IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 12 OF 2009

BETWEEN:

THE BELIZE BANK LIMITED	**Appellant**
AND	
THE ASSOCIATION OF CONCERNED BELIZEANS **MEDICAL & DENTAL OFFICERS UNION OF BELIZE** **GODWIN HULSE** **NATIONAL TRADE UNION CONGRESS OF BELIZE** **PRIME MINISTER & MINISTER OF EFINANCE** **ATTORNEY GENERAL OF BELIZE** **UNIVERSAL HEALTH SERVICES LTD.**	**Respondents**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

V Nelson QC and E A Marshalleck for the appellant.
L Young SC for the first, second, third and fourth respondents.
M Perdomo for the fifth and sixth respondents.

28 October 2009, 19 March 2010.

MOTTLEY P

[1] I have read the judgment prepared by Morrison JA in draft. I agree with it and have nothing to add.

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MOTTLEY P

SOSA JA

[2] I concur in the reasons for judgment set out, and the orders indicated, in the judgment of Morrison JA, which I have read in draft.

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SOSA JA

MORRISON JA

Introduction

[3] This appeal is concerned with whether a Loan Note, dated 23 March 2007, made between the appellant ("BBL") and the Government of Belize ("GOB") is unlawful as having been entered into contrary to section 7(1) and (2) of the Finance and Audit (Reform) Act, 2005 ("the 2005 Act"). Hafiz J found that it was and granted the declaration to this effect prayed for by the first, second, third and fourth respondents ("the respondents"). The judge also ordered that GOB should pay the costs of the respondents, to be agreed or taxed.

[4] BBL is a commercial bank and the respondents are a grouping of citizens, trade union representatives and a representative of the business community in Belize.

The factual background

[5] What follows is largely based on the summary of the factual background very helpfully provided by BBL in its skeleton argument filed in the appeal. The

relevant facts are largely undisputed, though there are, naturally, substantial differences between the parties about the legal effect of significant aspects of them.

[6] Between March 2001 and late 2004, BBL advanced a total of $19 million to Universal Health Services Limited ("UHS") by way of a short term loan in various tranches. UHS was a private provider of health services and the purpose of the loan was to assist UHS in funding the completion of a 56 bed specialist hospital, which was already under construction. It was initially contemplated that long term financing would be provided by the Development Finance Corporation ("DFC"), a statutory corporation, but in the event this funding did not materialise. However, it was in due course agreed that DFC would provide a guarantee in respect of BBL's increasing exposure to UHS and this was achieved by a Guarantee and Postponement of Claim Agreement dated 21 February 2003, and a further guarantee dated 7 May 2004.

[7] Towards the end of 2004, with UHS in need of additional funds and the financial condition of DFC deteriorating, it was agreed after several discussions between the parties that GOB would itself provide a guarantee to secure the indebtedness of UHS to BBL. On the strength of this agreement, the existing loan facility between BBL and UHS, which then stood at $19 million, was amended on 9 December 2004 and increased to $29 million and, on the same date, GOB executed a new Guarantee and Postponement of Claim Agreement ("the 2004 guarantee") guaranteeing payment to BBL "of all debts and liabilities, present or future, direct, absolute or contingent, matured or not owing by [UHS]".

[8] But by 2007, UHS, having failed, it was said, to meet its expected "patient flow", was still not in a position to service its debt to BBL, thus giving rise to a new round of discussions between the parties. As a result, BBL and GOB entered into a Settlement Deed ("the Settlement Deed") and a Loan Note ("the

Loan Note"), both dated 23 March 2007. The Settlement Deed was, in so far as is relevant, in the following terms:

> "WHEREAS
>
> (A) On 9 December 2004 the Bank and the Government entered into a guarantee and postponement of claim agreement (the "Guarantee") under the terms of which the Government guaranteed the payment to the Bank of all debts and liabilities at any time owing by Universal Health Services Company Limited of 5780 Goldson Avenue, Belize City, Belize to the Bank.
>
> (B) The Government wishes to determine its liability and to settle all Claims owed under the Guarantee to the Bank; the total amount owed to the Bank by the Government pursuant to such Claims under the Guarantee as to the sate of this agreement being US$33,545,820 [the reference to US$s was an error; it is common ground that the sum involved was in BZ$s] and for the Guarantee to be discharged and the Government released from all future debts and liabilities owed to the Bank under the Guarantee.
>
> (C) The Bank has agreed to determine the Government's liability and to settle all Claims owed by the Government under the Guarantee to the Bank and for the guarantee to be discharged and the Government released from all future debts and liabilities owed to the Bank under the Guarantee, on the terms and conditions set out below.
>
> IT IS AGREED
>
> 1. DEFINITION…
>
> 2. SETTLEMENT
>
> This agreement is a full and final settlement of all and any Claims arising out of or in connection with the Guarantee.
>
> 3. CONSIDERATION
>
> 3.1 In consideration of the Bank agreeing (i) not to pursue its Claim arising out of or in connection with the guarantee and to determine the Government's liability under the Guarantee,

and (ii) to discharge the Guarantee and to release the Government from all future debts and liabilities owed to the Bank under the Guarantee, the adequacy and sufficiency of which is hereby acknowledged and agreed to by the Government, the Government:

(a) shall immediately upon the execution of this agreement: (i) pay to the Bank the sum of BZ$1.00 (One Belize Dollar), and (ii) execute and deliver to the Bank a loan note in the form set out in Schedule 1 to this agreement (the "Loan Note") under the terms of which the Government for value received hereunder shall pay to the Bank BZ$33,545,820 (Thirty-Three million, Five Hundred and Forty-Five thousand, Eight Hundred and twenty Belize Dollars) in accordance with the terms and conditions contained in the Loan Note."

[9] The contemporaneous Loan Note provided, again in so far as is relevant, as follows:

"FOR VALUE RECEIVED, THE GOVERNMENT OF BELIZE, ("Maker"), by this Loan Note hereby unconditionally promises to pay to the holder of this Note for the time being, being on the date of this Note, **THE BELIZE BANK LIMITED**, a company formed under the laws of Belize with registered office situate at 60 Market Square, Belize City, Belize ("Holder"), the principal sum of:

THIRTY-THREE MILLION, FIVE HUNDRED AND FORTY-FIVE THOUSAND, EIGHT HUNDRED AND TWENTY BELIZE DOLLARS (BZ$33,545,820) (the "Principal Sum"),

Together with interest thereon accruing daily from and including the date of issue of this Loan Note and compounded monthly at the rate of interest of thirteen percent (13%) per annum (the "Interest Rate").

The Maker shall repay the principal Sum (together with interest at the Interest Rate) on demand or unless and until such demand is made, the maker shall repay the Principal Sum (together with all outstanding interest at the Interest Rate) no later than September 23, 2007. The maker shall pay the Holder monthly payments of interest on the Principal Sum, with the first monthly interest payment being due and payable on April 23, 2007, and all monthly

> interest payments thereafter being due and payable on the subsequent monthly anniversary of such date."

[10] It is now common ground between the parties (and Hafiz J so found) that the 2004 guarantee was discharged and superseded by the express agreement of the parties as contained in the Settlement Deed and that, save for its relevance as part of the history of the dealings between the parties, nothing now turns on it (although the respondents' claim as originally filed had also sought declarations of its invalidity).

[11] On 29 March 2007, BBL made a further loan facility of $12 million ("the Additional Loan Facility") available to UHS, to which GOB was also a party. As at the date of trial, some $4 million had been disbursed to UHS pursuant to this facility. Although this loan facility had also been included in the respondents' original claim in the court below, Hafiz J did not grant the declaration of invalidity sought in respect of it and, there being no appeal from this conclusion, it played no part in the appeal save as an aspect of the history of the matter. Beyond that, therefore, nothing more needs be said about it.

