is, factually, a simple case which presents two opposite versions of the relevant transaction. It is the task of this Court to determine which of the two

divergent “roads”, in the “...yellow wood ...” of opposing allegations, is the road upon which the journey to justice will take place.

- [3] The Claimant, Atlantic Partnership Architects Inc. (‘APA’) claim that in early 2007 it entered into an oral agreement with the Defendant, Grenada and Carriacou Investments Limited (‘GCI’), for the provision of architectural services to GCI on a what was described as a Townhouse Project on Carriacou. APA further claims that the agreed fee was 5.5% of the anticipated construction costs of the Project.

- [4] APA alleges that it was agreed that the fees would be paid on submission of what is referred to in this case as “Fee Appraisals”, and which I take to mean no more than “Bills”, “Invoices” or “Fee Notes”, as there has not appeared any evidence to distinguish “Fee Appraisals” from the other common forms of submissions for payment, and, for convenience, I will therefore use these terms interchangeably in this judgment.

- [5] APA says that it did all it had agreed to do up to the point of procuring the grant of planning permission for the Project – 75% of their agreed work – but despite submitting bills, GCI has refused to pay their earned fees.

- [6] GCI says that there was no agreement at all with APA, other than a “Gentlemen’s agreement”, and certainly no agreement for the payment to APA of any fees unless the Project received financing from a financial institution or other type of ‘funder’, and was ‘successful’.

- [7] GCI says that after Planning Permission was received the financing fell through and the Project had to be abandoned, and therefore none of the professionals, including APA, was entitled to payment for services rendered.

- [8] This, says GCI, was the “Gentlemen’s Agreement” - and there was no other - which they had entered into with APA in early 2007, and to show that this was the case, GCI produced two witnesses, both professionals - Ms. Margaret Blackburn

and Mr. Denis Thomas – to testify that that was the arrangement which they had with GCI. More will be said about these witnesses later in this judgment.

[9] This case is therefore about determining which of these two contrasting sets of facts - or combinations thereof - is the correct one.

[10] There were but two legal issues which arose, one on GCI's Pleadings and the other during the course of the trial. I shall address those now.

LEGAL ISSUES

[11] GCI contend that there was 'no agreement'; just a 'Gentlemen's Agreement', and that this is so because the elements necessary to constitute an Agreement in Law, i.e. offer, acceptance and consideration, are absent.

[12] On GCI's own case that is a misconceived submission. They say that the 'Gentlemen's Agreement' was that APA would perform the required services for GCI and would be paid for those services only if and when the Project received funding and was successful. That submission contains the necessary elements for the coming into being of a legally binding contract.

[13] There must have been an agreement between the parties as to what each was expected of the other. When there is doubt as to whether a legally binding agreement has been made, it is necessary to examine carefully the communication between the parties to determine whether one has made an 'offer' and the other has "accepted" that offer. Each of these terms, "offer" and "acceptance" are terms of art.

[14] In this case, GCI has not pleaded that there was no offer or acceptance. Rather, it places reliance on the absence of adequate "consideration". The consideration in this case is inadequate, submits GCI, because its obligation to pay APA was contingent upon the Project receiving funding and being successful.

- [15] The submission is that this contingency renders the consideration inadequate. No authority was cited for this submission. It is devoid of merit. No one has ever alleged that an insurer's contingent promise to pay upon loss to the insured is insufficient consideration.
- [16] The other issue of law arose when Mr. Ferguson, Counsel for GCI, was cross-examining Ms. Marion Suite, a witness for APA.
- [17] In her Witness Statement at paragraph 9, Ms. Suite stated as follows:
"9. A meeting was subsequently held at the premises of the Claimant, at Grand Anse, St. George's on February 19, 2009, to try and resolve the issue, at which meeting I took notes of the discussion. Present were Peter Wallace and Eric Johnson for the Claimant Company and Ms. Margaret Blackburn who represented the Defendant Company. Ms. Blackburn indicated that Dr. Davidson and Mr. Francis were asking for a reduction in the fee and a payment plan. There was no question that there was a debt owed to the Claimant. A copy of my notes taken at that meeting is attached..."
- [18] That Witness Statement was dated 28th June 2011, and was served on the Defendant's Counsel shortly thereafter. Apparently the Defendant did not comply with the directions as to the time for serving their Witness Statements and, after an Appeal was filed, a Consent Order was entered permitting the Defendant to file and serve their Witness Statements. These were filed in October 2014, although they were all dated 1st November 2012, a year and four months after the filing and serving of the Claimant's Witness Statements.
- [19] The significance of that elapsed time period is that Ms. Blackburn, who provided a Witness Statement on behalf of the Defendant, did not in that Witness Statement contradict or take issue with anything which Ms. Suite had said about that meeting in her Witness Statement. In fact all that Ms. Blackburn addressed in her Witness Statement was her Fee arrangement with GCI; nothing else.

