

IN THE SUPREME COURT OF BELIZE, A.D. 2007

CLAIM NO. 145 OF 2007

**DAVID NOVELO
ANTONIO NOVELO**

Claimants

BETWEEN AND

**MARK HULSE
THE ATTORNEY GENERAL OF BELIZE**

Defendants

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Dr. Elson Kaseke for the claimants.

Ms. Lois Young S.C. for the first defendant.

Mr. Edwin Flowers S.C., Solicitor General, for the second defendant.

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JUDGMENT

This is a claim by Messrs. David and Antonio Novelo seeking the following relief from this Court:

- “1. A Declaration that the appointment of Mark C. Hulse, Forensic Auditor into the Development Finance Corporation by the Ministry of Finance pursuant to an Agreement dated 5th December, 2006 was ultra vires section 16(7) of the Development Finance Corporation Act, Chapter 279 of the Substantive Laws of Belize Revised Edition 2000, and Statutory Instrument 24 of 2005 appointing the DFC Commission of Inquiry, and therefore unlawful, null and void.*

2. *A Declaration that the Report of Mark C. Hulse, Forensic Auditor into the Development Finance Corporation is unlawful null and void since it was produced by a person who was unlawfully appointed and who had unlawful access to the books, accounts, vouchers, papers and records of the Development Finance Corporation.*
3. *A Declaration that the Report of Mark C. Hulse, Forensic Auditor into the Development Finance Corporation is null and void as against the Claimants since the said Mark C. Hulse failed to afford the Claimants their right to natural justice (right to be heard and to fairness) in the production of the Report when the said Mark C. Hulse made observations, recommendations and comments in the Report adversely affecting the personal and business affairs of the Claimants without having interviewed or even spoken to the Claimants, and without informing them that he was investigating their business affairs.*
4. *An injunction prohibiting the said Mark C. Hulse from furnishing the Report to the Government of Belize, the DFC Commission of Inquiry, the National Trade Union Congress of Belize (NTUCB), the Development Finance Corporation, the Office of the Director of Public Prosecutions, and “any other relevant parties” as provided in the Agreement dated 5th December, 2006.”*

2. However, at the hearing of the claim on 14th June 2007, Dr. Elson Kaseke, the learned attorney for the claimants, informed the Court that the injunctive relief sought to prohibit the furnishing of the Report of the first defendant, Mr. Mark Hulse, will not be pressed anymore, thereby abandoning this relief. This is just as well, for at the hearing, it was evident that Mr. Hulse’s Report had been forwarded to designated recipients. Indeed, the first claimant himself exhibited a copy of the Report, in three volumes, to his first affidavit as Exhibit DN 5(1), DN 5(2) and DN 5(3).

3. In essence, the claimants are claiming three declaratory reliefs relating first to the appointment of Mr. Hulse as forensic auditor into the Development Finance Corporation (the DFC); secondly, that the Report produced by Mr. Hulse, the forensic Audit Report, is unlawful null and void as it was produced by a person who was unlawfully appointed and had unlawful access to the books, accounts, vouchers and papers and records of the DFC; and thirdly, that Mr. Hulse, as the Forensic Auditor in producing his Report denied the claimants their right to natural justice and therefore the Report itself is null and void as it contains adverse observations, recommendations and comments affecting their personal and business affairs without interviewing or even speaking to them or informing them that he was investigating their business affairs.
4. Although the claimants complaints are directed at the appointment of Mr. Mark Hulse as a forensic auditor into the DFC and his Report thereon and how he came to produce that Report or more specifically that part of it relating to the claimants, it is manifest that it is the Commission of Inquiry appointed by the Prime Minister by Statutory Instrument No. 24 of 2005 to investigate the affairs of the DFC that has agitated this application.
5. The DFC itself is a statutory corporation first set up on 29th September 1963 by the Development Finance Corporation Act – Chapter 279 of the Laws of Belize, Revised Edition, 2000-2003. It was set up with the express purpose of expanding and strengthening the economy of Belize. To this end the DFC was given extensive powers by sections 4 and 5 of its parent Act. The composition of the Board of Directors of the DFC is stated in section 7 of the Act and section 8 spells out the functions of its Board of Directors: it is charged with administering, supervising and controlling the affairs and business of the Corporation subject to any directions of a general character given by “the Minister” who is enigmatically not defined in the Act.

