[2016]JMSC Civ. 219

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 02664

BETWEEN CONTINENTAL PETROLEUM PRODUCTS LTD. CLAIMANT

AND SCOTIA DBG INVESTMENTS LTD. DEFENDANT

IN OPEN COURT

Hugh Small, Q.C, Conrad George and Adam Jones, instructed by Hart, Muirhead and Fatta, for the Claimant

Michael Hylton, Q.C, Shanique Scott and Sundiata Gibbs, instructed by Michael Hylton and Associates, for the Defendant

Heard: July 24 and 25, November 18, 2013 and September 30, 2016

CLAIM FOR DAMAGES FOR BREACH OF CONTRACT – IN THE ALTERNATIVE, CLAIM FOR RESCISSION OF CONTRACT – CREDIBILITY OF PARTIES' WITNESSES

ANDERSON, K. J

The background and the parties' statements of case

[1] This is a claim for damages for breach of contract and further or alternatively, a claim for rescission of the contracts, the terms of which are contained in the letters dated March 8, 2007, June 19 and September 19, 2008 and return to the

claimant, of the sum of US$1,234,305.55. The claimant also seeks to recover interest and costs.

[2] The claimant is a company incorporated under the laws of the Bahamas Islands, whereas the defendant is a company that was incorporated under the laws of Jamaica.

[3] It is agreed on between the parties, that the defendant is, among other things, in the business of selling and buying securities to and from corporate entities and giving investment advice and the claimant's agent – Mr. James Eroncig, (hereinafter referred to as 'Mr. Eroncig') was the Chief Executive Officer of the claimant, which, as part of its business, invested in various bonds and securities.

[4] Mr. Eroncig had, during the course of events which led up to this dispute having become the subject of a court claim, primarily interacted with a then employee of the defendant, namely: Leslie Clay Moodie (hereinafter referred to as 'Mr. Moodie'), who is an experienced bond trader and who was, between 2007 and 2009, then employed by the defendant, as the Assistant Vice President for the Treasury Unit. While working in that capacity, his responsibilities included the supervision of stock and bond trades, as well as cash flow management for the defendant's liquidity. His duties also included liaising with clients and taking orders for the purchase and sale of various securities.

[5] Between 2007 and 2009, the claimant was a client of the defendant, as regards the purchase and sale of bonds and other securities instruments and in that regard, Mr. Moodie and Mr. Eroncig frequently communicated with each other.

[6] Mr. Moodie gave evidence while he was being cross-examined, that he had joined the defendant as an employee, in the year – 2000 and that he left there, in 2009. This claim was filed on June 2, 2010.

[7] The essence of the claimant's claim for breach of contract reliefs, is that the defendant had purchased the wrong securities for the claimant, in that, the

defendant had purchased General Motors Corporation (GMC) securities, rather than General Motors Acceptance Corporation (GMAC) securities. Those purchases were effected pursuant to three (3) contracts between the parties. Two (2) of those, three (3) contracts are contained in written 'agreement letters,' (hereinafter referred to as 'letters of agreement or 'confirmation letters') signed to, by Mr. Eroncig, on the claimant's behalf. The purported terms of one of those three (3) contracts, are also contained in a written, 'confirmation letter,' and dated June 19, 2008, which was not signed on the claimant's behalf.

[8] Interestingly, the claimant's particulars of claim, has specifically described those three (3) agreement letters,' as – 'The First Contract,' 'The Second Contract' and 'The Third Contract,' respectively. See paragraphs 6, 9 and 10 of the particulars of claim, in that respect.

[9] Those three (3) contracts between the parties, as set out in those 'agreement letters,' were respectively dated March 8, 2007, June 19, 2008 and September 16, 2008. For the purposes of these reasons for judgment, the respective contracts will be referred to, based on chronological order, just as they have been referred to, in the particulars of claim, as the first, second and third contract.

[10] Pursuant to those contracts, the claimant paid to the defendant, the sum of US$1,234,305.55. As things evolved, General Motors declared bankruptcy in 2009 and it is the claimant's allegation that the General Motors bonds (GM bonds) were therefore, then worthless. Accordingly, the claimant claims to have suffered loss and damage, as a consequence of the defendant having allegedly purchased the wrong bonds, on the claimant's behalf. That loss and damage has arisen, not only because, according to the claimant, the GMC bonds are worthless, but also because the claimant has not benefitted from the profits which have accrued from the appreciation of the GMAC securities.

[11] The defendant had, in their defence, accepted that the GMC bonds are now worthless, but made no admission as to the allegation which was made in

paragraph 15 of the claimant's particulars of claim, that profits have accrued from the appreciation of the GMAC securities – which are the ones that should, according to the claimant, have been purchased and that accordingly, the claimant has suffered loss and damage, since, the claimant did not obtain the benefit of those alleged profits. The claimant led no evidence whatsoever at trial, as to that particular allegation. Expert evidence would have been required in that respect. As such, the claimant is now standing firmly on its leg of there having been loss accrued to them, of US$1,234,305.55, arising from the wrong bonds having allegedly been purchased by the defendant, on their behalf.

[12] It is a fundamental aspect of the claimant's claim, that the defendant had, through its employee – Mr. Moodie, made several representations to the claimant, which formed part and parcel of all of the relevant contracts. For the purpose of enabling persons reading these reasons, to have a better understanding of this claim, it is necessary to set out the alleged historical background to the alleged representations made, especially since, it is as regards those representations allegedly made by the defendant, through its then employee – Mr. Moodie, that the most significant factual disputes existed at trial. In that regard, this court will rely extensively, on what has been set out in the claimant's particulars of claim. This court will do this, since it is the claimant that has alleged that those representations were made, while the defendant has completely denied, ever having made any of the alleged representations.

[13] The claimant has alleged as follows, in that regard: In or about May, 2005, Mr. Moodie advised Mr. Eroncig, in an electronic mail (hereinafter referred to as 'e-mail') message, of an option to purchase securities in GMAC.

[14] Subsequent to having received that advice, Mr. Eroncig agreed in a telephone conversation with Mr. Moodie, to purchase US$500,000.00 nominal, in GMAC securities. The defendant then forwarded a letter of agreement dated March 8, 2007, to the claimant, seeking its written confirmation of the agreed transaction.

Before he signed that 'letter of agreement' on the claimant's behalf though, Mr. Eroncig noted that it referred to GMC bonds, as opposed to GMAC securities.

[15] Mr. Eroncig telephoned Mr. Moodie and enquired about this discrepancy, and in order to induce the claimant to enter into a contract to purchase the GM bonds, the defendant, through its agent – Mr. Moodie, told the claimant's agent – Mr. Eroncig, that although the letter said GMC bonds, the claimant would in fact receive GMAC securities ('the representation').

[16] Induced by and in reliance on the representation the claimant entered into a written contract with the defendant, to purchase US$500,000.00 nominal, in GM bonds, in accordance with the 'letter of agreement' dated March 8, 2007 ('the first contract').

[17] Subsequent to the claimant having purchased the GM bonds, while under the belief that they had instead, purchased GMAC securities, Mr. Moodie sent to Mr. Eroncig, by electronic mail, information relating to the performance of GMAC LLC., further cementing the claimant's belief that the securities that it had purchased, were in fact GMAC securities ('the further representation').