- [20] Therefore, at no time prior to the cross-examination of Ms. Suite by Mr. Ferguson was any issue taken with either the said notes or their contents.
- [21] Mid-way through his cross-examination of Ms. Suite, Mr. Ferguson asked:
- “Q: *Would you agree that the meeting of February 19, 2009 was a ‘Without Prejudice’ meeting?*
- A: *Yes, I agree that it was Without Prejudice.*
- Q: *A meeting to try to resolve the differences between the parties?*
- A: *Yes.”*
- [22] Mr. Ferguson then went on to ask Ms. Suite NINE specific questions about the very contents of the Notes of that very meeting:
- “Q: *Is it not true that Ms. Blackburn made it clear that she had come to listen because she had been so instructed?*
- A: *No such statement was made.*
- Q: *The Notes were your personal Notes?*
- A: *I was taking notes for my client.*
- Q: *[referring to Notes at page 9 of Bundle B] I see you have “R&P” and I take it you mean “Renwick & Payne”?*
- A: *Yes.*
- Q: *I take it that where you have “R&P” those are issues raised by Ms. Blackburn?*
- A: *Yes.*
- Q: *The first “R&P”, what are the last three words?*
- A: *“Plan of payment”.*
- Q: *“R&P” how charged?*
- A: *Yes.*
- Q: *“Peter advised...” is a further elaboration by Peter to the question?*
- A: *Yes.*
- Q: *Would you agree that there is nothing in your Notes which reflect any agreement between the parties arising out of the February 19 meeting?*
- A: *No.*

Q: *Point me to anything in those notes which you say would reflect an agreement arising out of that February 19 meeting. What was the agreement in your view?*

A: *Peter agreed to provide a detailed breakdown [of APA's Fee Appraisal] prior to them providing the Plan of Payment."*

[23] At that point Mr. Ferguson ended his cross-examination of Ms. Suite.

[24] It is significant that Ms. Blackburn did not address the February 19, 2009 meeting in her Witness Statement. From the Bar it was suggested that, given the intervening occurrences the Witness Statement of Ms. Suite, though served and not sealed, was not looked at by the Attorneys for GCI prior to the preparation of Ms. Blackburn's Witness Statement because they did not want to obtain an 'advantage'.

[25] This in the face of the Defendant's Pleading in its Defence of 5th October 2010, at paragraph 5, that "The Defendant further avers that its attorneys-at-law did attend a meeting with the Claimant and its previous attorney-at-law in or about the month of May in 2009 and objected to the oral claim put forward by the Claimant for fees". There is evidence before the Court of only one such meeting; that of 19th February 2009.

[26] At no time prior to cross-examination did the Defence take issue with the Notes of Ms. Suite. There was no objection to the admission of Ms. Suite's witness statement as Examination-in-Chief. There was no objection to the Notes which she clearly refers to in that Witness Statement as being attached to it. "Without Prejudice" privilege was not at any time raised previously by the Defence. Then, having asked that question as to whether the meeting was a 'Without Prejudice' meeting, Mr. Ferguson proceeded to ask the questions on the contents of the very notes set out above.