[12] And finally in this brief account of the relevant background to this matter, I must make reference to the legislative development which is the real fulcrum of these proceedings. On 1 April 2005 the 2005 Act came into force. The purpose of this Act, which repealed and replaced the Finance and Audit Act, was stated in its long title to be "to make new and better provisions regulating public revenue, expenditure and contracts…and to provide for matters concerned therewith or incidental thereto". Under the rubric "Finance", section 7(1), (2) and (3) of the 2005 Act provides as follows:

> "(1) The National Assembly may, subject to subsection (2), from time to time by resolution authorize the Government to borrow monies or to raise loans and to offer security for such monies or loans, from any public or private bank or financial institution or capital market in or outside Belize, upon such terms and conditions

and in an amount not exceeding in the aggregate the sum specified in that behalf in the resolution, to meet current or capital requirements.

(2) Any agreement, contract or other instrument effecting any such borrowing or loan to the Government of or above the equivalent of ten million dollars shall only be validly entered into pursuant to a resolution of the National Assembly authorizing the Government to raise the loan or to borrow the money:

Provided that the Government shall not use any money borrowed under this section to meet its 'recurrent expenditure' as defined in the financial regulations made under section 23(4) except

(a) to refinance existing public debt; and

(b) to amortize and service principal payments to existing public debt.

Provided further that, subject to the foregoing the Government may raise loans, borrow monies and secure financing to meet its capital requirements in amounts of less than ten million dollars at any one time without the authority of a resolution as aforementioned on the condition that the total aggregate amount, raised or borrowed in any one fiscal year does not exceed ten million dollars.

(3) A resolution referred to in subsection (1) and (2) shall not have effect for any period exceeding twelve months."

[13] It is also common ground between the parties that no resolution of the National Assembly was either sought or obtained in respect of the Settlement Deed, the Loan Note or the Additional Loan Facility.

The proceedings before Hafiz J

[14] On 2 May 2007 the respondents issued these proceedings against the Prime Minister & Minister of Finance, and the Attorney General of Belize, in their capacities as Ministers and representatives of GOB. Following amendment, the claim sought declarations that the 2004 guarantee, the Settlement Deed, the Loan Note and the Additional Loan Facility, were unlawful as having been

entered into contrary to section 7 of the 2005 Act. Immediately after the claim was issued, BBL applied to be joined as an interested party, claiming a substantial and legitimate commercial interest in the subject matter of the proceedings, and this application was granted on 14 July 2007.

[15] Though also added as an interested party on its own application (granted on 14 May 2007), UHS took no part in either the hearing by Hafiz J or in this appeal. The Prime Minister and Minister of Finance and the Attorney General, though initially resisting the claim on behalf of GOB, ceased to do so after a change of government in February 2008 and did not defend it in the court below. At the commencement of the hearing of the appeal (on 28 October 2009), Ms. Magali Perdomo, although announced as appearing for the Prime Minister and Minister of Finance and the Attorney General, told the court that her clients did not intend to participate in the proceedings in this court in any way. In substance, therefore, as had been the position before Hafiz J, the contesting parties on the appeal were BBL and the respondents.

[16] BBL's response to the claim that the Loan Note was unlawful for failure to comply with section 7(2) of the 2005 Act was that the Loan Note, properly characterised, was a promissory note and as such fell to be regarded as separate from the transaction underlying it and therefore did not itself effect a borrowing and accordingly did not breach section 7. But even if the Loan Note did effect a borrowing, it was contended, section 7(2) was directory rather than mandatory in effect with the result that a breach of it did not necessarily invalidate the Loan Note. Further, and in any event, BBL contended that the respondents had no locus standi to bring the proceedings.

[17] In a detailed and closely reasoned judgment, Hafiz J rejected all three contentions. While she accepted BBL's argument that the document described as a Loan Note ought properly to be characterised as a promissory note, as it conformed to the definition of a promissory note in section 85(1) of the Bills of

Exchange Act, she considered that on the evidence, including that coming from BBL itself, the Settlement Deed and the Loan Note did effect a borrowing. This is what the learned judge said (at para. 143):

> "On the evidence from Mr. Johnson which I find credible as to what transpired, the Government has clearly borrowed by way of advance BZ$33,545,820 from the Bank resulting in the Loan Note. Mr. Johnson said the principal amount was advanced to the Government. The principal amount is $33,545,820. The court will not speculate as to the method of advance or the accounting method used in this transaction, or whether there was any facility letter or whether there was any recording of all of this transaction. The evidence before the Court is that the 2004 Guarantee was discharged under the Settlement Agreement. The sum of $33,545,820 was advanced to GOB and the Minister of Finance executed the 'Loan Note'. I therefore, respectfully disagree with the Bank's submission that the Settlement Agreement and Loan Note did not effect borrowing of a loan. I am satisfied that the Minister of Finance borrowed the sum of $33,545,820 by way of advance from the Bank."

[18] As a result, Hafiz J found that the borrowing without prior approval from the National Assembly was in breach of section 7(2) of the 2005 Act, which she further considered to describe "a mandatory statutory requirement" (para. 173). Finally, on the question of locus standi, the judge held that the respondents did have a "sufficient interest in the subject matter", which is the single criterion of standing laid down in Part 56 of the Supreme Court (Civil Procedure) Rules 2005 (see rules 56.2(1) and 56.13(1)). On the basis of these findings, the judge accordingly granted the declarations sought by the respondents in the following terms:

"A Declaration is granted that the Loan Note dated 23rd March 2007 under the terms of which the [GOB] was to pay [BBL] BZ$33,545,820.00 is unlawful as being contrary to section 7(1) and (2) of the [2005 Act]"

The appeal

[19] Dissatisfied with this result, BBL appealed to this court by notice dated 2 June 2009. Although the grounds were somewhat differently formulated in the notice of appeal, the skeleton argument filed on its behalf in the appeal stated its three grounds of appeal as follows:

"(a) **Ground One.** The judge wrongly construed the Settlement Deed and Loan Note as providing for a loan from the Bank to the Government. Any such loan must have been made outside the Settlement Deed and Loan Note. If those agreements did not provide for a loan, they cannot have been made in breach of section 7 of the Act.

(b) **Ground Two.** Having found (rightly, the Bank submits) that the Loan Note is a promissory note, the judge failed to consider that, as a matter of law, the Loan Note and any underlying loan were separate transactions. With the Loan Note standing as a separate contract to any underlying loan, the judge's determination that the loan was unlawful should not have contaminated the Loan Note with illegality as well.

(c) **Ground Three.** The judge wrongly concluded that section 7 of the Act has mandatory, rather than directory effect. On the contrary, properly construed, section 7 only has directory effect. Thus a breach of section 7 would not render any loan from the Bank to the Government illegal and void."

[20] The main difference of substance between the grounds stated above and those originally filed on behalf of BBL is that the original grounds specifically challenged the judge's finding in the respondents' favour on locus standi, while these do not. As nothing at all was said about this matter in either the skeleton argument or the oral submissions of Mr. Vincent Nelson QC, who appeared for BBL in this court, as he had done before Hafiz J, I propose to treat this aspect of the original grounds as having been abandoned and will accordingly say nothing more about it in this judgment.

BBL's submissions

[21] On the first ground, Mr. Nelson submitted that the judge erred in construing the Settlement Deed and the Loan Note as providing for or effecting a loan from BBL to GOB, especially by treating the words "for value received" in the Loan Note as referring to a loan from BBL to GOB. Neither document referred to a loan, nor did they contain any reference to any of the terms commonly regarded as essential to a loan, such as the amount of the loan, its term, repayment schedule, and the like. There was no evidence of any transfer of funds from BBL to GOB, neither was there any documentation (such as a banking facilities letter) of the kind that one would expect in these circumstances. In addition, the judge was wrong to rely on what the skeleton argument described as "some throwaway remarks" made by BBL's chairman in his affidavits filed in the proceedings as a basis for her conclusion that the Settlement Deed and Loan Note had effected a borrowing by GOB. And finally, to the extent that there was a loan from BBL to GOB, it must have been as part of some other transaction, the lawfulness of which was not relevant to the question whether the Loan Note was unlawful by virtue of section 7 of the 2005 Act.

[22] As regards the second ground, Mr. Nelson's submission was that, having (correctly) found that the Loan Note was, in effect, GOB's promissory note to pay $33,545,820, the judge erred in not giving effect to the well established principle

that a promissory note, as a bill of exchange, is a separate (though related) contract from the underlying agreement for which the note is the instrument of payment. Therefore, given that the underlying loan and the Loan Note are separate transactions, the judge erred in treating the invalidity of the former as also determinative of the validity of the latter.