[18] In reliance on the representation, as confirmed by the further representation, and believing that it had purchased GMAC securities, the claimant did not seek to dispose of the bonds purchased under the first contract, which it could have done at the time, on terms that would have allowed it to recover its entire investment in the first contract.

[19] Induced by and in reliance upon the representation and further representation, Mr. Eroncig had, on the claimant's behalf, instructed the defendant to purchase an additional US$500,000.00 nominal in GMAC securities. What transpired though, was that the claimant entered into the second contract with the defendant, to purchase US$500,000.00 nominal, in GMC bonds. The purported

terms of the second contract, are contained in a, 'letter of agreement' dated June 19, 2008, which was not signed by the claimant.

[20] Again, acting in reliance upon the representation and the further representation, Mr. Eroncig had, on the claimant's behalf, instructed the defendant to purchase an additional US$500,000.00 nominal in GMAC securities and the claimant entered into the third contract with the defendant, to purchase US$500,000.00 nominal, in GMC bonds. The purported terms of the third contract, are contained in a, 'letter of agreement' dated September 16, 2008.

[21] The representation and further representation were express, or alternatively, implied terms of the first, second and third contracts (collectively hereafter referred to as, 'the contracts'). Further or alternatively, the representation and further representation were collateral warranties that the bonds were GMAC securities, in consideration of which, the claimant entered into the contracts.

[22] Pursuant to the contracts, the claimant paid to the defendant, the total sum of US$1,234,305.55. As aforementioned, the GMC bonds that were purchased pursuant to the contracts, are all now worthless, as a consequence of the GMC having declared bankruptcy in 2009.

[23] The defendant has, of course, responded to those allegations and it is not necessary, for present purposes, to refer extensively, to their defence, for the purpose of understanding the essence of same.

[24] That essence is as follows: There are three (3) contracts between the parties, which now form the subject of this claim. Those contracts required the defendant to purchase GMC bonds and it was in fact those bonds which were purchased by the defendant. There was no contractual agreement between the parties, which required the defendant to purchase GMAC securities.

[25] Each of the contracts ('letters of agreement') had set out therein, as an express term that: 'by tendering a cheque or other form of payment to (the defendant) in

relation to the transaction... (the claimant) thereby represents and warrants to (the defendant) that the transaction details are accurate and as agreed by the parties.' The contracts each define the phrase – 'Transaction Details,' as 'the main commercial terms of the transaction which are set forth in the letter.'

[26] The claimant duly tendered three (3) separate payments to the defendant in relation to each of the transactions set out in each of the contracts. In the circumstances, the claimant expressly represented and warranted that the three (3), 'agreement letters,' accurately set out the terms of the contracts.

[27] The defendant has also alleged that on numerous occasions before May 2005 and between May, 2005 and March, 2007, Mr. Moodie had informed Mr. Eroncig of investment options available in the market. By electronic mail message dated March 8, 2007, sent by Mr. Eroncig to Mr. Moodie, the claimant requested the purchase of, '$500,000.00 of GMC 2021 yield approximately 9.1%.' At that time, there were GMC bonds with a coupon rate of 9.4% with a maturity date in 2021 and a yield of approximately 9.1%. At that time, and in fact at all material times, there were no GMAC bonds available with a maturity date in 2021 with similar coupon rates or yields.

[28] The defendant has expressly denied that any conversation between Mr. Moodie and Mr. Eroncig took place as the claimant has referred to, as constituting, 'the representation.' In fact, the defendant has alleged that there was no communication between the parties, between the despatch of the, 'letter of agreement' dated March 8, 2007 and the return by the defendant to the claimant, of a signed copy of that, 'letter of agreement.' Accordingly, the defendant has averred that the, 'letter of agreement,' dated March 8, 2007, which is the first contract, accurately and fully records the terms of the agreement between the parties, save for one error, which is that the letters – 'GOJ' ought not to have been in the heading to that contract.

[29] The defendant has admitted that Mr. Moodie sent the electronic mail message which contained information relating to the performance of GMAC LLC, but has denied that said e-mail message constituted, 'a further representation,' as the claimant has alleged. Accordingly, the defendant has denied that it made any representations as alleged.

[30] The defendant has also denied that Mr. Eroncig instructed the defendant to purchase an additional US$500,000.00 nominal in GMAC securities, as the claimant has alleged that they did, through Mr. Eroncig, in an electronic mail message which is hereinafter referred to as, 'exhibit C.P4,' as it was referred to as an attachment to the claimant's particulars of claim. It should be noted that during the trial, that electronic mail message was entered into evidence. That particular exhibit and the evidence concerning it, will be considered further on in these reasons, when the overall evidence is being examined more closely.

[31] Before the parties entered into the second contract, the defendant sent to the claimant by fax on June 19, 2008, a copy of a trade ticket issued by Bloomberg, which set out the terms of the proposed purchase of GMC bonds. The trade ticket which was sent to the claimant on June 19, 2008, sets out the same terms as those of the second contract.

[32] Before the third contract was entered into, the defendant sent to the claimant by electronic mail dated September 15, 2008, a copy of a trade ticket issued by Bloomberg, which set out the terms of the proposed purchase of the GMC bonds. The terms of the third contract, are the same as those set out in the trade ticket sent to the claimant on September 15, 2008. The defendant sent to the claimant, an electronic mail message, dated September 16, 2008, confirming the details of the purchase of the GMC bonds as referred to in the, 'letter of agreement,' and the trade ticket.

[33] Having denied that they made any representations as alleged, the defendant has also, in similar vein, denied that the alleged representations were either express

or implied terms of any of the contracts, or that the same constituted collateral warranties, that the bonds were GMAC securities.

[34] The defendant has also denied that it was on the insistence of the defendant's management, that the claimant had agreed to accept that the GMC bonds belonged to them, so as to take advantage of a debt swap which was being offered by GMC, the claimant had, by means of several electronic mail messages which were sent to the defendant, in or about May, 2009, confirmed their willingness to accept the GMC offer.

The primary issue

[35] The primary issue between the parties, it can readily be discerned, is an issue of credibility. If the defendant did not in fact make the representations as alleged, then, the parties are inevitably, bound by the terms of the contracts which they voluntarily made with each other. The terms of each of those contracts, required that the defendant transfer to the claimant, the securities which the claimant would purchase from them. That is exactly what the defendant did. If though, the representations were made, as alleged, then it will be for the court to decide what legal effect, if any, those representations should have on the contracts, which are constituted by, according to the claimant's own statement of case, 'the agreement letters,' albeit that the claimant is alleging that those contracts should be interpreted as, subject to the representations allegedly made. Indeed, the claimant has gone even further than that, to some extent, by having alleged that the representations allegedly made, were either express or implied terms of the contracts.

[36] Even if it were so, as a matter of law though, assuming that this court considers that the defendant did make the representations as alleged, this still would not detract from it being the primary issue to be determined, that this court must first decide on whether the representations as alleged, were made, since, if this court were to conclude that no such representation was made, that would undoubtedly

put an end to there being any prospect of success, as regards the claimant's claim.

