THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2012/0118

Between:

(1) HUMPHRY LEUE
(2) HUMPHRY LEUE d/b/a AQUARIOUS CAPITAL INVESTMENTS INC
(3) HUMPHRY LEUE d/b/a ALPHA CONSULTING SERVICES INC

Claimants

And

TOM PETERS d/b/a TOM'S PRIVATE CLUB a/k/a ONLINE TRADING CLUB a/k/a ONLINE CURRENCY TRADING INVESTMENT LIMITED

Defendants

Appearances: Tanya Scantlebury of Price Demers & Co. for the Claimants
Mishka Jacob of Mc. W. Todman for the Defendants

2015: October 12th

JUDGMENT

[1] **ELLIS J:** The relevant context of this litigation concerns foreign currency trading. The Foreign Exchange Market (**Forex**) is a global decentralized market for the trading of currencies. This includes all aspects of buying, selling and exchanging currencies at current or determined prices. Assisted by a burgeoning internet age, it is now possible for average investors to buy and sell currencies easily through online brokerage accounts. As a result, Forex has been described as the largest market in the world.

[2] The Defendant is engaged in the business of trading on foreign exchange markets, through his business Online Trading and Investment Currency Limited or Tom's Private Club.

[3] On 28th August 2008, the Claimant entered into a written agreement with the Defendant, whereby he invested the sum of US$10,000 with the Defendant's online currency trading business. On 1st September 2009, the Claimant, doing business as Aquarius Capital Investments Inc. entered into a further agreement with the Defendant whereby he invested US$15,000. On or about 9th April 2010, the Claimant, doing business as Alpha Consulting Services Inc., entered into a third written agreement with the Defendant whereby he invested US$50,000. The total amount invested by the Claimant was US$75,000.

[4] The Agreements which all contain similar wording, include the following provision:

> "**Forex is a High Risk Investment**
> **Trading in the foreign exchange markets on margin carries a high level of risk and may not be suitable for all individuals. The high degree of leverage offered in the Forex markets can work against you as well as for you. Before deciding to trade in the foreign exchange markets you should carefully consider your investment objectives, your level of experience and your risk appetite. The possibility exists that you could sustain a loss of some or all of your equity and therefore you should not invest money that you cannot afford to lose. Only true excess disposable cash should be used in trading. You should make yourself aware of all the risks associated with foreign exchange trading and seek advice from an independent financial advisor if you have any questions or concerns as to how a loss would affect your lifestyle."**

[5] Each of the Agreements set out that there would be a monthly projected return of between 3 and 10 percent on the investment. Each Agreement provided for a maturity period/date, after which time the investment could be withdrawn or reinvested. For the purposes of this litigation, the Parties agree that the operative maturity period in all of the Agreements is September of each year.

[6] The Agreements further provided that all funds would be paid to the investor at the end of the maturity period and that there would be a penalty applied to any withdrawal made prior to the maturity period.[1] It follows that an investor could only withdraw or close his investment without incurring a penalty, where he chose to withdraw or close the investment account within the maturity period.

[7] The Agreements also prescribed that quarterly statements would be provided. The Defendant contends that he sent the Claimant quarterly investment reports, which provided information on the investments, including any gains or losses that had been made as well as details of the monthly and quarterly balance.

[8] The Claimant contends that on or about 1st December 2010 and until October 2011, he repeatedly attempted to withdraw funds from his investment account when the same had matured, but he was unsuccessful in doing so because the Defendant ignored or deterred him from making any withdrawals. It is the

[1] In the first Agreement the penalty was 10%; in the second Agreement the penalty was 10% and in the third Agreement the penalty was 15%.

Claimant's case that had the payment been made in accordance with the Agreements, he would have been owed the sum of US$101,827.12.

[9] It is not disputed that the Defendant has made no payments to the Claimant. Consequently, by Claim Form and Statement of Claim filed on the 2nd May 2012, the Claimant claims the sum of US$101,827.12, which he alleges was the value of his portfolio as at September 2011. The Claimant also seeks interest and costs in the amount of US$15,234.15.

[10] This Claim was strongly resisted by the Defendant who argued that the risk involved in this type of investment is very high and the outcome depends largely on the prevailing market conditions and trends. The Defendant stated that the Claimant entered into the Agreements fully cognizant of the risks involved. He referred extensively to the Risk Disclosure Statement which formed part of each Agreement and which binds the Claimant.

[11] In his Defence filed on 21st June 2012, the Defendant he contends that he never refused to make any payments to the Claimant. Instead he stated that the Claimant elected to defer his withdrawals as he was unwilling to accept the losses which were associated with his investment portfolio.

[12] The Defendant claims that as at that date of the filing of the Defence, the investment portfolio showed a loss of 76%. In the event that the Claimant was to close the account, he would receive the sum of $27, 868.93. The Defendant indicated his willingness to pay over that said amount.

ANALYSIS OF THE EVIDENCE

[13] In order to succeed in his claim the Claimant must satisfy the Court on a balance of probabilities of the merits of his case. In applying the standard of balance of probability the Court was guided by the dicta of Lord Nicholls in the House of Lords decision **Re B (Minors) 2008 EWCA Civ.282 and by Lord Nicholls in Re H (Minors) (Sexual Abuse: standard of proof) 1996 AC 563 at 586 D-H.**

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury…. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

[14] This Claimant must therefore establish each aspect of his alleged claim.