6. But the story of the DFC and its contributions to the economy of the country is not without controversy. The less charitable would say it is a sad story. As I have said, however it is the Commission of Inquiry into the DFC that has agitated this case, which is not however about the DFC itself.

7. This case strictly concerns the Commission of Inquiry into the affairs of the DFC which was appointed in 2005. The Commission of Inquiry itself was the upshot of much public agitation especially by the trade unions. On the 11th February 2005, the Government of Belize and the National Trade Union Congress of Belize signed an Agreement by which, inter alia, the Government agreed to set up a Commission of Inquiry into the affairs of the DFC. Pursuant to this Agreement and in exercise of powers rested in him by the Commission of Inquiry Act – Chapter 127 of the Laws of Belize, Revised Edition 2000-2003, the Prime Minister by Statutory Instrument No. 24 of 2005 made on 9th March 2005 appointed a three-person Commission of Inquiry. The terms of reference of the Commission of Inquiry were stated in the Statutory Instrument in paragraphs (a) – (i), but so far as material for this case, I shall only reproduce paragraphs (a), (f) and (g). The Commission was mandated:

“(a) to investigate the DFC’s loan portfolio in respect of the categories specified in section 4(1) of the DFC Act for the period 1st January 1999 to 31st December 2004, including the procedure for the processing and approval of applications as well as the disbursement and performance of the said loans;

(f) to provide oversight and support for the projected Forensic Accounting Investigation (FAI) of the DFC:

(g) to review the report of the Forensic Accounting Investigation when complete, and make appropriate recommendations arising therefrom.”

8. It is important, I think, to point out here that the idea of a forensic auditor or auditing of the DFC was provided for in clause 9(a) and (b) of the Agreement between the Government of Belize and the National Trade Union Congress of Belize referred to in the preceding paragraph. These provided in terms as follows:

“9 (a) Within 14 days of the signing of this agreement, Government of Belize will appoint a Commission of Inquiry under the Commission of Inquiry Act to investigate the activities and transactions of the Development Finance Corporation (DFC) over the past six (6) years to determine if any wrong doing occurred and the person(s) responsible as well as a forensic auditor to carry out a Forensic Accounting Investigation (FAI) to determine if any financial malfeasance occurred at the DFC over the same period.

(b) At the request of the NTUCB, the Forensic Auditor shall be selected from a country other than Belize.”

9. I now turn to a consideration and determination of the three issues canvassed for the claimants in this case.

1. *Was the appointment of the first Defendant, Mr. Mark Hulse as the Forensic Auditor into the DFC ultra vires section 16(7) of the DFC Act?*

10. Section 16 of the DFC Act provides for the accounts and audit of the DFC. Subsection (1) requires the Corporation to keep proper accounts of all its financial transactions, its assets and liabilities and to prepare annually a

statement of accounts in a manner satisfactory to the Minister and in conformity with sound commercial practice.

Subsection (2) provides that the accounts of the Corporation shall be audited annually by an auditor or auditors appointed by the Minister.

Subsection (3) provides that the auditor of the Corporation shall be provided with a copy of its annual balance sheet, together with the accounts and vouchers relating to them. This subsection also provides that the auditor shall at all reasonable times have access to the books, accounts and vouchers of the DFC and that he is entitled to require from the directors and officers of the DFC such information and explanation as he may need to perform his duties.

Subsection (4) provides that the auditor of the DFC may if he so desires, make a continuous audit of the accounts of the Corporation.

Subsection (5) provides for the passing of the accounts and balance sheet of the DFC by its auditor in a written report.