[23] And, as regards the third ground, Mr. Nelson submitted that even if, contrary to BBL's primary position, a loan was in fact granted to GOB under the terms of the Loan Note, the judge erred in construing section 7(2) of the 2005 Act as a mandatory requirement that there should be prior approval by the National Assembly of the transaction before a loan for an amount in excess of $10 million is contracted for by GOB. As a matter of statutory interpretation, it was submitted, section 7 is directory in effect and not mandatory, as the judge found. A relevant factor in this regard was the absence of any statement of the consequences of non-compliance in section 7 itself (cf, for instance, section 17 of the Contract Act). When considered in its full statutory context, so the submission went, it will be seen that non-compliance with section "does not violate the objects and purposes of the Act as a whole."

[24] In support of these grounds, we were referred by Mr. Nelson to a number of authorities from the United Kingdom and the rest of the Commonwealth, including a decision from the Eastern Caribbean Court of Appeal, upon which special reliance was placed. So we were referred to **Central Bank of Yemen v Cardinal Financial Investments Corporation [2001] 1 Lloyd's Rep. 1**, along with some others (to make the point that as a bill of exchange a promissory note is a separate contract from any underlying agreement); to **Australian Broadcasting Corporation v Redmore Proprietary Limited (1989) 166 CLR 454** and **R v Home Secretary ex parte Jeyeanthan [2000] 1 WLR 354**, **London and Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182** and De Smith, Woolf and Jowell, Judicial Review of Administrative Action (5th edn, 19850 (all for the distinction between mandatory and directory statutory

requirements); and **The State of New South Wales v Bardolph (1933 – 34) 52 CLR 455** and **Attorney General of Saint Lucia v Martinus Francois** (Civil Appeal No. 37 of 2003, judgment delivered 29 March 2004) (both for the proposition that, under established constitutional practice, the existence of a contract made by the executive is not conditional upon parliamentary approval which pre-dates the contract).

[25] More generally, Mr. Nelson also referred us to Lord Hoffman's now long famous guide to the construction of contractual documents in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896** and related material, to **Intrepreneur Pub Co (GL) v East Crown Ltd [2000] 2 Ch 611** (on the effect of 'entire agreement' clauses in contracts), and to **L. Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235** (on the relevance of subsequent conduct in interpreting a contract).

The respondents' submissions

[26] Ms. Young SC took issue with the assertion in the first ground of appeal that Hafiz J had "wrongly construed the Settlement Deed and Loan Note as providing for a loan from the bank to the Government". She pointed out that the judge's findings had been fully based on the evidence, not least of all that of BBL's chairman, Mr. Philip Johnson, as well as in written submissions made to her on behalf of the bank. Ms. Young urged the court to look, as Hafiz J had done, on the transactions between BBL and GOB in their totality in order to determine whether a loan or borrowing in excess of $10 million had in fact taken place.

[27] As regards the second ground of appeal, Ms. Young also took issue with BBL's attempt to separate the Loan Note from some other underlying transaction which may have effected a borrowing, pointing out that the Loan Note was necessary to bring about the borrowing that had in fact taken place and that

however the transaction was characterised or effected, it was caught by section 7(2), which "was intended to ensure that before a public liability is incurred of $10 million or over, approval is given by the National Assembly". Ms. Young emphasised, as Mr. Nelson had done, the importance of construing the 2005 Act as a whole and section 7 in its proper context and submitted that if the underlying transaction was unlawful, then the Loan Note would also be unlawful.

[28] And finally, with regard to the third ground of appeal, Ms. Young maintained that the provisions of section 7(1) and (2) of the 2005 Act were plainly mandatory, particularly when compared with the provisions of the repealed Finance and Audit Act, and required that authorisation from the National Assembly be sought and obtained before the loan or other borrowing transaction is effected. In this regard, she referred to the limits of the executive power of GOB, in relation to money matters imposed by the Constitution of Belize, describing the relevant sections as having created "a matrix of accountability" to the National Assembly for matters involving the public finances of Belize.

[29] For her part, Ms. Young also relied on a number of authorities, including **ICS v West Bromwich BS** (supra) previously cited by Mr. Nelson. She also referred us to **Brown Shipley & Co. Ltd. v Amalgamated Investment (Europe) B.V. [1979] 1 Lloyd's Rep. 488** (to demonstrate that notwithstanding that money is borrowed from the creditor to pay off the creditor, it nevertheless creates an effective discharge of liability under the guarantee, which is then replaced by a loan obligation); **Lethbridge Irrigation District Trustees v Independent Order of Foresters [1940] 2 All ER 220, 227 (**for the "very familiar principle that you cannot do indirectly that which you are prohibited from doing directly); **Powdrill v Watson (No. 2) [1995] 1 BCLC 386** (for the principle that words used in a statute should be construed in context; and **Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co [1975] 1 All ER 968** (for the principle that the court must look at the entire transaction as a whole); and finally, Ms. Young referred us to the Privy Council decisions in **Commercial Cable Co v Government of**

Newfoundland **[1916] 2 AC 610** and **Mackay v Attorney General for British Columbia** **[1922] 1 AC 457** (for the purpose of showing the limits of the principle in cases such as **Bardolph** and **Martinus Francois**, supra, upon which Mr. Nelson heavily relied).

[30] I shall come in a moment to review in greater detail some of the cases so very helpfully cited on both sides, but it may be convenient at this stage to refer briefly to what BBL now describes as "some throwaway remarks" by Mr. Philip Johnson, BBL's chairman, to which Hafiz J, vigorously supported by Ms. Young before this court, obviously attributed great significance. Mr. Johnson, who described himself as the person "responsible for the day to day management of [BBL]", furnished three affidavits for the use of the court in the proceedings. In his second affidavit (sworn and filed on 25 May 2007), Mr. Johnson asserted that "it is the Bank's position that [GOB] is indebted to the Bank in relation to a principal amount of BZ$33,545,820 and related interest payments including default interest". Mr. Johnson described this as "the effect of the Settlement Agreement…which included a Loan Note between [BBL] and [GOB] dated 23 March 2007…". And later in that same affidavit, Mr. Johnson referred to BBL's "rights to pursue its debt against [GOB]…".

[31] In his third affidavit (sworn and filed on 23 July 2007), Mr. Johnson said this:

> "As I explained in my Second Affidavit dated 25 May 2007 I verily believe, and it is the Bank's position that, the Government is indebted to the Bank in relation to a principal amount of BZ$33,545,820 and related interest payments including default interest. The principal amount was advanced to the Government under a Settlement Agreement between the Bank and the Government dated 23 March 2007 (the "March Settlement Agreement") which included a Loan Note between the Bank and the Government dated 23 March 2007 (the "March Loan Note")."

[32] The respondents also drew the court's attention to a letter dated 17 May 2007 written on behalf of BBL by Messrs Allen & Overy, the bank's London solicitors, to the then Prime Minister and Minister of Finance, in which reference was made to "the principal amount advanced to the Government" under the Settlement Deed and the Loan Note. This was, Ms Young submitted, in the same vein as Mr. Johnson's affidavit, clear evidence coming from BBL itself that the Settlement Deed and the Loan Note had effected a borrowing from BBL by GOB.

[33] In a brief, but effective reply on behalf of BBL, Mr. Marshalleck submitted that it was important to view Mr. Johnson's affidavit evidence in context, pointing out that in making the statements which the respondents had highlighted, he had merely been articulating an alternative position on behalf of BBL, which would only arise if its primary contention that the Loan Note did not effect a borrowing was rejected by the court. The same point could also be made, Mr. Marshalleck observed, about the 17 May 2007 letter written by Allen & Overy to the Prime Minister and Minister of Finance. He therefore submitted that neither Mr. Johnson's evidence nor its solicitors' letter could be relied on as evidence that there was a loan. All that was necessary was to consider the documents themselves, from which it would be clear that all that the Settlement Deed and Loan Note did, having acknowledged GOB's liability to BBL, was to establish a payment plan.