[37] The claimant has raised the issue of rescission of the contracts, if this court is of the view that there was a unilateral mistake made by the claimant as to what were the bonds being bought on their behalf, by the defendant, or if this court is of the view, that there was a bilateral mistake as to the bonds being purchased.

[38] This court is, firstly, not of the view that both parties were mistaken as to the bonds that were being purchased. The documentary evidence clearly shows that at all times, what the defendant intended to sell to the claimant, was GMC bonds. The three (3) documents which the defendant transmitted to the claimant, immediately prior to their three (3) separate purchases of GMC bonds, make that apparent. What is not necessarily so apparent though and really depends on what view the court takes of the evidence of the claimant's principal at the time when those bonds were purchased – Mr. James Eroncig, is whether at that time, Mr. Eroncig was mistakenly of the understanding/view, that the bonds which were to have been purchased on the claimant's behalf, by the defendant, were GMAC bonds, rather that GMC bonds.

[39] As has been clearly stated in the text – The law of rescission, as authored by: Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, at paragraph 7.07, page 179 – '*At common law a mere unilateral mistake is not sufficient to vitiate a contract. Although the circumstances in which rescission will be permitted have not been much explored in England and Wales, it seems that the following factors must be present:*

(i) an operative mistake was made;

(ii) the other party knew of the mistake; and

(iii) there was sharp practice or other unconscionable conduct in connection with the mistake.'

These principles exist, no doubt, because rescission is a principle of equity and thus, in order for a contract to be rescinded by a court of law, the circumstances must be such that equity will desire to intervene. The case which is cited as setting out the position at common law, is: **Smith v Hughes** – [1871] LR 6 QB 597. For the equitable position, as per rescission, see: **Riverlate Properties v Paul** – [1974] 2 All ER 656.

[40] Even if this court were to accept that in respect of this legal dispute, the claimant had in fact been mistaken in an operative way, about the contracts which were entered into between the parties, this court would next have to go on to consider whether the defendant was aware of that mistake. Not only has the defendant denied that the claimant was so mistaken, but of course, having denied same, the defendant is also contending that they did not know of the claimant having been mistaken in any respect, about which bonds were to have been sold to them, by the defendant. This court can and will determine not only whether the claimant was mistaken in an operative way, as regards the contract and whether the defendant was aware of that mistake, if it has to, based upon this court's assessment as to the credibility of the claimant's principal witness – Mr. Eroncig and the defendant's principal witness – Mr. Moodie.

[41] It must be stated though, that this court does not believe that it need resolve the issue of rescission, based on its assessment of credibility of the parties' principal witnesses, because, the claimant has not at all, alleged, much less proven, that the defendant engaged in any unconscionable conduct, based upon that alleged mistake. Prior to the defendant's purchase of the GMC bonds, the claimant's representative – Mr. Eroncig, was informed by means of written documents – three (3) separate documents, that the defendant intended to sell to the claimant, GMC bonds, and those were the bonds that the claimant did in fact purchase from the defendant.

[42] Having so concluded, it would have been unnecessary to address the issue of rescission based upon the credibility aspect. Since though, the credibility aspect

of this case is central to other issues also, this court will return to briefly address rescission and credibility, collectively, further on in these reasons.

[43] In any event though, rescission cannot avail the claimant, since it is this court's conclusion that after the claimant's principal – Mr. Eroncig, had received legal advice, subsequent to having become fully aware that the defendant had sold to them GMC bonds, rather than GMAC bonds and subsequent to GMC having declared bankruptcy, the claimant affirmed the contracts, by having taken benefits under them, with knowledge of the facts giving rise to his alleged right to rescind and of his alleged legal rights. The claimant affirmed the contacts at that stage, by having, after the GMC had declared bankruptcy, taken advantage of an offer of shares and warrants by GMC, to its bondholders.

[44] Under cross-examination, when Mr. Eroncig was asked about his acceptance of the share warrants from GMC, he stated that when he had told a friend of his, who was an attorney that was handling the bankruptcy case of GMC, about 'his situation,' he was told that he should, '*sign it for the GM bonds, because they would be getting a certain percentage of stock, because if you don't sign, the possibility would be that GM bonds would not receive the stocks.'*

[45] As has been stated in the text – Modern Equity, by Hanbury and Martin, 18th ed., at paragraph 26-016 – '*where the party entitled to rescind affirms the contract, for example by taking a benefit under it, with knowledge of the facts giving rise to the right to rescind and of his legal rights, he will be taken to have waived that right. Affirmation may be shown by words or acts, or may be indicated by lapse of time, the remedy being, subject to the doctrine of laches.*'

[46] The claimant has not sought damages for misrepresentation, but is, no doubt, seeking the remedy of rescission on the ground of misrepresentation. If this court accepts the claimant's evidence, as given via Mr. Eroncig, that certain statements which were assurances, were made to Mr. Eroncig by Mr. Moodie, then it will be open to this court to conclude that the defendant made

misrepresentations of a material nature, as regards the sale to claimant of at least some of the bonds which were in fact sold by the defendant to the claimant. In any event though, for reasons already given, rescission cannot properly be ordered by this court, based upon the particular circumstances of this particular case.

[47] The claimant has alleged that both 'a representation' and 'a further representation' were made by the defendant to the claimant as regards that which the claimant has alleged was the then proposed purchase of GMAC bonds, rather than GMC bonds. As aforementioned, whether there was a, 'representation,' as specifically alleged in the claimant's particulars of claim, is solely an issue of credibility. The question of whether, even if that credibility issue were to be resolved in the claimant's favour, it ought to lead this court to rescind the relevant contracts, is a question of law and fact, combined. This court will address the latter, no further, since, it is this court's considered opinion that rescission cannot avail the claimant, in the particular circumstances of this particular case.

[48] Suffice it to state though, as regards the alleged, 'further representation,' that the same did not constitute a representation at all. The electronic mail message referred to, was merely a general electronic mail message about GMAC, the company and as such, only contained general information about GMAC. The information contained in that electronic mail message, furthermore, has not been shown by the claimant to this court, by means of any evidence whatsoever, as having been false in any way.

The credibility issue

[49] This court will therefore now address the most significant issue in this case, which is the credibility issue.

[50] It is important to firstly note, in addressing that issue, that the defendant was, at no time, engaged in purchasing bonds on the claimant's behalf. Instead, what

the defendant was engaged in as a part of its business, was the purchase of bonds which it then sold to its clients. The defendant therefore, did not act as the claimant's agent, in having purchased the bonds which form the subject of the dispute in this claim.

[51] That such was the case, has been made clear by one of the defendant's witnesses – Mr. Lissant Mitchell, who was, at the time when he testified in respect of this claim, the Chief Executive Officer of the defendant. While he was being cross-examined about the nature of the defendant's role in the relevant transactions, he testified that – '*In facilitating a trade of this nature Scotia investments, in getting an order to acquire securities at the agreed terms, would proceed to the market to try to access the particular security, thereafter purchasing the security. Scotia then onsells the securities to the client at the agreed price. The difference between the price that Scotia acquires the security from the market and onsells to the client, represents a trading income or gains.*'

[52] There was, during the trial of this claim, a particularly patent and significant dispute of fact between the only witness for the claimant – Mr. Eroncig and the defendant's principal witness – Mr. Moodie. That was as regards whether Mr. Moodie had, at any time, orally represented to Mr. Eroncig, that the claimant was purchasing GMAC bonds, rather than GMC bonds. The defendant's case, as supported in that regard, primarily, by Mr. Moodie's evidence on that point, is that no such oral representation was ever made by him. On the other hand, the claimant's case, as supported in that regard, primarily, by Mr. Eroncig's evidence on that point, is that such oral representations were made to him by Mr. Moodie.