Subsection (6) provides that the auditor shall transmit a copy of his report to the Board of the DFC and the Minister.

Subsection (7) grants to the Minister the power, in his discretion, at anytime, to require the Auditor-General to examine the report of the DFC's auditor on its accounts as well as the accounts of the DFC, in which case the DFC's Board shall afford the Auditor-General all the facilities she may require for the purposes of the examination.

This provision, in my view, provides for a double audit of the accounts of DFC: first, its auditor's report, and secondly, an examination of this report

as well as its accounts by the Auditor-General, if the Minister in his discretion, so requires. It is to be noted that this second audit as it were, or examination by the Auditor-General, is at the Minister's discretion. The Minister may or may not require the Auditor-General to examine the DFC's auditor's report on its accounts or the accounts of the DFC for that matter.

Finally, subsection (8) provides that all expenses incurred for the purpose of auditing the DFC shall be paid out of the funds of the Corporation.

11. It must also be noted that though section 16 talks about "the Minister" as indeed other sections of the Act do, nowhere is "the Minister" defined. It is, however, presumably safe to say it refers to the Minister of Finance in the Cabinet of the Government of Belize, given the purposes and powers of the DFC as set out in sections 4 and 5 of its Act.
12. The Commission of Inquiry into the DFC itself started on 1st August 2005. And on 5th December 2006, the Government of Belize through the Ministry of Finance signed a contract with the first defendant "to carry out a Forensic Accounting Investigation (FAI) into the activities and transactions of the ... (DFC) for the period January 1st 1999 to December 31st, 2004 to assist the DFC Commission of Inquiry in its investigation." The contract with the first defendant states that he will provide his services in accordance with the terms of reference set out in the schedule which shall be treated as an integral part of the contract and that "(the) *Forensic Auditor (the defendant) will work under the supervision of the DFC Commission of Inquiry ("the Commission") and will comply with any instructions which may be given to him by the Commission from time to time.*" (emphasis added)
13. The schedule to the contract contains the "Terms of Engagement for a Forensic Accounting Investigation of the Development Finance Corporation." The purpose of the engagement of the first defendant

was stated to be “to perform a FAI into the activities and transaction of the DFC. To achieve this, the Forensic Auditor will pursue the following objectives:

- *Determine whether there was financial wrongdoing at the DFC and/or whether the DFC was used as a vehicle through which to perpetrate financial wrongdoing and the perpetrators thereof.*
- *Determine whether there were deficiencies in the DFC’s lending policies, procedures; and internal controls.”*

14. In order to achieve the FAI objectives the Forensic Auditor was required to do certain specified things which are stated to be the **Scope of the Investigation**. These are:

A. **Review and investigate the lending and collection activities and transactions of the DFC with special emphasis in relation to its delinquent loans**

This was stated to include but not limited to **inter alia**:

- “1. *A review of DFC’s policies, guidelines, manuals, and desk procedures relating to the granting of loans.*
2. *A review of the audited financial statements of the DFC for the six year period. The Forensic Auditor will also review audit and other reports, if any, issued by the external auditors, the Auditor-General of Belize, the Inter-American Development, the Caribbean Development Bank, consultants, and by any other parties engaged by or involved with the DFC’s operations and financial condition, the report of the*

Senate on the Social Security Board and the report(s) of any Auditor(s) in connection therewith. (Emphasis of Auditor-General of Belize provided by me).

3. *Interview responsible DFC officials and others, as may be necessary to accomplish the objectives of the FAI.”*

B. Review and investigate the corporate governance and management of DFC, the procurement of financing by the DFC through direct borrowing, asset securitization schemes, bond issues, debentures or any other financial instruments

Under this head of the scope of the investigation two issues were stated as requiring looking into, though not limited to these, namely, the procurement and flow of funds into and through the DFC and to determine how the acquisition costs were arrived at and the method and circumstances under which the DFC acquired financing through asset securitization or by any other means.