The issues

[34] From all of the foregoing, it appears to me that the issues that arise for decision on this appeal are threefold, as follows:

(i) Whether the Loan Note effected a borrowing by GOB from BBL and, if so,

(ii) whether section 7(2) of the 2005 Act required that approval be sought and obtained from the National Assembly prior to its having entered into by GOB; and, if so,

(iii) what is the effect of the fact that no approval for the transaction was obtained before it was entered into.

The authorities

[35] Issues (i) and (ii) both give rise, to a large extent, to questions of interpretation, the one of commercial contractual documents and the other of statutes. Although dealing with legal instruments of a qualitatively different character, the governing principles of interpretation of both in the modern law are not entirely dissimilar, seeking as they do to ascertain the intention of the parties (contracts) or the intention of the legislature (statutes).

[36] With regard to the interpretation of contractual documents, we were referred by both counsel to the landmark decision of the House of Lords in **ILS v West Bromwich BS**. In that case, Lord Hoffman,, who delivered the leading speech for the majority (Lords Goff, Hoffman, Hope and Clyde, Lord Lloyd dissenting) referred to the "fundamental change which had overtaken this branch of the law", the result of which had been "to assimilate the way in which such documents are interpreted by judges to the common sense principles by which serious utterances would be interpreted in ordinary life" (page 912). The modern principles were then summarised as follows:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it

includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see **Mannai Investments Co Ltd. v. Eagle Life Assurance Co. Ltd. [1997] A.C. 749**.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in **Antaios Compania Naviera S.A. v Salen Rederierna A.B. [1985] A.C. 191, 201:**

> "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"

[37] **ICS v West Bromwich BS** has been consistently cited and applied, by this court (see for the most recent example **Stann Creek Development Ltd v**

Lighthouse Reef Resort Ltd, Civil Appeal No. 10 of 2008, judgment delivered 27 March 2009), and in England as recently as last year in one of the last decisions of the House of Lords, in **Chartbrook Limited v Persimmon Homes Limited and others** **[2009] UKHL 38**, **[2009] 4 All ER 677**. In that case, Lord Hoffman himself was able to observe (at para. [14]), that it was not in dispute "that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarized by the House of Lords in **[ICS v West Bromwich BS]**…They are well known and need not be repeated." The **Chartbrook** case is of some general interest because the House of Lords, which was expressly invited to reconsider the third principle set out in **ICS v West Bromwich BS** (the exclusion from the admissible background of the previous negotiations of the parties and their declarations of subjective intent), declined to do so, after full consideration. Lord Hoffman, who again delivered the leading speech, concluded "that there is no clearly established case for departing from the exclusionary rule" (para. [41]).

[38] But although the general approach to the interpretation of contractual documents was so incisively reformulated and restated in **ICS v West Bromwich BC**, other more specific rules of construction, consistent with the general approach, remain of importance. Thus every contract must be construed with reference to its objects and the whole of its terms, with the result that "the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated word or clause" (Chitty on Contracts, 30th edn., vol. 1, para. 12-063). Or, as Lord Mustill put it, memorably, in **Charter Reinsurance Co. Ltd. v Fagan** **[1997] AC 313, 384**, "The words [of the contract) must be set in the landscape of the instrument as a whole". Similarly, "Several instruments made to effect one object may be construed as one instrument, and be read together, but so that each shall have its distinct effect in carrying out the main design" (Chitty, op cit, at para. 12-067). Or, if the words used in an agreement are susceptible of two meanings, one which would, for instance, frustrate the commercial purpose of the agreement

and one which would preserve and give effect to it, the latter is to be preferred: *ut res magis valeat quam pereat* (Chitty, op cit, para. 12-081).

[39] Which is not to suggest, however, that there are no limits. Thus it is still the rule that pre-contract negotiations and declarations of intent by the parties are excluded from the admissible background **(Chartbrook,** supra at para. [37]). Related to this rule is the other well known exclusionary rule in this context, which is that extrinsic evidence is not generally admissible to add to, subtract from or otherwise in any manner to vary or qualify the terms of a contract which has been reduced to writing (Chitty, op cit, para. 12-096). And also related is the rule governing 'entire agreement' clauses in contracts, which constitute "an agreement that the full contractual terms to which the parties agree to bind themselves are to be found in the agreement and nowhere else and that what might otherwise constitute a side agreement or collateral warranty shall be void of legal effect" (per Lightman J in **Intrepreneur Pub Co. (GL) v East Crown Ltd**, at page 614). And finally, though admissible background is relevant to the construction of a contract as an aid to its interpretation, the subsequent conduct of the parties is not (see **Schuler v Wickman**).

[40] Moving now to the other question of construction in the case, that is, the applicability, meaning and effect of the 2005 Act, and in particular section 7, several authorities were put before us to suggest that background and context were also important considerations in this regard. So in **Powdrill v Watson**, for instance, which was a case concerned with the meaning to be given to a particular word ("adopted") used in the Insolvency Act 1994, Lord Browne-Wilkinson considered the history of the legislation, including the mischief sought to be remedied by Parliament by the introduction of the concept of 'adopting' contracts of employment as well as the 'rescue culture' which, as could be gathered from the committee report (Report of the Committee on the Insolvency Law and Practice), "seeks to preserve viable businesses [and] was and is fundamental to much of the 1986 Act" (page 11). Against that background, Lord Browne-Wilkinson, delivering the leading speech, said this (at page 14)

> "The words used by Parliament must be construed as a whole and in their context including, if it can be discovered, the mischief aimed at…In my judgment, in order to determine Parliament's intention it is necessary to look at the joint effect of adoption followed by the statutory consequences said to flow for it. If the words used by Parliament have a meaning which is consonant with its presumed intention not to frustrate the rescue culture and not to produce unworkable consequences, then in my judgment that construction should be adopted. If, having had regard to those factors, it is impossible to detect a more limited Parliamentary intention then the literal words of the sections must be given effect to. Only if the consequences of not departing from the literal meaning of the words produces an absurd result is it legitimate for the court to reject those words and seek to determine what Parliament in fact meant."

[41] There is no dispute about this between the parties. But BBL also sought to broaden the relevant context to include what was described in its skeleton argument as "the state budgetary process as a whole", bearing in mind the fact that section 36 of the Constitution of Belize vests the executive authority of Belize in Her Majesty, acting through the Governor-General or either directly or through officers subordinate to him. Further, in considering that process, the court must have regard to "established constitutional practice", as appears from the Australian case of **Bardolph**, a decision to which Mr. Nelson attributed considerable significance.

[42] **Bardolph** was a case in which the government department with responsibility for Tourist Board of New South Wales entered into a contract for the provisions of advertisement with the plaintiff, who was the owner of a newspaper. The contract which was for a period which effected more than one financial year, was neither expressly authorised by the legislature nor was it sanctioned or approved by any Order in Council or executive minute. In the

Supply and Appropriation Acts for the financial years affected provision was made under the hearing "Government advertising" for the expenditure of sums much larger in amount than the amount involved in the contract. Shortly after the making of the contract there was a change of Government and the new administration refused to pay for any further advertising space in the newspaper. The plaintiff nonetheless continued to carry the advertisement and at the end of the contract brought this action to recover the total unpaid amount of the agreed advertising rates. The High Court of Australia affirmed the decision of the trial judge giving judgment for the plaintiff. It was held that the contract was a contract if the Crown which, subject to the provision by Parliament of sufficient moneys for its performance, was binding on the Crown. Although the contract must be regarded as containing an implied condition that payments under it by the Crown should be made only out of moneys lawfully available for the purpose under parliamentary appropriation, that condition did not go to the viability of the contract, which could be sued on whether or not sufficient moneys had been so appropriated.

[43] BBL placed particular reliance on two statements by Dixon and Starke JJ respectively in the course of their judgments. Dixon J said this (at page 509):

> "The principles of responsible government imposes upon the administration a responsibility to Parliament, or rather to the House which deals with finance, for what the administration has done. It is a function of the Executive, not of Parliament to make contracts on behalf of the Crown …
>
> But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation f\by Parliament and doing so before funds to answer the expenditure have actually been made legally available…"

[44] And Starke J said this (at page 501):

> "The Crown is dependent upon the supply granted to it by Parliament, and there is an express or implied term in its contracts that payment shall be made out of moneys so provided. **But the existence of the contract is not conditional upon Parliamentary authority, or upon provision of funds by Parliament for the performance of the contract.** The view that it is so conditional is entirely contrary to English practice and to a long line of cases" (emphasis supplied).