[53] In fact, Mr. Eroncig's evidence went further than that both with respect to alleged assurances given by Mr. Moodie to Mr. Eroncig that it was GMAC securities/ bonds being purchased by the defendant, in accordance with the alleged oral instructions given to Mr. Moodie, by Mr. Eroncig, rather than GMC securities/bonds, as well as to there having been discussions between Mr. Moodie and Mr. Eroncig, subsequent to the three (3) separate bond purchases

having been made by the claimant from the defendant, as to the alleged incorrect bonds having been purchased.

[54] It is worthwhile to quote verbatim, from the evidence-in-chief of Mr. Eroncig, as per his witness statement, in those respects. For that purpose, paragraphs 7-23 of the 2nd witness statement of Mr. Eroncig are particularly apposite. Those paragraphs are quoted, collectively, as follows:

> *'I gave instructions to Mr. Moodie to purchase the first tranche of GMAC securities in March of 2007. As was the normal procedure I was e-mailed a Bloomberg trade ticket that contained the information of the stock that was to be purchased on my behalf. The trade ticket only referred to the security as 'GM.' The correct name for the security I intended to purchase was, as stated above, 'GMAC.' I instructed Mr. Moodie to carry out the transaction. When I received the confirmation letter, which I was to sign, I noticed that the securities stated to have been purchased were issued by the GMC as opposed to GMAC. The bonds issued by the GMC are referred to in these proceedings as 'GM bonds' or 'GM securities.' I called Mr. Moodie and alerted him to this. He said he would investigate and get back to me. When he returned my call, he told me that Keisha Brooks had purchased the wrong bonds. Mr. Moodie then asked me if I wanted to keep the GM securities as they had the same yield. I told him that I would prefer the GMAC securities. I reiterated to him the reason for my preference, which was that I knew GMAC was owned, in the majority, by a hedge fund. As a result I was more confident in its stability in the then uncertain conditions. Mr. Moodie assured me that the mistake would be corrected and transaction would be done to ensure that GMAC securities would be purchased on my behalf. On that assurance I signed and returned the confirmation letter. I did not feel it necessary to follow up on this as I had no reason to doubt Mr. Moodie's assurance. I became concerned at the time the same procedure was being done for the second transaction in June of 2008. Again, the trade ticket referred to GM securities and not specifically to GMAC securities. I again notified Mr. Moodie of this lack of clarity. This time, however, I was hesitant to sign the confirmation letter and confirm that I never did sign it. In*

September of 2008, Mr. Moodie was not in office and so I communicated with Keisha Brooks directly by e-mail. Mr, Moodie had previously told me that Ms. Brooks was the person who carried out all of the relevant trades. Ms. Brooks sent me another Bloomberg trade ticket which referred to GM securities. I telephoned Mr. Moodie to ensure that this was in fact GMAC securities. He, again, assured me that the securities being bought were, in fact, GMAC securities. In my response to Ms. Brooks I made it clear that I wanted to purchase GMAC securities. According to her witness statement Ms. Brooks stated that she believed this to be a typo and traded for GM securities on my behalf. Mr. Moodie subsequently told me that Ms. Brooks had not known the difference between the GM securities and the GMAC securities. I was surprised when I received the confirmation letter for this transaction as it referred to GM securities and not, as I had hoped, GMAC securities. I did, however, sign this confirmation letter, but only on the repeated assurance, from Mr. Moodie, that I was purchasing GMAC securities. GMC went bankrupt in June of 2009, and I remarked to Mr. Moodie that I was glad that we had made the right choice in purchasing GMAC securities. Mr. Moodie reluctantly told me that in fact no GMAC securities had been purchased in my name. We had a meeting to discuss the consequences of those incorrect trades. Garfield Sinclair, the Chief Operating Officer of the defendant company, was then notified of the incorrect trades. I later discovered from Mr. Moodie that none of the shares that were purchased on my behalf were ever registered in my name. I paid the defendant a total of US$1,234,305.55, towards the purchase of what I thought were GMAC securities. GMC has since gone bankrupt and the GM bonds have very little value. Upon the bankruptcy of GM, the management of the defendant, contacted me and insisted that a representative of the claimant sign a document accepting that the GM bonds belong to the claimant, in order to take advantage of a debt swap which was being offered by GMC. I signed the document accepting that the GM bonds belong to the claimant, only after making it clear that at all times, I had intended to purchase GMAC securities, and that at all times I had been reassured that this was being done. Although I have some informal knowledge about trading international securities, I am not by profession a

securities trader, nor do I have that professional expertise. The defendant held itself out as being an investment bank with knowledge and experience in trading international securities. In doing business with the defendant on behalf of the claimant, I relied on the defendant's experienced staff for trading advice and information, particularly information about the nature of the company issuing the stock, the stock's yield and maturity date.'

[55] The wording of paragraphs 2 to 6 of the second witness statement of Mr. Eroncig, are also, of importance. Respectively those paragraphs, collectively, read as follows:

'The claimant, as part of its business, invests in various bonds and securities. I make this statement as a supplement to my first witness statement, for the purposes of clarification. There is information contained herein that I did not realize was material at the time of my first statement. Additionally, I was hesitant to include the following statements previously, due to my long standing personal relationship with Mr. Clay Moodie, and I did not wish to say anything that could have damaged him in his employment with the defendant. I did not wish to put any more pressure on Mr. Moodie, as he had told me that, when he gave his witness statement, he had been under a lot of pressure from the upper echelons of management of the defendant company. As stated above, I have a long standing relationship with Mr. Moodie and discussed with him in or about May of 2005, my interest in purchasing high yield bonds. I asked Mr. Moodie to look up information for the GMAC securities. Mr. Moodie did in fact send me information and the financial profile of the GMAC securities. That was on May 10, 2005. Following these discussions and exchanges of information, I entered into the transactions that are the subject of these proceedings. I liaised throughout these transactions with Mr, Moodie, and had little or no interaction in this regard, with other employees of the defendant company until the transaction of September 2008 when Mr. Moodie was out of office. On that occasion I communicated directly with Keisha Brooks, the trader.'

[56] Before proceeding to carefully analyze Mr. Eroncig's evidence-in-chief as extensively quoted above and which undoubtedly constitutes the foundation of the claimant's claim, it is important to recognize that in respect of this claim, the burden of proof rests on the claimant from the beginning until the end and that as such, if the claimant is to succeed in proving their claim, it is necessary that they do so, to the standard of a balance of probabilities. In other words, the claimant would have to prove, on a balance of probabilities, that the defendant breached their contracts with the claimant or alternatively, that the contracts entered into between the parties ought to be determined by this court, as rescinded.