C. Review and investigate the corporate governance and management of DFC

D. Report of the FAI

It was provided that the Forensic Auditor will report to the Government of Belize, the Commission of Inquiry, the National Trade Union Congress of Belize, The Development Finance Corporation, the office of the Director of Public Prosecutions and any other relevant parties; and the report will detail the findings and recommendations based on the scope of the investigation.

15. On 2nd March 2007, the first defendant submitted the Final Forensic Audit Report, which is sought to be impugned by these proceedings.

The Final Report was submitted to the Financial Secretary for the Government of Belize and several copies given to Commissioner Merlene Bailey-Martinez for the Commission and for distribution to persons and entities set out in paragraph D of the first defendant's Terms of Engagement.

16. It has been forcefully argued by Dr. Kaseke for the claimants that the appointment of the first defendant as the Forensic Auditor was outwith section 16(7) of the DFC and therefore ultra vires.
17. Against this, the learned Solicitor General has submitted that it is a misconception. He argued that section 16 of the DFC Act (whose provisions I have tried to summarize in paragraph 10 above) deals with the normal audit and accounts of the DFC and that it does not preclude the appointment of a special auditor for a specified purpose. Ms. Lois Young S.C. for the first defendant supports this submission when she argued that there is nothing ultra vires in the appointment of the first defendant. She further argued that the first defendant was not appointed pursuant to the power given to the Minister under section 16(7) of the DFC Act.
18. After careful consideration and in the light of an examination of the materials put before me, including the relevant provisions of the Commissions of Inquiry Act, the DFC Act, in particular section 16, the Statutory Instrument No. 24 of 2005, the Agreement dated 11th February 2005, between the Government of Belize and the National Trade Union Congress of Belize, and the Contract for Services and its schedule dated 5th December 2006 between the Ministry of finance and the first

defendant, I am inclined to agreed with the learned Solicitor General and Ms. Young S.C. I am persuaded that the appointment of the first defendant as the Forensic Auditor for the DFC commission of Inquiry was not ultra vires the DFC Act.

19. I am satisfied that this appointment was not the ordinary run of the mill annual audit or the discretionary audit by the Auditor-General which the Minister may at anytime require, that is to say, a section 16(7) audit, if you will. This audit by the Auditor-General if the Minister so requires, is for an examination of the repot on the accounts as well as the accounts of the Corporation.
20. The purpose and objectives of the forensic auditing investigation for which the first defendant was engaged are however, much wider in scope, and cover a six-year period. The scope of this exercise comprehends, in my view, more than the annual audit or the special audit by the Auditor-General that the Minister may require.
21. I have, at paragraph 14 above, set out the scope of the forensic audit investigation.
22. I am further satisfied that the appointment of the first defendant was not pursuant to the DFC Act but rather is referable to and sustained by the provisions of the Commissions of Inquiry Act, and flows necessarily from the Agreement of 11th February 2005, between the Government of Belize and the National Trade Union Congress of Belize. The latter in clause 9(a) provided for the instituting of a commission of inquiry into the affairs of the DFC as well as the appointment of a forensic auditor. And acting pursuant to section 2 of the Commissions of Inquiry Act, the Prime Minister by Statutory Instrument No. 24 of 2005 instituted the DFC Commission of Inquiry. And by the Contract of Services dated 5th

December 2006, the first defendant was engaged to provide the services of a forensic auditor *“to assist the DFC Commission in its investigations.”* In the terms of reference for the first defendant, it was, inter alia, expressly provided that *“the Forensic Auditor will work under the supervision of the DFC Commission of Inquiry and will comply with any instructions which may be given to him by the Commission from time to time.”*

23. I am also satisfied therefore that the appointment of the first defendant is pursuant to and ancillary to the DFC Commission of Inquiry,
24. Moreover, quite who “a forensic auditor” is nowhere mentioned in the DFC Act. However, the Agreement between the GOB and the National Trade Union Congress of Belize, as I have already mentioned, provided for both the instituting of a Commission of Inquiry into the DFC and the appointment of “a forensic auditor.”