[45] But these clear statements of general principle must, as is usually the case with most statements of this nature, be balanced by other (qualifying) statements to be found in **Bardolph** itself. So, for instance, Rich J said this (at page 495):

> "The question whether the transaction was within the competence of the Crown cannot be answered simply by considering the statutory authority for it. Apart from the question whether the parliamentary appropriation of moneys is a prerequisite of the Crown's liability to pay under a contract made by it, the Crown has a power independent of statute to make such contracts for the public service as are incidental to the ordinary and ell-recognized functions of Government. When the administration of particular functions of government is regulated by statute and the regulation expressly or implicitly touches the power of contracting, all statutory conditions must be observed and the power no doubt is no wider than the state contemplates. But that is not the present case." (emphasis supplied).

[46] Similarly Starke J, after making the statement quoted at para. [42] above, qualified it with the further statement (at page 502) that "Constitutional practice, as in the **Commercial Cable Case**, or statutory provisions, as in **Churchward's Case** or **Mackay's Case**, may prescribe conditions precedent to the making of

contracts with the Crown, and so far as these conditions exist they must be observed." Statements to very similar effect are also to be found in the judgment of Dixon J ("… unless some competent statute property construed makes the Government otherwise within its authority is binding" – page 510), and McTiernan J (the contract, in the case under consideration, "is not rendered wholly invalid because of the operation of any express parliamentary or legislative restriction on the authority of the Government to make it or to spend revenue on the objects specified by the contract" – page 527).

[47] Two decisions of the Privy council referred to by Starke J in the passage quoted above **(Commercial Cable Company v Government of Newfoundland [1916] AC 610** and **Mackay v Attorney General for British Columbia and others [1922] AC 457),** were in fact also referred to by Ms. Young in her skeleton argument as authority for her submission that section 7(2) of the 2005 Act made it clear that the intention of the legislature in that Act was "to clarify that the power of government to borrow is to be exercised pursuant to or in accordance with a resolution of the National Assembly".

[48] In the **Commercial Cable** case, rule 278 of the rules and orders for the proceedings of the House of Assembly made pursuant to statute prescribed that "In all contracts extending over a period of years and creating a public charge, actual or prospective, entered into by the Government, there shall be inserted a condition that the contract shall not be binding until it has been approved by a resolution of the House." A contract (which was to continue for 25 years) for the extension of a transatlantic cable to Newfoundland was entered into by the Governor in Council, without it having first obtained the approval of the House of Assembly. By the letters patent under which the Governor was appointed, his powers were to be exercised according to (inter alia) "such laws and ordinances as are or shall be in force in our said colony." After a change of government, the new government, which was dissatisfied with the contract, announced that it regarded it as not binding in the absence of legislative sanction, and declined to recommend it to the House of Assembly for ratification.

[49] The Privy Council, in agreement with the Supreme Court of Newfoundland, held that rule 278 was binding upon the Executive and that the prerogative power of the Governor under the letters patent was subject to the restrictions imposed by the constitutional practice of the colony. The Board accordingly confirmed that the contract was not binding on the Government in the absence of the requisite parliamentary approval. Viscount Haldane, delivering the advice of the Board, considered that it was clear that "the Governor is by these provisions subjected to constitutional restriction, and that any persons dealing with him, whether or not they actually knew the character of his authority, must be taken to deal subject to such restriction" (page 616).

[50] This decision was applied by the Privy Council in **Mackay v Attorney General of British Columbia**. That was a case in which the Lieutenant-Governor in Council was authorised by statute to acquire lands in the name of the Crown and the Minister of Public Works was also authorised to enter into any contract required for carrying out the provisions of the statute. However, no such contract would be binding on the Minister unless it was signed by him and sealed with the seal of his department. Again, after a change of government, the new government refused to make payments due under a contract entered into by the Minister on behalf of the Crown on the ground that there was no record that the execution of the contract had been authorised by the Lieutenant Governor in Council and further, that the agreement was not sealed with the seal of the Department of Public Works. The Privy Council held, following the **Commercial Cable** case, that in the absence of an order or resolution passed by the Lieutenant Governor in Council authorising the contract, as required by the relevant statute, "the mere assent of the ministers of the day to the contract could not….under a constitution, such as that of British Columbia, made the contract a legally binding one…" (per Viscount Haldane at page 461).

[51] These authorities (including the **Bardolph** case itself) suggest that the general rule that contracts made on behalf of the Crown are not dependent for their validity in the ordinary course of things on proof of a distinct authorisation

from the legislature, in this case, the National Assembly, to enter into them, must give way in an appropriate case to any conditions precedent to the entering into such contracts as may be provided by the legislature. If and so far as such conditions exist, they must be observed.

[52] It is against this background of settled principle, derived from material relied on by both parties to this appeal, that I now come to the other case upon which BBL placed great reliance on this point, which is the decision of the Eastern Caribbean Court of Appeal in the **Martinus Francois** case. Section 41 of the Finance (Administration) Act of St. Lucia provided as follows:

> "No guarantee involving any financial liability shall be binding upon the government unless that guarantee is given in accordance with an enactment or unless approved by resolution of Parliament."

[53] Mr. Martinus Francois, an attorney-at-law, who described himself as "a citizen, a taxpayer and an elector", challenged in person the validity of a contract of guarantee entered into by the Prime Minister and Minister of Finance of St. Lucia on behalf of the government before parliamentary approval was sought and obtained (an appropriate resolution was in due course passed subsequently). In his written submissions Mr. Francois asserted that where there is a statutory condition precedent to be satisfied, observed or complied with, such as section 41, any contract entered into without that condition having been satisfied prior to its being entered into was not binding on the government. Any contract so entered into, Mr. Francois submitted, is "ULTRA VIRES - NOT WORTH THE PAPER IT IS WRITTEN ON." (emphasis apparently supplied by Mr. Francois himself).

[54] The Court of Appeal held that section 41 did not create a condition precedent requiring prior parliamentary approval for entering into the contract of guarantee. Redhead JA (Ag) pointed out (at para. [58]) that what section 41 provided was that the guarantee would not be binding without parliamentary approval, not that it would be void. Saunders JA agreed that section 41 did not

stipulate a condition precedent. At para. [80] of the judgment, Saunders JA said this:

> "The key phrase in the section is 'shall be binding' – [the] section is saying that guarantees may exist but, if those guarantees involve any financial liability, they can only bind the Government if one of two conditions is satisfied, namely, they must either be given in accordance with an Act of Parliament or they must be approved by a resolution of Parliament. When therefore the Prime Minister gave the guarantee, he was doing nothing wrong or unlawful. He was perfectly entitled to do so. However, because that guarantee involved a financial liability, Parliamentary approval was required before it could be made binding on the Government."

[55] Rawlins JA (Ag) (as he then was) also agreed, but in his separate – and, if I may say so respectfully, more nuanced – judgment, put the issue, it seems to me, in clearer perspective. Thus, he acknowledged that to the extent that the Act and the Constitution stipulated conditions that were to be fulfilled before moneys could be expended from the consolidated fund, any action not in keeping with the provisions could be declared by the court to be "unconstitutional, illegal and void and of no effect" (para. [109]). In this regard, he continued, "The essential legal imperative for this purview of the court is that any power that is granted by the Constitution or any statute must be observed. This is central to the rule of law, the sovereignty of Parliament and the supremacy of our Constitutions" (para [110]).

[56] Rawlins JA then considered the effect of cases like **Bardolph**, **Commercial Cable**, **Mackay v Attorney General for British Columbia** and others (all relied on by Mr. Francois), with the caveat that, to the extent that the question of the validity of the guarantees in the instant case turned on the true interpretation of the relevant St. Lucian provisions, the case law was of value "only to the extent that it elucidates the construction of those provisions" (at para.