[57] In assessing credibility, as between two (2) witnesses, one of whom is telling the truth in important respects and the other witness, who is not doing so, as regards those same matters, it is always important for the court of first instance to consider contemporaneous documents, probabilities and possible motives, in a case involving disputed facts. The Privy Council made this clear, in the case: **Villenueve and another v Gaillard and another** – [2011] UK PC 1, per Ld. Walker, at paragraph 67. See also: **Armagas v Mundogas SA (The Ocean Frost)** – [1986] 1 AC 717, at page 757, per Dunn, L.J.

[58] This court has adopted the approach as suggested immediately above in assessing the parties' respective primary witnesses' evidence, but in that regard it must be stated also, that this court has spent far more time, carefully examining Mr. James Eroncig's evidence, than it has, Mr. Moodie's evidence, because, if Mr. Eroncig's evidence in the most important respects are for good reason, not accepted, then it will mean that, based on how this case evolved at trial, that this court accepts Mr. Moodie's evidence in those most important respects, because, Mr. Moodie's evidence in those most important respects, fundamentally differed from Mr. Eroncig's evidence. In assessing the evidence given by the parties' witnesses, this court believes it necessary to focus primarily on the claimant's witness' evidence, since it was the claimant who, throughout the trial, bore the burden of proof. Accordingly, if the claimant's witness' evidence was not to be

accepted by this court, in its most important respects, then the claimant's claim would not have been duly proven.

[59] The respective parties' counsel had agreed with the court, upon their suggestion which was made to the court, on the day when they were scheduled to make their respective oral closing submissions, that their written closing submissions were sufficiently detailed and as such, the same could and would be relied upon, in lieu of oral closing submissions being made.

[60] This court has therefore, given careful consideration to the said submissions and will rely, where necessary and appropriate, on submissions made therein. The claimant's closing submissions were filed one day after the defendant's initial closing submissions were filed. Presumably therefore, that is why the defendant felt that it was warranted for them to have, through their counsel, filed a written document intituled as 'Defendant's Speaking Notes In Response to Closing Submissions.' That document was filed on November 18, 2013. Even though this court did not give permission for the same to be filed and/or relied upon, it was open to this court, in appropriate circumstances, to waive the irregularity inherent in the defendant having filed same without this court's prior permission.

[61] This court though, has decided not to exercise that option, for the reason that the claimant's counsel would not have been, prior to these reasons for judgment having been drafted, afforded an opportunity to be heard as to whether such irregularity should be waived or not. In the circumstances, this court has given no consideration whatsoever, to any of the contents of the said, 'speaking notes.'

Analysis of the evidence as to credibility of James Eroncig and Leslie Clay Moodie

[62] The analysis of the evidence as to credibility of James Eroncig and Leslie Clay Moodie on the issues of fact which form the foundation of this entire claim, can properly begin with a consideration as to whether either of those witnesses had any significant reason to be dishonest in their testimony to this court, with respect

to same. Other key aspects of the overall analysis of their evidence are addressed herein, seriatim thereafter.

Whether Mr. Eroncig and Mr. Moodie had reason to be untruthful in their evidence

[63] The claimant's lead counsel did not address that issue in his closing submissions, while the lead defence counsel, did address same, in his. It was the defence's submission that Mr. Eroncig had a significant motive to present false testimony to the court, as the company in respect of which, he is the principal – that being the claimant, had suffered a loss of US$1,234,305.55, in a bad investment. This claim constitutes a basis upon which, if the claimant is successful, it would be able to recover that lost sum, from the defendant. This court has accepted that particular submission.

[64] On the other hand, it is also the defence's contention, that Mr. Moodie had no motive to provide false evidence to the court, as he is no longer employed by the defendant and in fact, the evidence has disclosed that he ceased working there, in the year – 2009.

[65] This court does not accept that submission, as regards whether Mr. Moodie had any motive to be untruthful as regards his evidence. Mr. Moodie had, during cross-examination, testified that he ceased his employment with Scotia Dehring, Bunting and Golding ('Scotia DBG') in 2009 and that he had commenced working at Dehring, Bunting and Golding, in 2000 and that Scotiabank had taken over the business – Dehring, Bunting and Golding in 2007. None of that evidence was disputed by the claimant's counsel, at any point in time. Mr. Moodie had though, also testified that he was, at the time of his testimony, the assistant managing director of York Pharmacy Ltd. As such, he was then still closely involved with the operations of a business entity. Accordingly, he would still then have had a business reputation which he almost certainly, this court believes, would have desired to maintain.

[66] If that business reputation were to be significantly damaged, it would undoubtedly affect him negatively and there can hardly be any doubt, that if judgment were to be entered against the defendant in this claim, then, because of the particular circumstances of this particular claim, there will be an adverse stain on the business reputation of Mr. Moodie. That, in and of itself, would have constituted a significant motive to present false testimony.

Whether Mr. Eroncig was an experienced bond and securities trader

[67] Mr. Eroncig gave evidence, as parts of both his witness statements, that he was then (dates of respective witness statements), the Chief Executive Officer of the claimant and that the claimant, as part of its business, invests in various bonds and securities. Also though, he had therein, alleged that although he has some informal knowledge about trading international securities, he is not, by profession, a securities trader, nor does he have that professional expertise and therefore, he had relied on the defendant's experienced staff, for trading advice and information. He gave evidence, while he was being cross-examined though, which, in this court's mind, contradicted that earlier testimony of his.

[68] For example, when he was asked if he agrees that he is a sophisticated and experienced investor, his response was: 'In certain areas.' He then went on to state, after having been requested by cross-examining counsel, to do so, that he was one of the original founders of Corporate Merchant Bank, with Dehring, Bunting and Golding as his partners. He had negotiated for the purchase of Worker's Bank and later sold his investment, with a profit. He purchased controlling interest in Blaise Bank. He had also engaged in trade financing. He was never an investor in Dehring, Bunting and Golding, but when it was originally formed, he was asked to be the major investor.

[69] What transpired, during cross-examination, were the following questions and answers:

Q. 'Prior to the transactions in this case, you did numerous other securities transactions through Dehring, Bunting and Golding?'

A. 'Yes.'

Q. And would you agree that those transactions involved much larger sums than those involved here?

A. 'Correct.'

Q. At the time of the first transaction, continental had US$21.9 million invested through Dehring, Bunting and Golding?'

A. 'Yes.'

[70] Mr. Eroncig went on to explain to the court, arising from the question of the cross-examining counsel, the difference between investing through leverage, 'on margin,' as distinct from investing, 'on margin.' Whilst this court does not know if his explanation of that difference is a correct one, what was of more importance to the court, is that Mr. Eroncig did not resile from providing the explanation which cross-examining counsel had sought, on any basis at all, much less that he did not have the knowledge as to the answer to same.

[71] This court has considered the evidence, on or related to this particular issue, as a whole, including the evidence as to Mr. Eroncig's overall knowledge of matters of finance and investment and bearing in mind that the claimant had invested large sums as securities in Dehring, Bunting and Golding, prior to the first transaction which forms one of the subjects of this claim. Having considered all of that evidence, this court has absolutely no doubt, that the claimant and Mr. Eroncig, as the Chief Executive Officer of the claimant, were significantly experienced, with the former – mentioned being so experienced, via the latter-mentioned, as securities traders, prior to the transactions which form the subject of this claim.