[15] Fortunately, the Parties do not dispute that a contractual relationship existed between them. The terms of that contractual relationship are also not in dispute. The subject of the dispute between the Parties is set out at paragraphs 13-14 of the Claimant Statement of Claim in the following way:

> "In breach of the various agreements between the Claimant and the Defendant, the Defendant denied the Claimant access to the funds invested and profits thereon, despite the fact that the agreements entitled the Claimant to make the said withdrawals after the investments had matured.
>
> Despite the Claimant's repeated request for the withdrawal of the funds invested and all attributable gains, the Defendant has failed or otherwise refused to honor his financial obligations to the Claimant."

[16] The Claimant's success therefore hinges or his ability to satisfy this Court on the balance of probabilities that:

i. there the ascertainable funds or funds capable of ascertainment to which the Claimant is entitled.

ii. the Defendant denied him access to these funds, despite the fact that the Agreements entitled the Claimant to make the said withdrawals after the investments had matured;

iii. despite the Claimant's repeated requests for the withdrawal of the funds, the Defendant has failed or otherwise refused to honor his obligations to the Claimant.

[17] This demands an analysis of the evidence advanced by the Parties during the course of the trial. Fortunately, both Parties in the matter provided oral and written evidence to the Court.

The Claimant's Evidence

[18] In his witness statement, the Claimant accepted that the Defendant sent him quarterly reports which provided information on the investments and in particular any gains or losses that had been made.

[19] The Claimant also stated that on or about 1st December 2010, he sent an emailed message to the Defendant giving advance notice of his intention to withdraw US$50,000 – US$75,000 of the funds invested. He also requested information as to the correct procedure for withdrawing funds because this information had never been provided by the Defendant.

[20] The Claimant stated that his second request for withdrawal occurred on or about 6th June 2011 when he sent another emailed message giving advanced notice of his intention to withdraw his entire holdings at the end of the then applicable investment term. He stated that he sent a follow up email on 16th June 2011 to inquire whether he had received the email since he had received no reply to his earlier email of 6th June 2011. He eventually received an emailed response on the 22nd June 2011in which the Defendant explained that the withdrawal would not be possible as the funds were "tied up".

[21] The Claimant stated that over the following months, he continued to correspond with the Defendant in order to try to recover all of the sums that had been invested as well as the profits thereon.

[22] On or about 13th September 2011, he received an investment report which indicated that the initial investments were collectively worth US$104,853.42 with the profits gains made. On that same day, the Claimant stated that he requested that the full amount be paid to him by 30th September 2011. The Claimant contends that given the dates set out in the Agreements, all of the investments would have reached maturity by 30th September 2011 so that he would be entitled to close the account without any penalty being applied for early withdrawal.

[23] The Claimant claims that the Defendant has never made any payment to him. Following a written demand by his attorneys in November 2011, the Defendant's attorneys responded in a letter in which they indicated that at every stage of his requests, the Claimant would have sustained significant losses if he had withdrawn his investment.

[24] The Claimant refutes this contention. He referred to the quarterly statements and he contended that they paint a different picture. According to the Claimant, the only statement which reflected any loss was the one which he received on January 2012. He stated that he tried on numerous occasions to withdraw his investment prior to January 2012 but was hindered and frustrated by the Defendant's failure or unwillingness to process the withdrawal.

[25] The Claimant contends that he did everything possible to secure the withdrawal of his investments when it would have been profitable to do so. He argued that if there are any losses which have since been incurred, they should not be borne by him but rather by the Defendant. The Claimant asks that the Court award him the amount that he would have received had the investment been paid out when he made the original request for withdrawal.

[26] When he was cross examined under oath, the Claimant told the Court while he was aware of the FOREX as an industry or business he did not know the details of how it worked. He testified however that the Defendant explained to him the nature of the investment and that profits were not guaranteed. It also became clear that the Claimant was well aware of the terms of the Risk Disclosure Statement.

[27] In regard to his first attempt at withdrawal from the investment account, the Claimant agreed that by emailed message dated 1st December 2010, he sought to withdraw funds from the investment account in January or February of 2011. He agreed that at that time the investment would not have matured and that any withdrawal would attract a 10-15% penalty. The Claimant also accepted that there was a risk of loss to the Portfolio in case of early withdrawal.

[28] Critically, the Claimant accepted that following that message on 1st December 2010, he had a telephone conversation with the Defendant in which the Defendant explained that the Portfolio would mature in September 2011. While the Claimant did not agree that the Defendant would have also explained to him that there were penalties and loss which would attend an early withdrawal, he agreed that he did indicate to the Defendant that he wished to continue with the investment in accordance with the agreement terms.

[29] It follows therefore that the investment account would have continued undisturbed by the Claimant until June of 2011 when the second request for withdrawal would have been made. It is that second attempt at withdrawal which is critical and Counsel for the Defendant methodically questioned the Claimant about the communications which he had with the Defendant in that regard.