[119]). At the end of this review, the learned judge concluded that any limitation of the power of a Minister to enter into contracts as to execute guarantees could only be achieved by clear words and that section 41 "does not contain any clear words that require a Resolution as a condition precedent to the execution of a valid guarantee by a Minister… [it] simply states that any financial liability that arises from the guarantee will not be binding unless the guarantee is given in accordance with an enactment…[or]…is approved by Resolution" [para. [129]). Thus Mr. Francois' point was met and the guarantees were therefore held not to be invalid.

[57] I have spent a little time on **Martinus François** not only because of the importance both Mr. Nelson and Ms. Young attached to it (albeit for different reasons), but also because of the comfort it gives that the issues for determination in the instant case are not unique in the region. But it also seems to me to be clear, particularly from a reading of Rawlins JA (Ag)'s careful judgment, that it is a decision which, in the first place, not only fits neatly into the principles to be derived from the earlier cases (which I have attempted to summarise at para. [51] above), but, secondly, and perhaps more importantly, as a reminder that in each case regard must be had to the language and effect of the particular constitutional or statutory provision which is under consideration.

[58] Which brings me then to the legal position as regards the other significant question of principle canvassed by the parties in connection with section 7(2), that is, assuming for the moment that the transaction in this case was caught by the subsection, whether it is a mandatory or directory provision. In **Australian Broadcasting Corporation v Redmore Proprietary Limited [1989] 166 CLR 451**, the High Court of Australia had to consider the effect of a statutory provision which was in the following terms:

> "70.(1) The Corporation shall not, without the approval of the Minister –

(a) enter into a contract under which the Corporation is to pay or receive an amount exceeding $500,000.00 or, if a higher amount is prescribed by the regulations, that higher amount; or

(b) enter into a contract or arrangement with another person under which the other person agrees to acquire real or personal property to be leased or let or hire, to the Corporation."

[59] It was common ground in the case that the Corporation had in fact purported to enter into an agreement caught by section 70 (it concerned an amount greater than $500,000) without having obtained the approval of the responsible Minister and the question for decision was whether the requirement for such approval was directory or mandatory. The court considered the question to be finely balanced but, in the view of the majority, it fell to be interpreted as being directory only, with the result that the failure to obtain approval did not invalidate the agreement. Factors relevant to that decision were articulated by the majority as follows (at para. 6):

> "The words of the sub-section are not compelling either way. In strict terms they are directory. They speak of the exercise ('shall not…enter into a contract'), rather than the existence of power. Their direction is to the [corporation] and not to an innocent outsider having contractual dealings with the [corporation], who would be likely to act on the basis that the [corporation] would have complied with any statutory duty to obtain the approval of the responsible Minister before purporting to enter into a contract of a kind which required such approval. In that regard, it is relevant to note that the sub-section neither requires that the Minister's approval be in writing nor establishes any procedure by which a person dealing

> with the [corporation] can ascertain whether the Minister has given his approval to the precise terms of a particular contract. Nor do the words of s.70(1) either spell out the effect on third parties of a failure by the [corporation] to observe its statutory duty to obtain the Minister's prior approval or speak in terms which would be appropriate to refer to a purported or ineffective entry into a contract. If the statutory direction to the corporation not to enter into a contract of the specified kind without the approval of the Minister has either the effect of confining the actual powers of the [corporation] or of invalidating any contract with an innocent outsider entered into otherwise than in compliance with its terms, it must be by reason of a legislative intent to be discerned in the words of the sub-section construed in the context of the Act as a whole." (emphasis supplied.).

[60] The majority therefore considered their conclusion that the provision was directory to be indicated from the general structure of the Act as a whole, the context provided by the other provisions in the particular part of the Act and the legislative history of the sub-section. The contract was therefore neither void nor unenforceable.

[61] In **Ex parte Jeyeanthan**, in what Judge LJ (as he then was) described in his judgment in the same case as an "illuminating analysis" (ay page 366), Lord Woolf MR (as he then was) questioned the conventional approach of seeking to determine whether, in cases of non-compliance with a procedural requirement, the particular requirement fell to be classified as directory or mandatory:

> "The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the

non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if a word like 'shall' or 'must' is used." (page 358).

[62] The learned judge then went on to propose the following (at the same time acknowledging the "helpful guidance" of Lord Hailsham LC in **London & Clydeside Estates v Aberdeen District Council**):

> "…I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows.
>
> 1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)
>
> 2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.
>
> 3. If it is not capable of being waived then what is the consequence of the non-compliance? (The consequences question.)
>
> Which questions arise will depend upon the facts if the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependant on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.

[63] Both the **Australian Broadcasting Corporation** case and **Ex parte Jeyeanthan** therefore emphasise, albeit from somewhat different approaches to

the problem, that the consequences of a failure to observe a statutory requirement will in every case be a matter of construction of the particular legislation as a whole. It must, however, always be borne in this exercise, that, as Lord Hailsham observed in **London & Clydeside Estates** (at page 189) that "When Parliament lays down a statutory requirement for the exercise of legal authority, it expects its authority to be obeyed down to the minutest detail" (or, as the editors of De Smith, Woolf and Jowell would have it, that "All statutory requirements are prima facie mandatory – see para. 5-060).

[64] On the basis of this – necessarily selective – survey of the relevant authorities to which we were referred, it appears to me that the general principles to be applied to the determination of the issues raised by this appeal may be summarised as follows:

> (i) In construing the provisions of the Settlement Deed and the Loan Note, the object of the court is to give effect to what the parties intended, as appears from the terms of the agreement as a whole, giving the words their natural and ordinary meaning in the context of the agreement, the relationship between the parties and all the relevant facts surrounding the transaction so far as known to the parties (I base this formulation on Lord Bingham's summary of the general principles in **Bank of Credit and Commerce International SA v Ali and others [2002] 1 AC 251, 259**).
>
> (ii) In construing the provisions of the 2005 Act, in particular section 7(2), the object of the court is, similarly, to give effect to the intention of the National Assembly, construing the words used in the section in the context of the statute as a whole and taking into account, if it is known, the mischief aimed at by the provision.
>
> (iii) The relevant context may include, in a proper case, generally known and established constitutional principles, but subject always to the consideration that, in a proper case, such

principles must give way to the clear and unequivocal contrary wishes of the legislature, as gathered from the actual words of the statute.

(iv) The question whether a statutory requirement is directory or mandatory is also primarily a question of construction of the statute as a whole, taking into account the purpose of and the actual language used in the statute and what, if any, are the stated consequences of non-compliance with the requirement.

Issue (i) – did the Loan Note effect a borrowing by GOB from BBL?

[65] Hafiz J considered that, in seeking an answer to this question, an important part of the relevant background was the 2004 guarantee and the nature of the obligation that GOB undertook pursuant to it. Her conclusion was that under that guarantee GOB "was guaranteeing payment to [BBL] of all debts and liabilities owing by UHS, which is a conditional agreement and in the event of default then an obligation would arise to pay the debt" (para. 130). The judge therefore accepted, having looked at the language and terms of the 2004 guarantee, that it fell within the definition of a guarantee, that is, ",,,a binding promise of one person to be answerable for a present or future debt or obligation of another if that other defaults…" (O'Donovan and Phillips, The Modern Contract of Guarantee, 2003, para. 1-18). Thus the GOB's obligation under the 2005 guarantee was plainly, as she described it (at para. 133), secondary.

[66] That, it seems to me, in common with Hafiz J, is indeed an important part of the history of the arrangements between BBL and GOB in relation to the UHS debt to bear in mind when seeking to discover the meaning of the agreement struck in March 2007. Indeed, the first recital in the Settlement Deed makes reference to the 2004 guarantee. The second recital speaks to GOB's wish "to determine its liability and to settle all Claims owed under the guarantee to the Bank", stating the amount then due to be $33,545,820 and expressing GOB's wish to be released from that guarantee and from "all future debts and liabilities

owed to the Bank under the guarantee". It seems to me to be tolerably clear from these recitals that GOB, which had in 2004 guaranteed payment as part of the arrangements for a $29 million loan facility from BBL, now wished to draw the line, so to speak, and to 'cap' its liability to BBL.