The acceptance by the claimant, via Mr. Eroncig, that the GM bonds belonged to the claimant, so as to take advantage of the debt swap offered by GMC, after they had been declared bankrupt

[72] The claimant's witness – Mr. Eroncig, gave evidence, during his evidence-in-chief, that he signed a document accepting that the GM bonds belonged to the claimant, only because after GMC had been declared bankrupt, the management of the defendant had contacted him and insisted that a representative of the claimant sign that document, in order to take advantage of a debt swap which was being offered by GMC. According to Mr. Eroncig, he only signed that document after having made it clear that at all times, he had intended to purchase GMAC securities and that at all times, he had been reassured that this was being done.

[73] This court does not accept that there was any insistence by the defendant's management that Mr. Eroncig sign that document. In any event though, having signed that document, it is not open to the claimant to retract that, at this stage. The claimant cannot accept and reject, as a matter of mere choice, after having already accepted that the claimant was the owner of the GMC bonds. If it were otherwise, the claimant would get the benefit of the debt swap, as well as the benefit of a successful claim, for breach of contract.

[74] This court has not accepted that evidence of Mr. Eroncig, partially because this court believes that, at the very least, Mr. Eroncig would have, at that stage made it clear, in writing, at least via an electronic mail correspondence, that he was only signing that document because of the defendant's insistence and/or that he was signing same, while reserving the claimant's right to take legal action, arising from the defendant having purchased the wrong bonds (as he has alleged in his claim). Mr. Eroncig is undoubtedly an astute businessman. As such, this court does not believe that if his evidence in that regard was true, he would have acted otherwise than that.

[75] Furthermore, Mr. Eroncig completely contradicted his evidence-in-chief as to why he accepted that the bonds purchased by the defendant, belonged to the claimant, during his cross-examination. At that latter stage, when it was suggested to him, by cross-examining counsel, that in paragraph 16 of his witness statement, the word – 'insisted,' is not correct, Mr. Eroncig agreed with that and stated that, *'It should be suggested, instead of insisted.'* Accordingly, when it was merely suggested to him, that the claimant accept ownership of the GMC bonds, so as to take advantage of the debt swap, the claimant of its free choice, acted on that suggestion. That is a completely different scenario from one in which it was, all along, prior to trial, both in the claimant's particulars of claim and two (2) witness statements – all of which documents were certified as true and correct, by Mr. Eroncig, stated that the defendant had, through its management 'insisted' that the claimant accepted that the GMC bonds belonged to it. That change of evidence lends even more support to the legal principle that the claimant should not be permitted by this court, to approbate and reprobate. Furthermore, it suggests that Mr. Eroncig's evidence on this issue, lacks credibility.

[76] The cross-examination evidence obtained from Mr. Eroncig though, went even further, on this particular issue and cast even greater doubt on his credibility as regards same.

[77] While he was being cross-examined, Mr. Eroncig was referred to an electronic mail correspondence sent on May 29, 2009, after he had been referred to paragraph 16 of his first witness statement. He was then asked – 'Was that the sequence of communications?

A. Yes.

Q. 'Would you describe that as management insisting that you sign?'

A. 'When I found out about this, a friend of mine, who is an attorney who was handling the bankruptcy case of GM, I told him my situation and he said to

mitigate any losses because of the disagreement, I should sign for the GM bonds because they would be getting a certain percentage of stock. If I don't sign it, then the possibility would be that I would get nothing, or the possibility would be that the GM bonds would not receive the stock in the transaction…..'

[78] Thus, at that stage of the trial, Mr. Eroncig had, for the first time, provided to this court, that explanation as to why he had accepted that the GM bonds were the claimant's. No reason was ever provided to this court, by Mr. Eroncig, as to why he had not stated such, at a much earlier stage, to this court. His change of evidence is that regard, inflicted a significantly negative blow to this court's overall view as to Mr. Eroncig's credibility and a devastating blow to his credibility as to why he signed for the GM bonds, after GM had declared bankruptcy.

Mr. Eroncig's assertion that prior to September of 2008, Mr. Moodie had told him that Ms. Brooks was the person who had carried out all the relevant trades – two prior trades

[79] Mr. Eroncig stated in examination-in-chief that in September of 2008, Mr. Moodie was not in office and so he communicated with Keisha Brooks, directly by electronic mail. 'Mr. Moodie had previously told me that Ms. Brooks was the person who had carried out all of the relevant trades.' (see paragraph 12 of second witness statement of James Eroncig)

[80] Mr. Eroncig did not resile from that evidence, while he was being cross-examined. Interestingly though, that bit of evidence, as quoted immediately above, was not at all stated by Mr. Eroncig in his original witness statement.

[81] It is also, of importance to note that, while she was being cross-examined by the claimant's lead counsel, it was never suggested to Ms. Brooks, that at anytime, much less, prior to September of 2008, she was the one who had carried out all of the relevant trades. It was not even, at that stage of the trial, posed as a question to her, by the claimant's lead counsel, as to whether she had, prior to

September of 2008, carried out two (2) of the three (3) trades which are relevant for the purposes of this claim.

[82] It was somewhat surprising to this court, that no such suggestion or query was posed to Ms. Brooks, since the same concern an issue that is of significant relevance to this court's overall assessment of Mr. Eroncig's credibility.

[83] On amplification of her witness statement, during her oral evidence, Ms. Brooks testified that she began working with Scotia Investments in September of 2007 and on cross-examination, she testified that, before she had been employed at Scotia Investments, she was employed at Jamaica Money Market Brokers. Also, during cross-examination, Ms. Brooks was asked the following questions and gave the following answer.

Q. *'In September of 2008, had Scotiabank group already incorporated into its operations, the Dehring, Bunting and Golding Merchant Bank?'*

A. *'Yes sir, in September of 2008 it had.'*

[84] There are three (3) trades which form the subject of this claim. One of those trades, being the last in time, took place on September 16, 2008. It was the evidence of Mr. Moodie and also, Mr. Lissant Mitchell – who was, at the time of his testimony, the Chief Executive Officer of the defendant, that the last in time, of those three trades, took place on September 16, of 2008, whereas the other two (2) trades took place on March 8, 2007 and June 19, 2008. It was the evidence of each of the defence witnesses, that it was Mr. Moodie who had assisted Mr. Eroncig with the first two (2) trades, whereas, Ms. Brooks had assisted with the third trade. Ms. Brooks further testified, that she had prepared the trade ticket pertaining to the third trade. Furthermore, when asked during amplification of her evidence-in-chief, why she had prepared the third trade ticket with the particulars as set out on it, Ms. Brooks stated that she had done so, because she was instructed to do so, by her supervisor at that time – Mr. Moodie.

[85] Clearly, it can readily be recognized that on March 8, 2007, Ms. Moodie was not employed either to Scotia Investments or Dehring, Bunting and Golding Ltd. Accordingly, this court does not accept it as accurate evidence, that prior to September of 2008, Mr. Eroncig had been told by Mr. Moodie, that the two (2) prior trades, had been carried out by Ms. Brooks. This court is of the considered opinion that Mr. Eroncig gave that evidence, in a calculated effort to deceive this court.