[30] It was not disputed that the request began with an emailed message of 6th June 2011, from the Claimant to the Defendant. This message followed the delivery of the quarterly report in June of 2011 and its terms were clear and unambiguous. The message stated as follows:

> **"Thanks Tom, The markets are rough these days…**
>
> **Also due to several unforeseen circumstances I am going to need a substantial amount of case/liquidity later this year so I hereby give notice that I will redeem my entire holdings in OCTIL as of the end of the current investment term, i.e. August 31, 2011. I will send you the Bank account and wire**

transfer details so that you can arrange for the direct deposit of the balance in the first week of September 2011. Depending on how things go, I may be able to make an investment again in 2012 and start over.

Please confirm.

Thanks and regards,

Humphry"

[31] On 16th June 2011, there was a further email from the Claimant in the following terms:

"Hi Tom,

Did you receive my email regarding the withdrawal? Please confirm. Also, maybe it is better that after this month no more trades be done with my account? Whatever the balance is, it can be held on deposit until the maturity date of August 30 and then wired to my account. This way I won't suffer more losses (but also no gains) depending on the market fluctuations. Again, please confirm."

[32] The Claimant agreed that the Defendant responded in an email dated 22nd June 2011 in the following terms:

"Was having problem with my email have over 900 to check

Get this one

It will not be possible to do that because the fund are tied-up in open trading

Will talk to you about it

When you have some time let me know

From Tom"

[33] The Claimant stated he made his request in June 2011 in order to give 3 months' notice of his intention to withdraw the funds in September 2011. He stated that he understood that as long as he gave the requisite notice, he would be entitled to receive the funds which were in his investment account.

[34] During cross examination, Counsel for the Defendant repeatedly suggested to the Claimant that following this emailed message, he had a telephone conversation

with the Defendant in which he recanted those instructions. While, the Claimant was prepared to agree that he may have had a conversation with the Defendant in the wake of this emailed correspondence, he could not recall instructing the Defendant to continue with the investment because of the losses which had been incurred in his account.

[35] Counsel then referred the Claimant to his emailed message dated 26th July 2011 to the Defendant which he attached to the earlier emailed trail of 6th June 2011. In that email the Claimant states:

> **"Hi Tom,**
>
> **I was off island for while, back now. Just a reminder again that I will liquidate and redeem my entire holdings as of the end of next month (August 31) when the current investment term ends.**
>
> **I will send you the bank account and wire transfer instructions soon so that you can arrange for the money to be wired to my account, I presume that you can do it within 7 days of the end of the month."**

[36] Again, when taxed in cross examination, the Claimant stated that he could not recall having a further telephone conversation in the wake of that email, in which the Defendant indicated to him that because of market conditions, the Portfolio was showing a loss of 72% if cashed out at that time. The Claimant also could not recall instructing the Defendant to continue the investment because of the 72% loss. In fact he strongly denied that he elected to maintain his investment because he was unwilling to accept any losses to his account.

[37] It is therefore critical that the Court determine whether the Claimant's position changed at all following his request for withdrawal. Did the Claimant change his mind and recant his request?

[38] It was under re-examination, that the Claimant testified that his emailed messages after July 2011 demonstrated a clear intention to withdraw his investment. He agreed with Counsel that they were clearly inconsistent with an intention to keep the investment going. Counsel referred the Claimant to his email of 31st August 2011 in which he provided the Claimant with the details necessary to send the withdrawal and redemptions funds to his account. That email also indicated that he looked forward to receiving his June – August 2011 statement and the balance on his account.

[39] The Defendant responded on that same date.

> **"I receive email with the information, will send out statement this week, about the withdrawal I will let you know when that**

will be possible because the funds are tie-up in open trade, and will cause great lost if close now so I have to watch the market condition for the time been, but will keep you up to date."

[40] In the Court's judgment, the Claimant's response later that same date is significant. It demonstrated a clear intention to withdraw the funds.

"Hi Tom, Thanks, but I gave you almost 3 months notice to there should not be problem, plus we talked often about the fact that only after a full year could withdrawals take place, this is the end of the full year (after 3 years).

Please arrange for the transfer urgently because if I lose this investment opportunity it will cause a big problem, I really must have that money ASAP.

Thanks,"

[41] While there may well have been ensuing telephone conversations between the Parties, the import of the written correspondence between them in the month of September is unambiguous. That correspondence commences with the Claimant's emailed message of 13th September 2011, well within the maturity period and following receipt of the quarterly report:

"Thanks for the report.

Please now confirm that I will receive the ending balance of approximately $101,000 by no later than September 30. That is the deadline I have been given for the other major investment that I have committed to. If I do not have the funds by that date I may face legal action and serious fines by other investors so I must have the money by then.

….

Remember that I mentioned this since June, more than 3 months ago when I knew I was going to need it now.

Let me know as soon as possible.

Thanks,"

[42] The Defendant's response on the 14th September 2011 was in the following terms:

"I need to talk to you about the withdrawal request, because of the Market condition over the past months the trading

account have open trade that will cause serious losses is they close now.

Because of that withdrawal at this time is not possible, and till market condition change, so that is the condition at this time it is beyond my control at this time.

From Tom"

[43] Again, the Claimant's response is significant. On 19th September 2011, he stated:

"Hi Tom,

I'm afraid that this will be a problem Tom. Like I said, if I do not get the money, I may face serious problems myself, not only financially but potentially criminal as well! I have a commitment that I MUST be able to meet. That is why I gave you so much notice since June – I knew that I was going to need the money this month.