[27] The "Without Prejudice" nature of the meeting would have been a shield available to both parties should either attempt to use its contents without the consent or waiver of the other. Obviously APA, by the Witness Statement of Ms. Suite,

waived its right to rely on the “Without Prejudice” nature of the meeting. So too did GCI waive its rights when, at the very latest, Mr. Ferguson proceeded to question Ms. Suite on the very contents of the Notes taken at the meeting.

[28] Further, Ms Blackburn’s denial that the contents of the Notes represent what in fact took place at the meeting leaves one to wonder what exactly was supposed to be ‘Without Prejudice’? She expressly denied the contents of the Note made by Ms. Suite as having occurred, and during her cross-examination by Mr. John no objection was taken by the Defence to questions being put to her on the contents of the Note.

[29] I hold that, as a matter of law, GCI waived the ‘Without Prejudice’ nature of the February 19, 2009 meeting, at the latest, when Mr. Ferguson embarked on the line of questioning set out above. They cannot have their cake and eat it too, and, having eaten the ‘Without Prejudice cake’ in the cross-examination of Ms. Suite set out above, there is no ‘cake’ left to shield the contents of that meeting.

[30] Let me make it immediately clear, however, that the decision which this Court will set out below would be the same whether or not the meeting was ‘Without Prejudice’ and the contents of the meeting were excluded from the Court’s consideration. The contents of that meeting are not necessary for the conclusion which this Court has arrived at.

THE FACTS

APA’s ‘ROAD IN THE YELLOW WOOD’

[31] APA presented three witnesses: Henry Taylor – via Skype, Peter Wallace and Marion Suite.

[32] **Mr. Henry Taylor:**

- (i) Mr. Taylor said that in or about October 2007 he was approached by Mr. Peter Wallace of the Claimant to produce a bill of quantities for the housing development called Dover Heights on Carriacou.
- (ii) He said that he was informed that the Defendant had agreed to his appointment to perform that service.
- (iii) He submitted to the Defendant, via the Claimant, a Fee Proposal.
- (iv) He stated that there was a meeting with representatives from GCI and APA on November 1, 2007, at which he confirmed his acceptance of his appointment to provide the services, and he stated that his Fees would be due and payable on the grant of the Planning Permission. What is notable is that the language of the Minute of that 1st November 2007 meeting on the Fees is this: **“01. Fees- Subject to Planning Consent. HT and NJ accepted that no fees will be paid until Planning Consent is granted. NJ stated that his engineering design would be in two parts. Firstly for Planning and secondly for construction.”** [emphasis added in part].
- (v) There is no evidence before the Court that this did not occur as stated by Mr. Taylor, save and except a blanket statement by Wayne Francis in cross-examination that all the professionals involved in the Project were on the same ‘agreement’ as were the Claimant; namely, no pay until and unless the Project was funded and successful. I am obliged to state at this point that where there is any conflict between Mr. Taylor’s evidence and Mr. Francis’ evidence, I accept Mr. Taylor’s evidence as being true, and I so find as fact. The reasons will become obvious when I deal with Mr. Francis’ evidence later in this judgment.
- (vi) Mr. Taylor could not assist the Court with respect to the terms or engagement of APA by GCI as he had no knowledge of that agreement.

[33] Having observed him closely while giving his evidence, Mr. Taylor impressed the Court as being a witness of truth. I accept all his evidence as fact, and I so find.

[34] **Mr. Peter Wallace:**

- (i) Mr. Wallace stated that in early 2007 his company was engaged to provide architectural services for GCI with respect to a Hotel Project on Carriacou, on the same land which the subsequent Townhouse Project was destined to be conceived, at an agreed fee of 6% of the Construction Cost. The Defendant agrees with this statement.
- (ii) Mr. Wallace stated that the Hotel Project was stopped, and at about the same time the Defendant approached APA to provide services for the Townhouse Project. GCI agrees with that statement.
- (iii) Mr. Wallace said that it was then agreed that APA would be paid 5.5% of the Construction Costs of the Townhouse Project as their fee for their services, and that they would be paid on submission of Fee Appraisals. The Defendant agrees the percentage to be charged, but denies the payment part, and says that fees were only due on funding, completion and success of the Project.
- (iv) Mr. Wallace states that because APA was contracted to do the Townhouses APA reduced the fee due for the Hotel by 50% and submitted a Fee Note dated January 30, 2007.
- (v) This Fee Note was paid in three instalments of \$10,000.00; in fact GCI overpaid on that Note and APA wrote to them on 17th May 2007, indicating that the excess would be credited to the "... Fee Appraisal #1 for 25 and 26 Dover Heights" - the Townhouse Project. In fact, on the same day a Fee Appraisal was submitted to GCI. This Appraisal states the following:-