[86] This court is also, of the view that Mr. Eroncig was being untruthful to this court, when he testified, as per paragraph 8 of his second witness statement, that after the first relevant trade had been carried out and he had received the confirmation letter which he was to sign, he noticed that the securities stated to have been purchased, were issued by the GMC, as opposed to GMAC. According to him, he then called Mr. Moodie and alerted him to this, whereupon, Mr. Moodie said he would investigate and get back to him. When Mr. Moodie returned his call, he told Mr. Eroncig that Keisha Brooks had purchased the wrong bonds. That evidence as to Mr. Moodie having then told him, that Keisha Brooks had purchased the wrong bonds, is, in this court's considered opinion, untruthful.

[87] In fact, this court accepts the evidence given by Mr. Moodie, in amplification of his evidence-in-chief that he had not had any conversation with Mr. Eroncig, in the terms as respectively suggested by Mr. Eroncig in paragraphs 8 and 12 of Mr. Eroncig's second witness statement.

The signing by Mr. Eroncig, on the claimant's behalf, of two (2) of the three confirmation letters as regards the three relevant trades

[88] The confirmation/agreement letters are important, because they constituted the three relevant written contracts, for the purpose of this claim. They have been respectively referred to, in the claimant's particulars of claim, as the first, second and third contracts.

[89] Each of those confirmation letters – three of them being relevant, for the purposes of this claim, were exhibited into evidence, after having been accepted by the parties, as agreed documents. They each contain similar particulars, in terms of the information provided therein.

[90] In those confirmation letters, each of which was sent to Mr. Eroncig for signing, on the claimant's behalf, the addressee, being the claimant, was asked to sign and return the attached letter, 'in agreement with the foregoing.' The, 'foregoing' refers to the sale of GMC bonds to the claimant by the defendant.

[91] Those confirmation letters clearly state that the failure to sign those letters shall in no way, be indicative of any disagreement therewith, unless (Scotia Dehring, Bunting and Golding (SDB & G) – as Dehring Bunting and Golding later came to be named, after having been taken over by Scotia Investments, received from the addressee (the claimant), a written objection, 'to the above terms,' 'prior to receiving payment of the total sale price, 'stated above.'

[92] The claimant had, via Mr. Eroncig, signed two (2) of those three confirmation letters. No doubt, because he was of the view that he needed to explain to this court, why it was that he had signed two (2) of those three confirmation letters and why he had not signed one of them, Mr. Eroncig had, as part and parcel of both of his witness statements and thus, his evidence-in-chief, provided explanations, as to why he had signed two (2) of those confirmation letters and why he had not signed one of them. Those explanations were not altered in any way, in either of Mr. Eroncig's witness statements.

[93] To summarize, those explanations were that when he was sent the first in time of those three confirmation letters, that was when he realized that the securities stated to have been purchased, were issued by the GMC, as opposed to GMAC securities. He therefore then telephoned Mr. Moodie and alerted him to this. Later on, Mr. Moodie asked him if he wanted to keep the GMAC securities, as they had the same yield, to which query, he responded that he would prefer the

GMAC securities, as he was more confident in its stability in the investment conditions that then existed. Mr. Moodie assured him that the mistake would be corrected and a transaction would be done to ensure that GMAC securities would be purchased. According to him, it was based on that assurance, that he signed and returned the confirmation letter and he did not feel it necessary to follow up on that, since he had no reason to doubt Mr. Moodie's assurance.

[94] Interestingly though, Mr. Eroncig's evidence was that he became concerned at the time the same procedure was being done for the second transaction in June of 2008, since again, the trade ticket referred to GMC securities and not to GMAC securities. He again notified Mr. Moodie of that lack of clarity. According to him though, on that occasion, he was hesitant to sign the confirmation letter and he did not sign it.

[95] This court does not accept that Mr. Eroncig had, at any time prior to GM having declared bankruptcy, expressed to Mr. Moodie that the wrong securities had been purchased. Furthermore, this court can only ask rhetorically, questions which really, only permit one logical answer. That question is as follows: If Mr. Eroncig had no reason to doubt the first assurance given, that the error would have been corrected by Mr. Moodie, why then, didn't Mr. Eroncig sign the second confirmation letter? Secondly, since he did not sign the second confirmation letter, because he was hesitant, why then did he not, at that time, follow-up on the earlier assurance that had been given to him, by Mr. Moodie, that there would have been a correction of that earlier mistake? The only logical answer to each of those questions, is that there was no such communication between Mr. Moodie and Mr. Eroncig, in the terms as specified above, in respect of this particular issue. It is this court's conclusion, that Mr. Eroncig was untruthful, as regards those aspects of his evidence.

[96] According to Mr. Eroncig, he had, after he had queried the first relevant trade, been told by Mr. Moodie that Keisha Brooks had purchased the wrong bonds. This court has earlier stated, in these reasons, that it does not accept such

evidence as being truthful. What is surprising therefore, is that even though he had supposedly been told that, by Mr. Moodie, in September of 2008, Mr. Moodie was not in office and therefore, he then communicated with Keisha Brooks, directly, via electronic mail correspondence. Ms. Brooks sent him another trade ticket which referred to GMC securities. According to him, he then telephoned Mr. Moodie to ensure that this was in fact GMAC securities. According to Mr. Eroncig, Mr. Moodie then again, assured him that the securities being bought, were GMAC securities. Later on though, when he received the confirmation letter, he realized that it referred to GM securities and not, as he had hoped, GMAC securities. Why then, did he sign that third confirmation letter? His evidence of those alleged conversations with Mr. Moodie, was untrue and his evidence as to the reasons/explanations for his having signed two (2) of those three confirmation letters, is also untrue. Those are conclusions made by this court.

The purchase of the securities and the failure to register same in the claimant's name

[97] The confirmation letters which constitute the relevant contracts, by their wording, make it clear that the relevant securities were never, at any time purchased by the defendant, on the claimant's behalf. Instead, the defendant sold securities to the claimant. Thus, the preamble to each of those letters, are framed in the same way, save and except for the caption, which, in each letter, refers to the exact nature of the security being sold and the nominal value of the security being sold. For instance therefore, the third in time, relevant confirmation letter addressed to the claimant – 'Attention: James Eroncig,' has as its caption, the following words: 'Re: Sale of $500,000.00 nominal in 9.40% GMC bond maturing July 15, 2021.' The preamble reads as follows: 'Further to our agreement made over the telephone, we confirm our sale to you of the above – captioned security. The transaction details (pricing and settlement terms) of this transaction are as follows (all amounts are stated in US currency).'

[98] Accordingly, the defendant never purchased the relevant securities as an agent of the claimant. Instead, what transpired was that the parties communicated with each other by phone, or in writing, as to the securities which the claimant wished to purchase. That is why the confirmation letters are of such vital importance, because, unless the Dehring, Bunting and Golding/Scotia Dehring, Bunting & Golding client paid for the securities being sold to them by the defendant, then any loss incurred by the defendant in having purchased those securities and being unable to sell them to their client, would have been a loss which likely, the defendant would have had to have exclusively borne.

[99] That is why the confirmation letter makes it clear that the failure to sign the confirmation letter does not indicate any disagreement therewith, 'unless Scotia Dehring, Bunting and Golding receives from you a written objection to the above terms, prior to receiving your payment of the sale price stated above.'