Whatever the loss may be, it will probably be less than what I may lose ad consequently I may then have to file a claim against you for damages etc which I do not want to do but if I do not get these funds I may not have a choice. Then it may be worse because the authorities may freeze the entire trading account – I do not want that to happen.

So whatever it is that you have to do to get the funds to me, please do it. I am off islands until Sunday 25th will contact you when I am back. I can only extend the deadline until September 30, after that I must absolutely definitely have the money."

[44] The Defendant responded briefly on 22nd September 2011 to say that he would see what could be done. In October 2011, the Claimant again asked that the Defendant ensure that he urgently transfers "the $100K" by Wednesday. He demanded that the Defendant instruct the broker to wire the funds to the account provided.

[45] By 30th September 2011, the investments would have been well into the maturity period and yet there was no satisfaction. As a result, on the 26th October, 2011

there is a further emailed message in which the Claimant indicates that he can no longer delay the redemption. He also warned that the Defendant that if he does not respond he will be forced to take action.

[46] Thereafter, it would appear that legal counsel was retained to intervene with a formal demand. The Defendant responded in a letter dated 17th January 2012. He maintained that when the Claimant contacted him in September, he advised the Claimant against a withdrawal because of the losses which would be incurred. He further stated that he understood that the Claimant would maintain his investment for a further period.

[47] Following 14th September 2011, the Defendant claims that he received no further instructions from the Claimant. The Defendant made no attempt to explain or deny the several emails which followed that date and which were disclosed by the Claimant.[2]

[48] The Claimant testified that in January 2012, he received a message from the Defendant in which he stated that there are open trades in the market which, if closed, could mean a substantial loss to the account. Not surprisingly, the Claimant did not and does not accept this position.

[49] In re-examination, the Claimant pointed to the Investment Report which was provided in January 2012. He told the Court that the quarterly reports kept him up-to-date with the status of his investment and he pointed out that in in the quarter ending August 2011, the balance reflected was $108,096.31. He understood this balance to be the value of his investment after all gains and losses were applied.

[50] The Claimant testified that it was only after his attorneys became involved legal advice that he was told that his investment had suffered a loss of 72%. On every occasion prior to this, he had been advised that the value of his investment was considerably higher. In the premises he considered Defendant's assertion in January 2012 to be highly implausible and suspect.

The Defendant's Evidence

[51] In his written evidence, the Defendant stated that after receiving the sums invested by the Claimant, he deposited the same into his account at Scotia (British Virgin Islands) Limited in accordance with the Customer Information Form and the Client Account Agreement. These sums were later transferred to the Forex online trading account in his name with the brokers, FXDD.com, FXSolution.com and Ifroex.com via credit card. He asserts that all of the funds invested were put in a single investment portfolio and the maturity date in each case remained in the month of September. The Defendant's evidence is that after the maturity date, the Claimant had the option to withdraw the funds or to reinvest.

[2] See paragraphs 43 – 46 herein

[52] According to the Defendant, every quarter, he sent out an investment report to the Claimant. These reports provided details of the status of the investment based on trades which were open and closed in the particular period. He explained that trades which are open in the market would not be included in the report because there would not be a "*final amount for it*."

[53] The Defendant stated that the procedure for the withdrawal requires that the investor put in a request 3 weeks before the maturity period. According the Defendant's witness statement, once the request is made for the withdrawal, all open trading in the market is reviewed and any open trades with a loss or profit associated to it would be taken into consideration. Once the loss or profit is calculated, then he would report to the customer and advise them that there are open trades with loss or profit associated to the account. The amount of the loss or profit would then be applied to the account balance.

[54] The Defendant does not dispute that the Claimant made a request for withdrawal in December 2010. He stated however that he communicated to the Claimant that based on the terms of the investment portfolio, the funds were due to mature in September 2011 and that any withdrawal would attract the prescribed penalty plus loss of all interest. Following this discussion, the Claimant elected not to take the resulting loss and so the investment continued.

[55] The Defendant also does not dispute that he received a further request for withdrawal of the Claimant's investment. However, he contends that he had another discussion with the Claimant in which he agreed to wait a few more months to cash in the investments because his portfolio showed a significant loss of 72% in September 2011.

[56] The Defendant denies that he informed the Claimant that his portfolio was worth US$104,853.42 in September 2011. Instead, he admits that the report for the period September 2011 to October 2011 showed a quarterly balance of US$103, 679.06, which did not reflect the losses associated with the open trades in the market at the time.

[57] The Defendant denies that he refused to make any of the requested payments to the Claimant. He stressed that it was the Claimant who deferred the payments as he was not willing to accept the associated losses.

[58] When he was examined under oath, the Defendant substantially amplified his written evidence. He commenced his testimony by pointing out that notwithstanding that the quarterly report as at September, 2011 reflected a balance of $103,679.06, the actual value of the Claimant's portfolio at that time would have been $27,000.00. In explaining this difference, the Claimant told the Court that the report would have been based on the trades which were closed with a positive return. The balance indicated would not reflect the negative trades which are open in the market. He stated that it would not be possible to associate

those potential losses to the account because the trades would still be open in the market. If the portfolio was closed, all outstanding open trades would then have to be closed and once that is done, the relevant losses would have to be applied to the account.