*"Grenada & Carriacou Investments Ltd.
c/o P O Box 501
St. George's
Grenada*

17 May 2007

FEE APPRAISAL

Plots 25 and 26 Dover Heights, Carriacou

To professional services in connection with a scheme design for town houses on above site.

<i>Estimated Cost</i>	<i>5,800,000.00</i>
<i>Percentage fee</i>	<i>5.5%</i>
<i>Fee due to date</i>	<i>35% of 6%</i>
<i>Fee due</i>	<i>111,650.00</i>
<i>GCT @ 5%</i>	<i>55,825.00</i>
	<i>-----</i>
	<i>117,232.50</i>
<i>Less paid on account</i>	<i>3,750.00</i>
	<i>-----</i>
<i>TOTAL DUE</i>	<i>113,482.50"</i>

- (vi) There was no reply to this Fee Appraisal by GCI. They did not question the amounts; they did not question the submission of the bill; they did not question ABA's right to tender this bill. They did nothing.
- (vii) Mr. Wallace states that at the November 1 meeting [referred to earlier in Mr. Taylor's evidence] it was agreed that payment of fees would be subject to planning approval being granted for the Project. This is denied by GCI. GCI says that that was never the agreement.
- (viii) What APA says, in fact, is that it was agreed that initially the fees were to be paid on submission of the invoices, but at the November 1 meeting it was agreed that they would be paid upon receipt of planning approval. Again, GCI denies this.
- (ix) Mr. Wallace says that, pursuant to the agreement and after the November 1 meeting, APA proceeded with the work, obtained planning permission

for the plans and designs produced by them, produced working drawings, oversaw and coordinated the work of specialists, prepared a Bill of Quantities through Mr. Taylor, sent out tender documents for the construction of the Project, and that there was in fact a successful bidder in Sinclair Enterprises Ltd.

(x) Mr. Wallace stated that about 5th September 2008 APA tendered an invoice headed Fee Appraisal #2 in the amount of \$252,565.95, and that subsequently, on or about November 21, 2008, they received a payment of \$10,000.00 from GCI. It must be noted at this stage that the "Estimated build cost" had increased from \$5,800,000.00 to EC\$7,500,000.00 in this bill. This will have significance later in this judgment.

(xi) Mr. Wallace said that in about April 2010, he became aware that GCI began selling the land upon which the Project was to be constructed.

[35] Mr. Wallace was cross-examined by Mr. Ferguson.

(i) He admitted that the agreement was not in writing.

(ii) He was vigorously cross-examined about the Royal Institute of Architects protocol for agreements and stated that in his over 30 years as an architect, including working in the City of London, standard form agreements were rarely used.

(iii) He admitted that at some point the terms would be written down. He then said that the terms of the agreement with GCI were never reduced to writing.

(iv) He denied that he was ever told by GCI that they had no money for the Project, and that his services would be rendered on the contingency set forth by GCI in their Defence.

(v) He was crossed, at length, about a presentation he had made to GCI's Bank for the purposes of GCI obtaining financing for the Project, but said

that he was not aware of the relationship or details of financing with GCI and the Bank.