[100] As such, the claimant, if they were of the understanding, upon receipt of the confirmation letters, that their oral instructions to the defendant, had not been complied with, as to the precise securities to be purchased, did not have to pay for the purchase of the securities. In addition, they also could have simply written a correspondence and sent it via electronic mail if they wished, setting out the nature of their disagreement with the terms of the proposed purchase by them, of the securities which were then on the verge of being sold to them, by the defendant. They did neither of those things. Instead, they made their disagreement known to Scotia Dehring, Bunting & Golding's then managing director – Mr. Garfield Sinclair, after GM had declared bankruptcy.

[101] According to them, they had also, long prior to that, made their disagreement known, as to the securities which they were purchasing, since they should have been purchasing GMAC and not GMC securities. They made that disagreement known, in oral communications had, over the phone, with Mr. Moodie. Why then did they pay for those securities that were being sold to them? The claimant has provided no logical explanation for that. In any event, for reasons earlier given,

this court has entirely rejected the claimant's contention, that they had made that disagreement known, in oral communications had, over the telephone, with Mr. Moodie, prior to the GMC having declared bankruptcy.

[102] In the final analysis on this issue also, it only remains to be stated that no securities were ever purchased by the defendant on the claimant's behalf, or on behalf of Mr. Eroncig and thus, none such could or would ever have been registered in his name. It was surprising therefore, that as part of his evidence-in-chief, at paragraph 18 of his witness statement, Mr. Eroncig stated – 'I later discovered from Mr. Moodie that none of the shares that were purchased on my behalf were ever registered in my name.' This court is of the considered opinion that Mr. Eroncig gave that evidence, in a further effort to make it appear as though, the overall problem concerning the alleged purchase of the wrong securities by the defendant, was due to the incompetence of Mr. Moodie, in doing what he ought to have done, as he ought to have done same. What was set out in paragraph 18 of Mr. Eroncig's witness statement, was set out in an effort to convince the court that the same was yet another example of that. It has though, achieved the opposite effect, when considered along with all of the other evidence given, in respect of this claim.

The electronic mail correspondences concerning GMAC sent by Mr. Moodie to Mr. Eroncig

[103] The documentary evidence, as per the agreed documents which were exhibited into evidence, have clearly revealed that, on more than one occasion, Mr. Moodie had transmitted to Mr. Eroncig, via electronic mail, messages pertaining, either totally or in part, to GMAC securities. This court accepts as truthful, that those messages were transmitted to Mr. Eroncig, by Mr. Moodie, as information related to securities which was, overall, part and parcel of information passed on by Mr. Moodie to Mr. Eroncig, from time to time, as regards a variety of bonds, inclusive of GMAC, but not isolated to GMAC.

The electronic mail exchanges between Keisha Brooks and James Eroncig

[104] Ms. Keisha Brooks testified at trial, on the defendant's behalf. The most important aspects of her evidence-in-chief, are worthwhile repeating in full, and have been set out, in paragraphs 4-11 of her witness statement. Those paragraphs are quoted, collectively, as follows: 'On Monday, September 15, 2008 I received instructions from Mr. Clay Moodie to prepare a trade ticket for a transaction on behalf of Continental Petroleum. I prepared the trade ticket which indicated a face value of USD$500,000.00 of General Motors 9.4% Global Bonds due to mature on July 15, 2021. The indicative price quoted was US$60.50 with a yield of 17.076220% to maturity and an indicated settlement date of September 18, 2008. The ticket reflected a total cost to the client of USD$310,725.00. On the same date, at 10:52 a.m., I e-mailed the ticket to Mr. Eroncig and asked him to confirm whether to proceed with the purchase. By an e-mail sent at 11:36 a.m. September 15, 2008 Mr. Eroncig confirmed the purchase. While the subject of his e-mails was the same as the subject of mine, the body of his e-mail described the bonds as GMAC bonds 9.4% 2021 at US$60.50. I assumed that the reference to GMAC was a typo because the other details in the e-mail accurately repeated what had been set out in the trade ticket and subject of the e-mail. As far as I am aware there were no GMAC bonds with those details. Mr. Eroncig was sent a formal letter of confirmation to sign. The letter contained a complete description of the GMC bond that was purchased on Continental Petroleum's behalf. Mr. Eroncig signed it to confirm acceptance of the terms of the trade. The letter is attached and marked as 'KB-1.' I processed the transaction in accordance with the terms set out in the letter, my e-mails and the trade ticket. By e-mail at 9:08 a.m. on the following day, Mr. Eroncig asked me whether the bonds had been purchased, and I replied by e-mail at 9:36 the same morning, confirming that they had been purchased. The e-mail exchanges between Mr. Eroncig and me are attached and marked as 'KB-2.' Mr. Eroncig never gave any indication to me that the bond that was purchased on Continental Petroleum's behalf was not the bond that he requested.'

[105] During the trial of this claim, Ms Brooks was never challenged on any aspect of her account of relevant events as regards the matters surrounding this claim, which she gave evidence, in respect of. Mr. Eroncig did not give evidence to the trial court, which, in any respect, countered the evidence as quoted immediately above.

[106] Accordingly, there is no doubt that the written instructions give to Ms. Brooks, as to what securities were to have been purchased by the defendant for sale, thereafter, to the claimant, were, to put it simply, unclear. They were unclear because, firstly, there existed no GMAC bonds which would mature in 2021, with a coupon rate of 9.4% at a cost of US$60.50 and with a yield to purchase of 17.076220. Secondly, they were unclear, because the subject of each of those electronic mail correspondences, was: 'Re: Offer for sale of GM 9.4% 2021 bonds at US$60.50.' As such, although, in his electronic mail message which was transmitted on Monday, September 15, 2008, Mr. Eroncig stated – 'CONFIRM PURCHASE OF $500.000.00 GMAC BONDS 9.4% 2021 AT US$60.50.' it is understandable and accepted by this court, that Ms. Brooks thought, after having read that message, that the same contained a typographical error, otherwise more popularly now termed, using the American slang word – 'typo.'

[107] In any event though, what is without doubt, is that the claimant entered into the third in time, of the three relevant contracts with the defendant, when the claimant paid for the purchase of GMC securities, rather than GMAC securities. Mr. Eroncig has alleged that he again recognized an error in the third confirmation letter, but nonetheless, he went ahead and not only signed same, but most significantly, permitted the purchase, as clearly specified in that confirmation letter, by the claimant from the defendant, of the GMC bonds.

[108] Having thereby confirmed same, the claimant has not satisfied this court, that there exists any good reason for this court, to properly conclude, to the requisite standard of proof, which is proof on a balance of probabilities, that the claimant

has proven that there was any breach of that third contract, or any breach of either of the prior two (2) contracts.

Conclusion

[109] The claimant's claim for damages for breach of contract and in the alternative, for rescission of the relevant contracts, is unsuccessful. The claimant has failed to prove its claim. In the circumstances, this court's order, will be as follows:

Order

1) Judgment on this claim is entered in favour of the defendant.
2) The costs of this claim are awarded to the defendant and such costs shall be taxed, if not sooner agreed.
3) The defendant shall file and serve this order.

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Hon. K. Anderson, J.