[59] The Defendant readily acknowledged that the reports which he provided to the Claimant would not reflect an accurate picture of the status of the Claimant's account. As early as June 2011, he informed the Claimant of this and discussed the potential losses in the event that the Portfolio were to be closed. When Counsel referred him to the exchange of email correspondence commencing with his response on 22nd June 2011, he testified he was attempting to explain to the Claimant that he had trades tied up in the open market with a negative loss associated to them.

[60] Although the Claimant indicated that he wished to cash in or redeem as at 31st August 2011, according to the Defendant, between 22nd June 2011 and 31st August, the Claimant's position changed. When the Defendant was asked to clarify this, he told the court that what changed was the amount that the Claimant would receive if the open trades associated with the Portfolio were to close. He stated that when this was explained to the Claimant, he indicated that he needed the funds to do something else and so he could not accept a loss. The investment therefore continued notwithstanding that the maturity period.

[61] The Defendant testified that between June and September he continued to discuss the Claimant's request for withdrawal as well as the impact which closing the trades would have on the Portfolio. He stated that the Claimant was fully aware of the potential for losses which would not have been reflected in the quarterly reports but which would have to be associated with his account if it were closed.

[62] The Defendant testified that he never indicated to the Claimant that he could not process withdrawal. He stated that if the Claimant had agreed to accept the stated losses then he would have proceeded to close the trades and process the withdrawal. Instead, the Claimant never confirmed his willingness to accept the loss of 72% with the associated reduced balance. Instead, the Claimant insisted on receiving the balance indicated in the purported incomplete and in accurate quarterly report provided by the Defendant.

[63] When his Counsel asked the Defendant to confirm whether his email of 14th September 2011 was his final communication with the Claimant, the Defendant indicated that he could not recall if there was any information following this. The Court is satisfied that the prevarication is wholly unsupported by the evidence before the Court.[3]

[3] See paragraphs 43 – 45 herein

[64] Counsel for the Claimant commenced her cross-examination of the Defendant by exploring his investment experience. He testified that he did a course with a Canadian company called Forex Mentor where he learned how to trade in the Forex market. However, it became very clear to the Court that the Defendant was essentially an amateur who became involved in Forex trading "*after being online and looking at the stock market and currency trading*."

[65] This impression was confirmed when Counsel took the Defendant through a detailed examination of the reports which he had provided to the Claimant. It soon became clear to the Court that the reports contained obvious mathematical errors which misrepresented the position.[4] First, the Defendant attributed these discrepancies to a "*difference in calculation of the percentage loss*". In his words, "*a difference between minus three or minus four*." He later testified that it was a simple typing error. But when it became clear that the discrepancies covered the months June, July and August of 2011, the Defendant concluded that the mistakes are due to a confined calculation error.

[66] When he was asked to identify the correct statement for the quarter ending August 2011, the Defendant identified the statement at page 74 of the trial bundle (as opposed to the statement at page 76), which showed a balance of $101,728.12. He was however unable provide any intelligible explanation for this finding.

[67] Having identified the statement at page 76 of the trial bundle as incorrect, the Court was further perplexed when the Defendant then proceeded to rationalize that the remainder of that statement (which continued onto page 77 of the trial bundle) accurately reflected a loss to the account of 72%.

[68] The Court was further disturbed when during cross examination, the Defendant, admitted to "rounding up" the percentage gains or losses to what he termed "whole numbers". When he later, in attempted to resile from that position, the Defendant's evidence became unintelligible and he was forced to concede that his accounting was imprecise and inaccurate.

[69] Generally, the Court was not convinced about the reliability or the veracity of the Defendant's evidence. In fact it became increasingly clear during cross examination that the quarterly reports which were prepared by the Defendant in no way met their intended purpose.

[70] The Defendant's questionable accounting was further demonstrated when he was taxed on the issue of open and closed trades. He was unable to convincingly explain how or why the Claimant's portfolio would have suffered a loss of 72%. He explained that once he receives a request for withdrawal, he reviews the total account with a negative loss and makes a calculation (in his words, a "*rough percentage calculation*") based on the number of open trades which were

[4] See Reports contained at pages 74 and 76 of trial bundle describing the balance for the period ending August, 2011

operating at the time and which had to be closed. If he were to close all of those trades at that point in time in his words "*that will be the loss that will show up*" which he would then have to associate to the overall account.

[71] Given the so called "rough percentage" basis of calculation it is not surprising that the Claimant is highly suspicious that the first indication that the investment account suffered that alarming degree of loss came after the threat of legal proceedings. The Court shares this concern.

[72] The Defendant testified that notwithstanding that his quarterly report at the end of August recorded that the Claimant had $108,000 in his account in August 2011; the Claimant's *entire* account was involved in open trades which had not closed. This contention came as complete surprise to the Claimant and the Court notes that no trading record or other cogent evidence was advanced to substantiate this contention.