The word “forensic” however is said to be used in or suitable to a Court of law or public debate – see Black’s Law Dictionary 7th Ed. and the several examples of forensic professions mentioned therein, such as “forensic engineering”, “forensic linguistics”, “forensic medicine” and “forensic pathology”.

It is however, in my view, reasonable to say that “forensic” is related to the investigation, analysis and interpretation of a given state of facts for evidential purposes often in a court of law or inquiry.

25. It is for all these reasons that I find the appointment of the first defendant is not ultra vires section 16(7) of the DFC Act. There is nothing in his appointment, I find, that is incompatible with the DFC Act, in particular section 16(7).

26. Accordingly, I am unable to grant the claimants the relief they seek on this score.
27. It therefore follows that I am equally unable to grant the second declaration sought to the effect that the Report of the first defendant is unlawful, null and void as it was produced by a person who was unlawfully appointed.
28. From my analysis under the first issue above, I find that the appointment of the first defendant was lawful as it fell within the matrix of the Agreement of 11th February 2005 and the provisions of the Commissions of Inquiry Act and Statutory Instrument No. 24 of 2005, setting up the DFC commission of Inquiry. In this instrument, the DFC Commission of Inquiry itself is specifically charged in paragraphs (f) and (g):

“(f) to provide oversight and support for the projected (as it was then) Forensic Accounting Investigation (FAI) of the DFC” and

(g) to review the report of the Forensic Accounting Investigation when complete, and make appropriate recommendations arising therefrom.”

29. I am therefore satisfied that the Forensic Accounting Investigation much as it is ancillary to and in aid of the DFC Commission itself, it is not however, the Commission nor is the first defendant in any sense, a Commission or Commissioner. His role is as set out in the scope of the investigation in the schedule to the contract between him and the Government of Belize. And his appointment, I find, is not in anyway incompatible with either the DFC Act or the Commissions of Inquiry Act. He was therefore, in my view, validly appointed.

30. I am also not persuaded that the first defendant had unlawful access to the books, accounts, vouchers, papers and records of the DFC. In the first place, even if this were so, this is a complaint that legitimately would lie in the mouth of the DFC itself and no one else. I cannot therefore conceive of any ground of legitimate complaint by the claimants warranting a declaration by this court in their favour on this score.
31. Moreover, the access by the Forensic Auditor to the DFC's papers, I find, cannot, in the face of the evidence in this case, be unlawful. The Terms of Engagement attached as a schedule to the contract between the first defendant and the Government of Belize expressly provide under the clause on **Powers of Investigation**:

“To perform the FAI, the Forensic Auditor will act as the agent of the Commissioners appointed with the legal authority to do the following:

- *Interview DFC and other relevant persons as necessary.*
- *Investigate and review any ties between DFC directors' and officers' and loan recipients. This may include pursuing transactions to their source. If necessary, the forensic Auditor may call for the production of bank accounts and financial records of DFC officials, and loan recipients. Solicit the assistance of the Financial Intelligence Unit in procuring bank accounts and financial records of DFC officials, agents, facilitators and loan recipients domestically and internationally.*
- *Obtain access to all relevant paper and electronic records, including loan files and documents, loan portfolio databases, financial statements and audit reports of the DFC and its loan recipients. Therefore, the Government will ensure:*

That all the necessary administrative assistance and relevant files and documents shall be provided by the Development Finance Corporation, Government Ministries and other statutory bodies to the Forensic Auditor, as and when required. All concerned Officials of Government, the Development

Finance Corporation and other statutory bodies shall co-operate to provide any information/documents required or called for by the Forensic Auditor. The Government, the Development Finance Corporation and other statutory bodies shall provide letters of authority to the Forensic Auditor or his agents to request information and copies of documents from all borrowers, creditors, foreign entities or individuals including legal and financial advisors who provided services or assistance in the sourcing of funds or participated in whatever means in the asset securitization scheme of the Development Finance Corporation.”