- (vi) He stated that the Fee Appraisal submitted in September 2008 was for 75% of 5.5% of the build cost as that is the amount of work that had been completed at that stage. When pressed by Mr. Ferguson on whether APA had in fact done that much work, Mr. Wallace asserted that APA had complied with the scale set down by the Grenada Society of Architects Fixed Scale of Fees.
- (vii) He stated that he had explained the fee breakdown to GCI at the outset of the Project. "I went through the fees in detail with the Defendant ..." he said.
- (viii) It was put to him by Mr. Ferguson that as of 5th September 2008 75% of the work was not completed. He insisted that in fact 75% of the work was completed and that "...We had completed all the things set out in the Grenada Society of Architects Scale of Charges, and at that point, 75% of the Fees were due".
- (ix) He was pressed time and again by Mr. Ferguson on the meeting with the Bank and maintained his position that he was not aware of the Banking details.
- (x) And he was asked about the payments totalling \$78,750.00 made to APA by GCI from after January 2007. He insisted that they were payments made on account of the Fee Appraisals tendered, and denied that they were 'Good Faith' payments as GCI contended.

[36] I closely observed Mr. Wallace in the witness box. He was subjected to some incisive cross-examination by Mr. Ferguson. He remained steadfast on his claim. I observed his demeanour. I have no hesitation in concluding that Mr. Wallace is an honest witness who told the truth throughout his testimony. I so find as fact.

[37] **Ms. Marion Suite:**

- (i) Ms. Suite gave evidence about the Meeting which she attended for the Claimant with Ms. Blackburn and of the Notes which she took at that meeting of 19th February 2009. She was cross-examined by Mr. Ferguson on those notes, as is set out above.
- (ii) Having observed Ms. Suite closely in the witness box, and having studied her demeanour throughout, I find as a fact beyond any doubt that Ms. Suite was a witness of truth, and was at all times being honest in her evidence to the Court.

THE DEFENDANT'S 'ROAD IN THE YELLOW WOOD'

[38] Mr. Wayne Francis:

- (i) Mr. Francis claims that he and Winston David, acting for GCI, approached APA for architectural services "... in or about the month of April 2006."
- (ii) He states that they made it clear to the Claimant that they had no money to pay any professional fees and would be completely relying on financing from a lending institution and deposits from sales to get the project "off the ground".
- (iii) He further states that APA agreed to this arrangement.
- (iv) He claims that it was not until the Bank declined the Defendant's application for financing and the subsequent 'shelving' of the project, coupled with the decline in the building industry that APA began to make demands for fees.
- (v) Mr. Francis denies that there was ever an agreement with respect to the Townhouses for the payment of fees to APA other than on the contingency that GCI received financing and the project was a success.
- (vi) He states that he was aware of the Fee Appraisals submitted by APA in January and May 2007, around the times they were submitted, and he

became aware of the Fee Appraisals submitted in September and December 2008.

- (vii) He however claims that the payments made between 2007 and 2008 had nothing to do with any submitted Fee Appraisals, but they were made “in Good Faith.” Because they knew that APA would incur expenses.
- (viii) Yet, there is no evidence before the Court showing any communication whatsoever from GCI to APA supporting this ‘Good Faith’ basis for the payments totaling over \$78,000.00.
- (ix) Mr. Francis was cross-examined at length by Mr. John about the sale of land by GCI during the material times. Nothing turns on that save to say that it shows that GCI had an income stream which Mr. Francis insisted was ‘fair’ but not ‘lucrative’.
- (x) What is of critical importance is this: Mr. Wallace said, both in his witness statement and in cross-examination, that APA were contracted in early January 2007 to provide services in relation to the Hotel Project. It was not suggested to Mr. Wallace in cross-examination that he was mistaken about the month and the year when APA was engaged to provide the services with respect to the Hotel.
- (xi) Mr. Wallace further said, again in both the witness statement and in cross-examination, that it is when the Hotel project was stopped in early 2007 that APA was then contracted to provide services with respect to the Townhouses. Again, it was not suggested to Mr. Wallace that he was mistaken as to the time and year when APA was engaged to provide services for the Townhouse Project. Mr. Francis in his witness statement claims that this occurred in or about April 2006. He has said nothing further with respect to this point.
- (xii) Mr. Francis did not attend the 1st November 2007 meeting with APA, Taylor and Nigel John. Winston Davidson did on behalf of GCI. Mr.