[67]. Accordingly, BBL having agreed to determine GOB's liability to settle all claims owed under the 2004 guarantee and to discharge and release GOB from any further liability, GOB agreed, in consideration of BBL accepting those terms, to pay BBL the sum of $1.00 and to execute a loan note in the form set out in the schedule to the Settlement Deed, under which GOB would undertake to pay to BBL $33,545,820 on the terms and conditions set out in the Loan Note.

[68] This was, then, it seems to me, clearly a watershed in the relations between GOB and BBL: the effect of the Settlement Deed was to release GOB from the 2004 guarantee and the secondary liability which that relationship entailed, and to reconstitute the relationship between the parties to one in which, although BBL remained a constant as the creditor, GOB stepped into the place of UHS as the primary obligor. Or, put another way, GOB's status had changed from one in which its liability to BBL was conditional upon a UHS default, to one in which GOB itself had now undertaken primary liability for the agreed debt of $33,545,820. That is the background and the context against and within which the Loan Note itself which, it is important to keep in mind, was agreed by the parties in the Settlement Deed, to be an integral part of this agreement, now falls to be examined.

[69] The Loan Note is, in form, a promise by GOB to pay BBL $33,545,820, with interest accruing daily and compounded monthly at 13% per annum. The principal sum is expressed to be repayable no later than 23 September 2008 and a monthly payment, beginning 23 April 2007, is required from GOB to BBL. There can be no doubt that, in form and content, it clearly resembles and indeed satisfies the definition of a promissory note in section 85(1) of the Bills of Exchange Act, as Hafiz J found, and Mr. Nelson vigorously submitted before us.

It is this resemblance that led Mr. Nelson to submit further, based on the well known and oft stated principle that "a promissory note is a separate contract from the underlying agreement for which the note represents the instrument of payment" **(Cardinal Financial Investments Corp. v Central Bank of Yemen [2001] 1 LR 1**, per Brooke LJ at para. [7]), that the Loan Note itself could not effect a borrowing and that even if there is a separate underlying transaction which was itself illegal, that could not by that fact render the Loan Note illegal.

[70] With the greatest of respect, I cannot but regard this as an ingenious and highly technical argument that bears no relation to the realities of what both BBL and GOB obviously set out to achieve in this transaction. There is not now any dispute between the parties that, as BBL put the position in its skeleton argument, "the Settlement Deed and Loan Note discharged [GOB's] liability under the 2004 Guarantee as guarantor of the UHS debt". Neither is there any dispute that BBL's agreement to discharge the 2004 guarantee and to release GOB from any future liability under it was given in consideration of GOB paying $1.00 and executing and delivering the Loan Note. Indeed, BBL itself in its skeleton argument states plainly that "[BBL's] agreement to discharge the 2004 Guarantee was its side of the bargain in return for the promises made by [GOB]". So the net result of the March 2004 transaction was that GOB, which was immediately before the Settlement Deed and the Loan Note were subscribed to, a guarantor of the debt of UHS, under a secondary obligation to pay if UHS did not, was converted (as BBL would have it, by some unknown process) into the principal debtor in respect of a liability which, by executing both the Settlement Deed and the Loan Note, it explicitly acknowledged.

[71] In these circumstances, it appears to me that Hafiz J was fully entitled to take the view, which she did, that there was no need for the court to "speculate as to the method of advance or the accounting method used in this transaction, or whether there was any recording at all of this transaction." Rather, the judge opted to have regard to the fact that the 2004 guarantee was discharged under the Settlement Deed, and that GOB did execute the Loan Note, as required by

the Settlement Deed, and to conclude in the light of both those facts that the sum of $33,545,820 was advanced to GOB by BBL. In this regard it seems to me that it is not particularly significant on the facts of this case that, as Mr. Nelson submitted, no "new moneys" were advanced by BBL. As **Brown Shipley & Co. Ltd.**, a case cited by Ms. Young and also referred to by the judge demonstrates, an obligation as a borrower can be created without any actual passing of cash from the creditor to the debtor or any 'drawdown' by the borrower.

[72] In coming to her decision on the question whether BBL had made a loan of the sum covered by the Loan Note to GOB, Hafiz J also took into account the statements made by BBL's chairman, who was the person responsible for the day-to-day operations of the bank, on the matter. While I accept, as Mr. Nelson reminded us, that the subsequent conduct of the parties cannot be used in the interpretation of a contract (**Schuler v Wickman**, supra), it nevertheless appears to me that the statements made by both Mr Johnson and BBL's London solicitors do have a bearing on the question of whether, as a matter of fact, funds were in effect advanced by BBL to GOB to enable both parties to fulfil their obligations under the Settlement Deed, given that there is not now any dispute between the parties as to what those obligations were in fact.

[73] While it may be arguable, as Mr. Marshalleck submitted in his reply on this point, that Mr. Johnson's remarks in his second affidavit (see para. [32] above) were made in the context of his seeking to articulate BBL's alternative position, this cannot, in my view, diminish the force or significance of those remarks, made as they were in a sworn affidavit, presented to the court as evidence of the facts, and not as the argumentation of an advocate. But in any event, I do not think that even that excuse can avail Mr. Johnson in respect of the unequivocal statements made in third affidavit ("The principal amount [of $33,545,820] was advanced to the Government under a Settlement Agreement…" - see para. [33] above).

[74] Some statements made in Allen & Overy's letter of 17 May 2007, which was a letter written on behalf of BBL to the then Prime Minister and Minister of Finance, also appear to me to have a bearing on the matter. After referring in detail to the Settlement Deed and the Loan Note, as well as to the action taken by the respondents to this appeal, BBL's solicitors sought to put GOB on notice that "regardless of the outcome of the…challenge to the financial arrangements between [GOB] and [BBL]…BBL is confident that it has very strong claims against [GOB] for the full amounts due and owing under the Settlement Deed and the Loan Note." The letter went on to identify those claims as including a claim for restitution, on the basis that BBL "acting under a mistake as to law has paid out over BZ$33 million", as well as a claim that BBL was entitled to rescind the Settlement Deed and Loan Note on the ground of GOB's negligent or fraudulent misrepresentation as to its authority to enter into the transaction, the effect of which "would be to revest in the Bank the principal amount advanced to the Government and give rise to a claim in damages…".

[75] These remarks, it seems to me, are consistent only with the judge's view that, in keeping with the obligation undertaken by GOB pursuant to the Settlement Deed and the Loan Note, there was in fact a borrowing from BBL by GOB and in my view she was correct to take them into account in determining this question. I cannot imagine that, in a matter in which BBL claimed a substantial and legitimate commercial interest from the very outset of the proceedings, its chairman would on more than one occasion allow himself the indulgence of "throwaway remarks" in sworn affidavits. Nor can I conceive that Messrs. Allen & Overy would take anything less than a considered position, based on instructions, in a letter written just over two weeks after proceedings were issued in the matter.

[76] For all of these reasons, as well as those given by Hafiz J, I would decide this issue, that is, whether the Loan Note effected a borrowing by GOB from BBL, in favour of the respondents.

Issue (ii) – did section 7 of the 2005 Act require that approval be sought and obtained from the National Assembly prior to the Settlement Deed and the Loan Note having been entered into?

[77] As Ms. Young pointed out, section 7 of the 2005 Act was introduced as an amendment to the Finance and Audit Act, which was repealed. The purpose of the changes brought about by the 2005 Act was, as its long title indicated, "to make new and better provisions regulating public revenue, expenditure and contracts…and to provide for matters concerned therewith and incidental thereto".

[78] There was no equivalent of section 7(2) in the repealed Act, section 8 of which provided as follows:

> "8.(1) The House of Representatives may from time to time by resolution authorize the Minister to borrow, by means of advances from a bank (or from the Crown Agents) or from any public institution, money to an amount not exceeding in the aggregate the sum specified in that behalf in the resolution, to meet current requirements: Provided that the resolution shall not have effect for any period exceeding twelve months.
>
> (2) The principal and interest of all the advances shall be charged on the Consolidated Revenue Fund.
>
> (3) Where, by resolution in accordance with this section or in pursuance of any Act, power to borrow money by means of advances or from the Crown Agents or from any public institution is conferred on the Minister the power may be exercised by means of a fluctuating overdraft."