[73] It is also significant that when he was asked to explain his emailed correspondence of 16th June 201, in which he told the Claimant that it would not be possible for him to withdraw funds from the account because the funds were "*tied up*" in trading, the Defendant denied that this constituted a refusal to process the Claimant's request. Instead, he suggested that this response must be read in the context of the ongoing telephone communications with the Claimant, in which they discussed the condition of the account leading up to September, 2011. In fact, the Defendant emphasized that the majority of the critical exchanges with the Claimant (upon which he relies) were in fact verbal discussions. Given the import of these communications, it is surprising that the critical details did not find their way into his written evidence filed in defence of this action.

THE COURT'S FINDINGS

[74] Having reviewed the evidence, and with the benefit of having heard and observed the witnesses, the Court has no reservation in the following findings:

i. That the Parties entered into three written agreements in terms which contemplated that the Claimant would invest a total sum of US$75,000.00 in the Defendant's online currency trading club. The said sums were all deposited into one investment account.

ii. Although the Agreements projected an estimated monthly return of 3% - 10% on the investments, this was not guaranteed.

iii. That notwithstanding that there were different maturity periods set out in each of the Agreements,[5] the Parties appear to have accepted that the maturity period was in the month of September of each year.

iv. That there was a penalty attached to any withdrawal prior to maturity which included 10% of the investment and a loss of the accumulated interest.

v. That the Agreements did not prescribe the procedure for withdrawing from the account neither did it set out any notice period for such withdrawals. However, a notice period of three months was later prescribed by the Defendant and agreed by the Claimant.

vi. That the Defendant provided questionable quarterly statements to the Claimant which nevertheless provided the only accessible record of the Defendant's trading activity and the returns and losses associated with the Claimant is investment account. These reports were intended to inform investors of status of their investments and were the only means by which the Claimant could discern what funds were available in his account for withdrawal or reinvestment during the maturity period.

vii. That in December 2010, the Claimant attempted to withdraw about $50,000 - $75,000 from his account outside the maturity period. When he was reminded of the maturity period and the applicable penalties for early withdrawal, the Claimant changed his mind and elected to maintain his investment.

viii. That the Claimant made a second request for withdrawal on or about the 6th June 2011, in which he sought to redeem his entire holdings in the online trading club as at the end of the current investment term and within the maturity period. The timing of this request was intended to provide the Defendant with sufficient notice of the Claimant's intention to withdraw within the maturity period.

ix. That notwithstanding that the Parties may have had oral discussions during the period June – September 2011, the Claimant's withdrawal instructions were clear, unequivocal and unchanged. Well into the maturity period in 2011, the Claimant persisted in his unequivocal request for withdrawal. Despite recurring demands, the Defendant either ignored or willfully refused to process the Claimant's request.

[5] In the first Agreement dated 28th August 2008, the maturity period begins 1st September 2008 through to 1st September 2009. In the second Agreement dated 1st September 2009, the maturity is said to start when investment funds are made and mature 1 year from the start date. In the third agreement dated 9th April 2010, the maturity starts 5 days after investment funds are made and matures 1 year from start date.

x. That in light of the Claimant's written instructions which continued well into October 2011 through to January 2012, the failure of the Defendant to pay out even what he claims the Claimant is owed is an obvious breach of his obligation under the Agreements.

[75] It is clear from the terms of the Agreements that the Parties expressly intended to create a binding and legally enforceable obligations as between them. The Agreements prescribe performance obligations which are clear and unambiguous. They provide that the Defendant is to provide quarterly statements to the Claimant which would detail the status of his investment account. Moreover, the Agreements also provide that "**All funds will be available to the Investor for withdrawal or reinvest at the end of the maturity period**."

[76] It is trite law that performance must be strictly in accordance with the terms of the contract in order to qualify as an appropriate discharge of the obligations under a contract. In circumstances where he had the requisite notice and where the maturity period had arrived and where the Defendant was in receipt of clear written instructions, he was obliged during the maturity period to take the necessary steps to make the funds available to the investor for withdrawal. It was not open to the Defendant to indicate (on 14th September 2011) that withdrawal would not be possible. This is especially so in circumstances where the Claimant's desperate response to him was that " *whatever the loss may be, it will probably be less that what I may lose* …"

[77] The Court does not accept that the Claimant's instructions were in any way equivocal and they operated to prompt the Defendant to satisfy the Claimant's request to redeem his entire holding. The Defendant failed to do so in breach of his obligation under the Agreements. Having reviewed the totality of the evidence in the matter and having observed the witnesses under oath, the Court is satisfied that there is no proper justification for the Defendant's failure.

THE AWARD

[78] In light of the conclusions drawn herein, the Court must now turn to the remedy to be awarded in this case. In that regard, the Court notes that the Claimant's Claim Form in this matter advanced a claim of money owed (due and payable) and not a claim in damages for breach of contract. It is therefore surprising that the Defendant's submissions focused largely on the appropriate measure of damages for breach of contract and did not address the legal issues arising from the Claim. These submissions did not assist the Court.

[79] It is now trite law that actions claiming money payable under the terms of a contract are for money which a defendant has promised by the contract to pay and are not actions for damages.[6]

[6] Young v Queensland Trustees Ltd (1954) 99 CLR 560 at 567, 569-70

[80] If one party has fulfilled all contractual requirements for the money due to him, then if the other party refuses to pay, he may be able to claim the sum due under the contract rather than damages. An action for the sum due under the contract is a form of specific enforcement of the contract but as it involves only the payment of debt, it does not involved the same restrictions as an action for specific performance and is not subject to the uncertainty and restrictions of the rules on damages.