Francis could not therefore offer any evidence as to what transpired at that meeting.

(xiii) Mr. Winston Davidson did not give evidence in this case.

[38] I observed Mr. Francis very closely when he gave evidence in the witness box. I did not find him to be a credible witness. I found him to be artful and evasive. He was asked in cross-examination the following questions:

“Q: *Would you say that that Fee included Engineers and Quantity Surveyors?*

A: Yes.

Q: *You know that the Claimant denies that?*

A: *My only answer is that I must have got it wrong.”*

[39] Further on, the exchange goes like this:

Q: *[Having been referred to the Fee Appraisal for 5th September 2008]*
Do you see the letterhead?

A: Yes.

Q: *Look at the breakdown of the fees; do you see any reference to engineering or quantity surveying fees?*

A: *I do not, but I see to professional services.*

[I pause to note that that Fee Appraisal was on the letterhead for ‘Atlantic Partnership Architects].

Q: *[Having been referred to the Fee Appraisal of 17th May 2007]*
No reference to quantity surveying or engineering fees?

A: *Agreed.”*

[Mr. John then referred Mr. Francis to paragraph 4 of his Witness Statement]

Q: *No written agreement of what the Claimant says the agreement was that fees to be paid on Planning Permission being granted?*

A: Yes.

Q: *No written agreement to show what you claim the agreement is?*

A: Yes.

[Mr. John then refers Mr. Francis to the Minutes of the 1 November 2007 meeting]

- Q: *"...H.T. and N.J accepted that no fees will be paid until Planning Consent is granted." That's a clear statement, yes?*
- A: *Yes, but I was not at that meeting. My clear understanding is that no fees were to be paid on the project until and unless financing was got and the project got off the ground."*
- [Mr. John then referred Mr. Francis to paragraph 3 (c) of the Defence which states "The Defendant did make several random or sporadic payments to the Claimant between June 2007 and November 2008 totalling altogether the sum of \$78,750.00, the last of which was \$10,000.00, but not on account of any invoice that was submitted to it, nor in respect of any money due and owing, but as a gesture of good faith on its part to assist with out of pocket expenses that the Claimant would have incurred.", and to the Fee Appraisals dated 30th January 2007, 17th May 2007, and again 17th May 2007]*
- Q: *Was Fee Appraisals submitted to your Company?*
- A: *It was, and it was for the Hotel Project.*
- Q: *What are you saying in paragraph 3 (c) then?*
- A: *I am saying that the first Invoice we got after January 2007 was in September 2008, and we made payments without having Invoices.*
- Q: *In paragraph 3 (c), that \$78,500.00, does this statement [in 3 (c)] apply to it: "...but not on account of any invoice that was submitted to it..."?*
- A: *Yes.*
- Q: *[referring Mr. Francis to the 30 January 2007 Fee Appraisal in the amount of \$26,250.00] That is a Fee Appraisal?*
- A: *Yes.*
- Q: *Those figures included in the \$78,500.00?*
- A: *I am not sure.*
- Q: *Do you know when you paid the \$78,500.00?*
- A: *There were several payments.*
- Q: *Put to you that those payments were made pursuant to Fee Appraisals submitted?*
- A: *Page 9 [January 30, 2007 Fee Appraisal] refers to the hotel project. Then page 10 [17 May Fee Appraisal] we had an estimated build cost of 5.8*

million and I assumed that on an ongoing basis we were making periodic payments which added up to \$78,500.00.

Q: Put to you that the payments were referenced to the Fee Appraisals.

A: I was making payments and to the best of my recollection were made in good faith. Payments I believe were made on the basis of the estimated build cost of \$5.8 million, and not on the \$7.5 million. I saw the 17th May 2007 Fee Appraisal before September 2007. The figure \$7.5 million was spoken of sometime between September 2007 and December 2007. I did not see Fee Appraisal #2 - \$7.5 million.

Q: The Fee Appraisal 17th May 2007 was about the Townhouses?

A: I would have to say yes.

...