32. Therefore, I agree with the learned Solicitor General that the first defendant was not an “unauthorized person”. On the contrary, he was as an agent of the DFC Commission of Inquiry, an authorized person with lawful access to the DFC accounts, books and papers etc.
33. I now turn to the third declaration sought by the claimants.
34. Were the claimants entitled to their right to natural justice (right to hearing and to fairness) in the production of the Report of the first defendant? Did the alleged failure to accord this right to the claimants make the Report null and void as against them?

It has been strenuously contended for the claimants that the Financial Audit Investigation Report produced by the first defendant makes adverse and prejudicial findings against them but they were not given the opportunity to comment upon or refute these findings before the first defendant produced his Report. In particular, the claimants say that pages 59 to 69 of the Report are dedicated to them. Dr. Kaseke their learned attorney, in his written submission, highlights paragraphs 4.6.3.27 to 4.6.3.29 of the Report as highly prejudicial to them. Therefore, he submitted for the first defendant to submit his Report containing these critical passages without an opportunity for his clients to comment or explain or even to be interviewed beforehand by the first defendant, was to deny them natural justice. That is to say, in this instance, an opportunity to be heard first. Fairness, Dr. Kaseke submitted, demanded

this: once the Forensic Auditor (the first defendant) arrived at the decision to make findings adverse to the claimants, fairness demanded that he should have disclosed a draft of the relevant sections of his Report touching and concerning the claimants, to them, before submitting it to the Commission.

35. Dr. Kaseke relied principally on the decision of the Court of Appeal of Antigua in the case of **Prince v De La Bastide et al** Vol. 1 OECS Law Reports at p. 117 and certain dicta of Peterkin JA who delivered the judgment of the Court. Although the appeal of the appellant was dismissed in that case, I think, however, that the principles of natural justice, in particular the opportunity to afford a hearing to a person who may be the subject of an adverse finding in any inquiry or determination is, with respect, now almost incontestable. Indeed, Peterkin JA quoted with approbation the words of Lord Denning in the case of **Kanda v Government of Malaya** (1962) A.C. 322 at page 337:

“(That the person concerned) must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them.”

36. I must point out that in **Prince** it was **not the Report** of the Commission of Inquiry that was involved that was in issue but rather its **proceedings** themselves. **Apropos** the Commission itself and the need to observe the rules of natural justice, Peterkin JA quoted Sachs LJ’s statement in **Re Pergamon Press Ltd** (1970) 3 All E.R. 534 at pages 541 and 542, that it is the characteristics of proceedings that matter and not the label of the proceedings as “judicial”, “quasi-judicial”. “administrative” or “investigatory” and proceeded:

“What then are the characteristics of the proceedings under consideration? The Commissioners are not to decide or determine anything. They only investigate and report, along with whatever recommendations and suggestions they may add. On the other hand, they have to make a report which may have wide repercussions. In their fact-finding capacity they have to produce a report which may be made public and thus be damaging to the appellant. They may criticise or condemn, and their report may even lead to judicial proceedings. Seeing that their report may lead to such consequences, the Commissioners ... owed to the appellant what Sachs LJ has described in the Pergamon Press case as “an appropriate measure of natural justice, or as it is often nowadays styled fair play in action.” In short, the Commissioners must act fairly even though their inquiry may be merely investigatory or administrative” at pp. 123 – 124.

37. Therefore, all things being equal, I am prepared to say that the claimants were not accorded an appropriate measure of justice by having the first defendant's Report being submitted and circulated without first having been given the opportunity to comment on, deny or refute or explain the findings therein. This is more so when by the terms of his engagement, the first defendant's Report with details of his findings and recommendations will be submitted to the Government of Belize, the Commission of Inquiry, the National Trade Union Congress of Belize, the DFC, **The Office of the DPP** and “any other relevant parties”. I therefore find that to take any action against the claimants by any of the entities to whom the Report is submitted, without first giving them the opportunity to comment, deny or refute or explain the findings in the report, would, in my opinion, be to deny them that appropriate measure of justice which fair play in action would warrant – **Re Pergamon Press supra**. I am not persuaded about the wisdom of submitting the Forensic

Audit Report to other entities other than the Commission of Inquiry itself. I cannot fathom what the wider-mailing list of the Report was intended to achieve.