[81] Only two requirements must be satisfied in an action for money payable: (i) the contract must impose an obligation to pay a certain or ascertainable sum of money and; (ii) the right to payment of the sum must have accrued. In an action for failure to pay money due under a contract, the claim accrues when the claimant had the right to demand payment.

[82] While it is open to a claimant to bring a claim for money owed in conjunction with, or as an alternative to, a claim for damages, this has not occurred here. In the case at bar, the Claimant contends that he invested the sum of US$75,000.00 and he now claims the sum of US$101,827.12 which includes the interest and profits earned on his investment. The Claimant bases this claim on the investment report which was prepared by the Defendant and which declared this as the balance due on his account as at August 2011.[7]

[83] Counsel for the Claimant argued that the utility of the quarterly reports provided by the Defendant, hinges on the accuracy of the information contained therein. These reports were prepared by the Defendant with the intention of informing and advising the Claimant on the status of his account. She submitted that given the subject matter of this contract and the nature of the relationship between the Parties, the Claimant was entitled to rely on the information contained in those reports. Counsel submitted that nowhere in the quarterly reports or the Agreements is there any indication that the figures quoted do not represent true or complete picture of the status of the Claimant's investment.

[84] Moreover, Counsel for the Claimant submitted that the contention that the declared balance would be affected by "open trades" was not advanced as part of the Defendant's pleadings in the matter. She argued that the Defence does not allege that the quarterly statements were inaccurate or incomplete nor did the Defendant produce any evidence to demonstrate the stated balance could be affected by open trades. On the contrary, Counsel pointed out that the Defendant's pleadings readily admitted paragraph 7 of the Claimant's statement of claim in which he pleaded the following:

> "The Defendant sent quarterly investment reports which provided information on the investments **and any gains or losses that had been made**." Emphasis mine

[7] Investment Report attached to the Defendant's emailed message of 13th September 2011

[85] Counsel submitted that the Defendant never pleaded or alleged that there were any gains or losses which had not been reflected in the quarterly report. She submitted that it was only during the trial that the Defendant testified that there were open trades which would affect gains and losses in the portfolio.[8] She submitted that this was at odds with the Defendant's pleadings in the matter.

[86] Counsel concluded that having provided the agreed notice of his intention to withdraw within the maturity period, the sum of US$101,827.12 is now due and owing to the Claimant.

[87] Curiously, this submission was advanced in spite of the several accounting irregularities revealed during her cross-examination of the Defendant.

[88] In essence, Counsel for the Claimant asked the Court to allow the Claimant to advance an *estoppel* argument premised on the basis that the Claimant relied, and was entitled to rely on the balance reflected in the quarterly investment report as at September 2011. This legal claim was not raised in any of the Claimant's pleadings, neither was it supported by his evidence in the matter.[9] Instead, the cursory legal submissions filed after the trial provide that:

> "*It is clear from the evidence before this learned Court that the Claimant relied on the contents of the quarterly statement. This has been the Claimant's consistent claim throughout this litigation…on the Defendant's evidence at trial, the contents of quarterly statements were a misrepresentation of the true picture and this is to the Claimant's severe detriment. As such, and as a result of the Defendant's evidence at trial. We would ask that the Court be minded to consider a claim for estoppel in addition the claim for breach of contract."*
>
> And later:
>
> *"In the alternative, the Defendant ought to be estopped from paying the Claimant anything less than the amount that was purported to be available to the Claimant in September 2011 quarterly report."*

[89] In the Court's judgment, the Claimant has done little to support or develop this eleventh hour claim. Litigation proceeds on the basis that the court is a court of pleadings.[10] Comprehensive pleadings are critical in that they give fair notice of the case that has to be met, so that the opposing party may direct its evidence to the issues disclosed and they assist the court in adjudicating on the allegations

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[8] *cf* paragraph 5 of the Claimant's Reply filed on 3rd July 2012. This submission is inconsistent with paragraphs 10- 12 of the Defence and paragraphs 17- 20 of the Defendant's witness statement.

[9] Notwithstanding, the Defendant's denial of the sum claimed (see: Note 8 supra), the Claimant's Reply does not allege estoppel.

[10] CPR Part 8 and **Ian Charles v The Board of Governors of the H. Lavity Stoutt Community College** BVIHCV 2010/0049 per Hariprashad-Charles applying **Yorkshire Provident Life Assurance Co. Gilbert and Rivington** (1895) 2 QB 148 at 152

made by the litigants. It is therefore not appropriate for the Claimant to augment his substantive claim by way of legal submissions filed after trial.

[90] Unfortunately, the Claimant's pleadings as well as his written and oral testimony do little to address this equitable claim and the Court is left to speculate as to what evidence supports the constituent elements of the estoppel.

[91] What is clear is that in order to prove estoppel by representation, there must be a clear and unequivocal representation of fact and the representee must have acted to its detriment through its reliance on the representation which would make it inequitable to allow the representor to deny or withdraw the representation. No equity arises to raise an estoppel by representation unless the person in whose favour it is being raised, has acted to their prejudice in some way, whether in terms of direct expenditure or on some other basis.