Q: Did you protest the 17th May 2007 Fee?

A: No. I only protested the Fee Appraisal of 5th September 2008 for \$7.5 million.

Q: The September 5, 2008 fee was for the Townhouses like the May 2007 one?

A: Yes.

Q: I put to you that the protestation of the 5th September 2008 fee was to quantum, not to the principle that payment was due.

A: I am going to stick to my position that the legal team and all the professionals were to get paid when the project got financing and was off the ground.

...

Q: In January 2009 the Bank declined to finance the project unless you had found two or three purchasers for what?

A: To purchase the Townhouses.

Q: They were not yet built?

A: No. They were looking for pre-sales.

Q: After the bank declined to finance, did you sell one of the lots?

A: After the bank declined, yes.

Q: How did you expect to fulfil the new condition if you sold the land?

A: *We decided to abandon the project as it was highly unlikely that we would have gotten financing, and somebody wanted the land, and we sold it.*

...

Q: *Your answer to the Claimant's complaint that you sold the land for the project was "so what"?*

A: *What is stated in paragraph 8 of the Defence is correct; the Defendant could dispose of its property without restriction."*

[40] I have quoted extensively from the cross-examination of Mr. Francis - and referring to his observed demeanour in the witness box - to show why this Court cannot rely on his evidence. I am satisfied that Mr. Francis is an unreliable witness whose evidence was 'cut to fit his case', and he was less than frank with the Court, and I so find as fact.

[41] Where therefore there is any conflict between the evidence of Mr. Francis and that of Mr. Wallace, I find as fact that Mr. Wallace's evidence was truthful and frank, and Mr. Francis' was not, and I accept Mr. Wallace's evidence and reject Mr. Francis' evidence.

[42] **Ms. Margaret Blackburn:**

"MEMORY IS A PERILOUSLY FRAGILE VESSEL FOR COLLECTIVE TRUTH".
'The Match', by Mark Frost.

(i) Ms. Blackburn's witness statement is devoted entirely to the alleged Fee arrangement she made with GCI in or about March, 2006 with respect GCI having "... commenced plans to construct eight town houses on part of its property at Dover Heights which the company wished to sell to foreign investors." She speaks of nothing else in her witness statement.

(ii) I have already addressed the issue as to when it was probable that the Townhouse scheme was conceived. Based on the evidence of Peter Wallace, I find as a fact that it was in early 2007, and not in early, or March 2006.

- (iii) That this is so is clear from the fact that the first project, the Hotel project, preceded the Townhouse project, and Wallace's uncontroverted evidence is that the Hotel project stopped in early 2007.
- (iv) It is therefore impossible that Ms. Blackburn could have entered into the arrangement which she alleges in her witness statement in or about March 2006, and I so find as a fact.
- (v) Ms. Blackburn admitted in cross-examination to having the meeting in February 2009 to which Ms. Suite's evidence spoke.
- (vi) She further admitted to having received an email from Ms. Suite which suggested a meeting between "... the debtors and their attorneys."
- (vii) Ms. Blackburn states that she was present at the meeting on behalf of GCI, and Ms. Suite and representatives of APA were present.
- (viii) She was referred to Ms. Suite's Notes of that meeting.
- (ix) She admitted that the references in the Notes to "R&P" were references to her Law Firm, and therefore to her.
- (x) She denied, however, making any of the statements attributed to her in the Notes, and said – for the very first time in this case - "My instructions were to go and listen."
- (xi) She stated that none of the statements which Ms. Suite attributed to her at the meeting is true.
- (xii) She did not say whether or not she made notes at, or shortly after the meeting, concerning what transpired at the meeting.
- (xiii) She apparently was going from memory - that "...perilously fragile vessel for collective truth." - when giving her evidence about that meeting. It was not mentioned in her witness statement at all.