38. The claimants complain that they were adversely affected by the findings of the first defendant in his Forensic Audit Report (see paragraphs 37, 38, 39, 40, 41, 43, 44, 45, 47, 49, 50, 51 and 52 of the first affidavit of David Novelo, the first claimant) and para. 4 of his second affidavit.
39. Ms. Young S.C. has, however, correctly submitted that the first defendant, the Forensic Auditor, was engaged to investigate the lending and collection activities of the DFC and that he was not engaged to investigate the business affairs of the claimants. I am however unable to accept this fully in the face of the evidence. I find, on the evidence, that there are several personal references to the claimants in the Forensic Auditor's Report, that call, at the very least, for explanation or refutation. See in particular, paragraphs 4.6.3.19; 4.6.3.23, 4.6.3.24, 4.6.3.27, 4.6.3.28 and 4.6.3.29. Admittedly, it is the Board of the DFC and its management that have mostly been put in the dog-house by the findings of the Forensic Auditor to bear the brunt of the strictures for the sorry state of the DFC.
40. Therefore, in my view, to move to take action against the claimants because of the findings of the Forensic Auditor, the first defendant, without first affording them an opportunity to be heard, would be a denial of their right to natural justice. This is so in the light of the circumstances in which the report of the Forensic Auditor was produced without any opportunity for an input by the claimants. This move or action could include, for example, adoption or endorsement of the first defendant's Report by the DFC Commission of Inquiry in its own Report, without any opportunity being afforded to the claimants to explain the findings in the Forensic Audit Report. This, I apprehend, would be highly improper.

41. However, in the circumstances of this case, I am unable to grant the declaration the claimants seek on this score. Although the Report may be short on the requirements of fairness, when objectively looked at, the claimants were not the subject of the investigation by the first defendant, rather it was the affairs of the DFC.

Also, I find, that the Forensic Auditor's Report is only preliminary to any action that may be taken on it; and bearing in mind what I have said earlier about the need to afford the claimants an opportunity to refute or explain the findings in the Report concerning them before any action, I do not think I need to grant the declaration sought. It is salutary to remember that the DFC Commission of Inquiry is expressly mandated to review the Report of the Forensic Accounting Investigation and make appropriate recommendations.

Moreover, the claimants have yet to appear before the DFC Commission itself, although Mr. Hulse, the first defendant, states in para. 10 of his affidavit that the claimants had been summoned by the Commission but had refused to give any information or evidence. In keeping with the dictates of procedural fairness one can only express the hope that the Commission itself will afford the claimants an opportunity to explain or refute the findings in the Forensic Auditor's Report before it compiles or submit, its own Report

42. I am constrained as well to refuse the declaration sought on this score because I do not believe it would now serve any practical purpose. The Forensic Auditor's Report has been submitted. There is nothing to stop it. – See generally Zamir and Woolf, The Declaratory Judgment 3rd Ed. (Sweet & Maxwell, London 2002), pp. 163 – 180 on when a Court can refuse a declaration because of its inutility.

43. For all these reasons, I find I am unable to grant any of the declaration sought by the claimants.

44. Conclusion

Finally, although I am unable to grant any of the declarations sought by the claimants, I am constrained to point out that if the Commission of Inquiry into the DFC itself were to rush to a conclusion of its work and submit its Report which might well contain materials from the Forensic Auditor's Report adversely reflective on the claimants, without first affording them an opportunity to be heard, then this may well impair the integrity of the proceedings of the Commission and its Report, in so far as the claimants are concerned. But of course, if the claimants choose, when summoned by the Commission, to stay away, then they will only have themselves to blame.

A. O. CONTEH
Chief Justice

DATED: 23rd July 2007.