[92] Moreover, having reviewed the evidence in this case, and the submissions of the Parties, the Court is not satisfied that this equitable claim is in any event maintainable. A critical component of this equitable principle is the element of unconscionability and in the case at bar the Court does not accept that the Claimant would have been completely unaware of the purported "open trades" and the potential negative impact which their closing could have on his bottom line. The emailed correspondence between the Parties (13th – 19th September, 2011) clearly indicates that this issue would have been raised and the Claimant would have been advised of the potential for losses.

[93] In order for the Claimant to succeed on his Claim, it is clear that he must prove that there is a definite and ascertained or ascertainable sum of money owed to him. While it is not surprising that, he would need to advance an equitable claim which would estop the Defendant from denying the representations set out in the quarterly report, it is perplexing that he would fail to do so in his pleadings.

[94] As it is, the Claimant asks this Court to disregard the damning evidence solicited during Counsel for the Claimant's cross examination of the Defendant which raised significant doubts as to trustworthiness of the quarterly statements prepared by him. Because of the way the Claimant chose to prosecute this case, it quickly became apparent that the Defendant was guilty of obvious mathematical errors and that he utilized questionable accounting techniques. The Court was left with the distinct impression that the Claimant applied figures which were notional and speculative at best.

[95] This view is reinforced when the Court takes into account the inconsistency in the stated balance as at August 2011. This figure has been pitched at $108,096.3[11] and later, at $101, 728.12.[12] Indeed, the Claimant himself was unable to admit or

[11] Page 76 of the trial bundle
[12] Page 74 of the trial bundle

deny whether his investment suffered the losses alleged by the Defendant and at paragraph 12 of his Reply, he could only say that when the portfolio matured, "*the amount that the Claimant could rightly have expected would have been in excess of US$100,000.00*."

[96] Without attempting to prove the sum due, the Claimant has instead asked the Court to rely on Reports which he has himself successfully impugned. This submission essentially asks the Court to ignore the deep sense of unease caused by the Defendant's oral testimony and the implausible and so called "rough calculations" presented by him.[13]

[97] Having said this, it is clear to the Court that maturity period under the Agreements had arrived and having given the requisite notice, the Claimant was properly entitled to withdraw from his investment account any sums which had accrued. The Court has no doubt that as at September 2011, there were outstanding sums which had accrued and which were due and owing to the Claimant under the terms of the investment Agreements.

[98] The Defendant's case is that the quarterly reports were essentially incomplete and misrepresented the true balance in the Claimant's investment account. That may well be, but this Court is also persuaded that the Defendant's contention that the Claimant's account suffered losses of 72% or 76% is highly implausible. The Defendant did not identify the relevant trading history which would have underpinned the purported losses. Further, he failed to demonstrate the actual losses which were associated with the alleged open trades. He also failed to provide the Court with a tangible or plausible explanation for the margin of loss (72%) which was radically poles apart from that reflected in the earlier quarters.

[99] In fact, it was Counsel for the Defendant who attributed the negative impact on the Claimant's portfolio to the spiraling market conditions. Counsel suggested that the Claimant would have fully appreciated this position (emailed message on 6th June 2011) so that it would be unreasonable for him to expect to recover his total investment plus over $26,000 in profits despite unfavorable market conditions. The Court fails to see how an emailed message in June 2011, could *without more* be applied to the investment account as at the maturity date. The submission was abstract at best and the evidence in support, equally so.

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[13] Paragraph 13 of Defence sets out that after a 76% loss the Portfolio is valued at $27,868.93; while the last investment report provided reflects that after a 72% loss, the Claimant's portfolio is valued at $27, 868.93.

[100] The reality is that the Defendant provided no tangible evidence to support this contention. Instead, the Defendant submitted that the Court should award the Claimant the sum of $30,000.00 which he contends is the current value of the Claimant's portfolio after a 72% loss.

[101] Having observed the Defendant on the witness stand and having heard the mysterious and incomprehensible way in which the losses were calculated by the Defendant, the Court is satisfied that "creative accounting" was applied to present a contrived picture of the alleged losses.

[102] Unfortunately for the Claimant, this does not assist him. Ultimately, this is a claim in debt and the Claimant bears the burden of proving on a balance of probabilities that a definite and ascertained sum of money was due to him. Notwithstanding his questionable dealings, this burden never shifted to the Defendant. It follows that save for the unequivocal admission of the Defendant; the Claimant has not discharged his burden.

[103] In the absence of tangible and credible evidence to the contrary, the Court cannot be satisfied on a balance of probabilities that the balance of US$101,827.12 was the true balance owed. The Court is therefore obliged to rely on the Defendant's admission. In the premises and for the reasons which have been set out above, the Court finds that the sum of US$30,000.00 is due and owing to the Claimant. The said sum is to be remitted forthwith.

[104] **The Court's order is therefore as follows:**

i. Judgment is entered for the Claimant in the sum of US$30,000.00.
ii. In accordance, with CPR Part 65.4 the Claimant will also have his fixed costs.

[105] Finally, the Court conveys its sincere regrets for the delay in rendering the judgment in this matter and must thank Counsel and the Parties for their patience.

……..……
Vicki Ann Ellis
High Court Judge