- (xiv) I observed Ms. Blackburn very closely. I studied her demeanour. She was very nervous and appeared unsure in her answers.
- (xv) She was not hesitant to say that none of what Ms. Suite wrote in her contemporaneous Note was true. In other words, that Ms. Suite had written untruths – and inferentially misrepresented the facts to the Court.
- (xvi) I find as fact that Ms. Blackburn was not a truthful witness, and where her evidence conflicts with that of Ms. Suite I reject hers and accept Ms. Suite's evidence as being the truth. Likewise, where her evidence conflicts with Mr. Wallace's and/or Mr. Taylor's evidence, I completely reject her evidence, and accept theirs as being the truth.
- (xvii) She is an Attorney-at-Law, an Officer of the Court.
- (xviii) Her "...perilously fragile vessel ..." was shattered in the witness box.
- (xix) About Ms. Blackburn I need say no more.

[43] **Mr. Denis Thomas:**

- (i) Mr. Thomas in his witness statement and under cross-examination spoke to his alleged fee arrangement with GCI. It was like Ms. Blackburn's fee arrangement.
- (ii) I attach no significant weight to it for it is equal in effect to the evidence of Mr. Taylor, if its purpose is to show a 'course of conduct'.
- (iii) It is equally likely that GCI could have entered into that fee arrangement with Ms. Blackburn and Mr. Thomas, while entering into a different arrangement on Fees with Mr. Taylor and APA.

CONCLUSION

*"...And having perhaps the better claim,
Because it was grassy and wanted wear;*

*Though as for that the passing there
Had worn them really about the same,*

*And both that morning equally lay
In leaves no step had trodden black.
Oh, I kept the first for another day!
Yet knowing how way leads on to way,
I doubted if I should ever come back.*

*I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.”* [Robert Frost: ‘The Road Not Taken’]

[43] Having examined in detail the “... two roads [which] diverged in a yellow wood...” the time has come for the Court to choose the road which the evidence leads it to follow.

[44] Based on the foregoing, I find the following facts to be proven:

- (i) There was an oral agreement entered into between GCI and APA in early 2007 with respect to APA providing professional services to GCI for the Townhouses Project.
- (ii) This agreement was entered into by the parties shortly after the Hotel project was stopped early in 2007.
- (iii) APA reduced its Fees due on the Hotel project by 50% because they were engaged by GCI to work on the Townhouses project. GCI paid this fee, and in fact overpaid. That overpayment was expressly stated by APA to be applicable to the next Fee Appraisal, and there was no objection by GCI.
- (iv) It was agreed that APA’s Fee would be 5.5% of E.C. 5.8 million dollars.

- (v) It was agreed that that Fee would be paid on the submission of Fee Appraisals by APA. This was later varied at or before the 1st November 2007 meeting to be contingent on the grant of planning permission by the relevant authority.
- (vi) There were payments made by GCI on account of Fee Appraisals submitted in 2007 and in 2008. There were no objections made by GCI at any time prior to the 5th September 2008 Fee Appraisal to any of the previous Fee Appraisals submitted. When objection was made to the 5th September 2008 Fee Appraisal, it was to the build cost amount having being increased to \$7.5 million dollars.
- (vii) There was no agreement to pay fees on the increase of the 'build cost' to \$7.5 million dollars.
- (viii) 75% of the work required to be done by APA was in fact done.
- (ix) GCI is in breach of the agreement to pay APA its earned fees.
- (x) GCI must pay to APA the fees due, together with interest and costs as ordered below.

[45] I wish to thank Counsel for their great assistance in this case, and to commend them both for their excellent advocacy.

IT IS HEREBY ORDERED THAT:-

- (1) The Defendant shall pay the Claimant 75% of 5.5% of EC\$ 5,800,000.00 less the EC\$ 78,500.00 already paid. The sum due is to be calculated and certified by the Registrar of the Supreme Court, Grenada, within 7 days of the date of this judgment.
- (2) Interest at the Statutory Rate of 6% per annum shall be paid on the sum certified by the Registrar, from the date of this judgment until payment.

- (3) The Defendant shall pay the Claimant's Prescribed Costs based on the sum certified by the Registrar. The Registrar is to calculate and certify those costs within 7 days of the date of this judgment.

Thomas W. R. Astaphan, Q.C.

High Court Judge