[79] As will readily be seen, section 7(1) of the 2005 Act (see para. [12] above), is to the same general effect as section 8(1) of the repealed Act, the main differences of substance being the substitution in the 2005 Act of the National Assembly for the House of Representatives, and the enlargement of the

category of institutions from which loans might be sought by the government from "a bank (or from Crown Agents) or from any public institution" (section 8 of the repealed Act) to "any public or private bank or financial institution or capital market in or outside Belize" (section 7(1) of the 2005 Act).

[80] Section 7(2) of the 2005 Act is, however, completely new and bears repeating below:

> "7(2) Any agreement, contract or other instrument effecting any such borrowing or loan to the Government of or above the equivalent of ten million dollars shall only be validly entered into pursuant to a resolution of the National Assembly authorizing the Government to raise the loan or to borrow the money:
>
> Provided that the Government shall not use any money borrowed under this section to meet its 'recurrent expenditure' (as defined in the financial regulations made under section 23(4)) except
>
> (a) to refinance existing public debt; and
>
> (b) to amortize and service principal payments to existing public debt.
>
> Provided further that, subject to the foregoing the Government may raise loans, borrow monies and secure financing to meet its capital requirements in amounts of less than ten million dollars at any one time without the authority of a resolution as aforementioned on the condition that the total aggregate amount so raised or borrowed in any one fiscal year does not exceed ten million dollars."

[81] It is noteworthy, first of all, that the proviso to section 7(2) expressly permits the government to borrow sums up to $10 million in aggregate in any one fiscal year without the authority of the resolution required for borrowings in excess that amount contained in the main body of the sub-section. The

significance of this is, it seems to me, that the proviso therefore extends a not unsubstantial discretionary margin to government borrowing by not requiring specific approval for potentially any number of borrowings up to a total of $10 million per year. This consideration appears to me to go some way towards meeting the concern expressed by Saunders JA in **Martinus Francois** that "the smooth running of Government would be entirely frustrated if, for example, each time the Prime Minister, or a Government Minister, sought to enter into a contract, it was first necessary to convene a meeting of Parliament in order to seek and obtain approval" (para. [8]). Borrowings falling into this category, therefore, will continue to fall under the general principle (or the "established constitutional practice", as Mr. Nelson put it) articulated in cases like **Bardolph** and **Martinus Francois** (as to which, see paras. [42] – [58] above].

[82] But the other noteworthy feature of section 7(2) is, of course, the explicit requirement of approval by resolution of the National Assembly for borrowings over $10 million. The actual language in which the requirement is found is of importance, that is, that "any agreement, contract or other instrument effecting such borrowing shall only be validly entered into…" (emphasis supplied). Quite apart from the fact that this is a completely new feature of the legislation (which is itself an important fact to keep in mind), there is also the imperative "shall only be validly entered into": not only is it the case, as Lord Woolf observed in **Ex parte Jeyeanthan**, that a statutory requirement "is never intended to be optional if a word like 'shall' or 'must' is used", but section 58 of the Interpretation Act also provides that "In any enactment 'shall' shall be construed as imperative and the expression 'may' as permissive and empowering".

[83] In this respect it accordingly seems to me that the language adopted by the draftsperson in section 7(2) is significantly different from that used in the section of the St. Lucian Act with which **Martinus Francois** was concerned ("No guarantee involving any financial liability shall be binding upon the government unless…etc"). The position under section 7(2) is therefore not, in my view, one in which, as the Court of Appeal found in that case, a contract may be entered into,

but will only bind the government if one of the two stated conditions are fulfilled: in the case of section 7(2) the words of the statute, it seems to me to, as Hafiz J found, "clearly refer to a prior qualification for validity" (para. 148).

[84] Further indicia to the same effect may also be found, as Hafiz also pointed out, in the fact that the general power of borrowing given in section 7(1) is, by its express terms, subject to section 7(2), as also in section 7(3), which specifies a 12 month period during which a resolution under either subsection will remain valid (see paras. 153 and 154).

[85] I would therefore conclude that, pursuant to section 7(2), prior approval from the National Assembly was required as a pre-condition of the validity of a loan or borrowing by GOB in excess of $10 million, and that the Loan Note, as an instrument effecting such a borrowing was as a result not validly entered into, no resolution approving it having been sought or obtained from the National Assembly.

Issue (iii) - what is the effect of the fact that approval for the 23 March 2007 transaction was not obtained before it was entered into?

[86] This question gives rise to the issue upon which a lot of time was spent during the hearing of this appeal. To a large extent, my view on this issue has been clearly foreshadowed by the view that I have expressed on the previous issue. Not only was the prior approval of the National Assembly required for this transaction, in my view, but this is also a mandatory requirement, as Hafiz J found. As the learned judge concluded, I think correctly, the **Australian Broadcasting Corporation** case, which was the source of the distinction posited by Mr. Nelson between statutory provisions granting powers and provisions governing the exercise of those powers (the latter category being directory only), is clearly distinguishable from the instant case. Section 7(1) of the 2005 Act, which gives a general power to borrow to government is, as has already been observed, expressly subject to section 7(2), which has the clear effect of

"confining" or defining the precise boundaries of that general power in relation to borrowings over the $10 million threshold. In the **Australian Broadcasting Corporation** case, on the other hand, the court found that the provision in question had to do with the manner in which an undisputed power to contract was exercised, rather than with the existence or extent of the power itself. As Hafiz J put it, section 7(2) "speaks about power and not the exercise of that power" (para. 159).

[87] Finally on this point, Hafiz J, despite her conviction that section 7(2) was "in its ordinary language mandatory" (para. 173), nevertheless went on to test her conclusion against the questions posed by Lord Woolf CJ in **Ex parte Jeyeanthan** as "more likely to be of greater assistance than the application of the mandatory/directory test" (see para. [63] above). I set out in full below, not only because I cannot possibly improve on it, but also by way of respectful tribute to Hafiz J's judgment, her conclusions on Lord Woolf CJ's three questions:

> "174. The first question raised is the substantial compliance question. In the case at hand, there is no compliance at all as no resolution has been obtained in respect of the Loan. I disagree with the Bank that substantial compliance is evidenced by the fact that authorization will be required before payment can be made out of the Consolidated Revenue Fund. Substantial compliance in my respectful view is obtaining a resolution prior to entering into a contract to borrow of or above the equivalent of ten million dollars or more.
>
> 175. As for the second question, it is my view that the non-compliance in obtaining the resolution is not capable of being waived because of the mandatory requirement.
>
> 176. Since it is not capable of being waived, the next question is the consequence of the non-compliance. I disagree with the bank's submission that the non-compliance with section 7(2), that is, the failure to obtain the National Assembly's approval before entering into the Settlement Agreement does not violate the object and purpose of the Act as whole. Firstly, it is not the settlement agreement which is in issue. It is the borrowing of over ten million dollars, I find Lord Woolf's speech at 360C of some assistance.

> '…In order to decide whether a presumption that a provision is mandatory is in fact rebutted, the whole scope and purpose of the enactment must be considered, and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act."

177. What is the object of section 7(2)? That section was not in the repealed Act. It is a new section and the preamble to the Act as mentioned above is to "make new and better provisions regulating public revenue, expenditure and contracts". If there is no compliance with this section then there will be no control of public spending of over ten million dollars. This is certainly not the intention of Parliament. Non-compliance will violate the object and purpose of the Act as a whole. Section 7 read [as] a whole makes better provision for regulating public revenue. If a contract is entered into to borrow over ten million dollars and there is no resolution, then in accordance with section 7(2) that contract is not valid. Further, when section 7(1) and 7(2) are read together, an agreement to borrow will only be valid if there is a resolution authorizing such borrowing. Therefore, I find that the loan of $33 million dollars as evidenced by the Loan Note of 27th March 2007 entered into by the Minister of Finance is unlawful as being contrary to section 7 of the **Finance and Audit (Reform) Act 2005** and therefore void."

Conclusion

[88] In the result, therefore, I am of the view that this appeal should be dismissed, with costs to the respondents, to be agreed if not sooner taxed.

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MORRISON JA