IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 202 of 2010

DEVELOPMENT FINANCE CORPORATION **CLAIMANT**

AND

CAHAL PECH LIMITED **DEFENDANTS**
RENE VILLANUEVA SR.
RENE VILLANUEVA JR.

Hearings
2012
25th July
14th September
28th September
16th October

Miss Darlene Vernon for the claimant.
Mr. Michael Young SC and Mrs. Melissa Balderamos-Mahler for the defendants.

LEGALL J.

JUDGMENT

The Loan

1. This is a claim by the claimant against the defendants for the sum of $898,408.39, being the balance on a loan of $1,423.562.90, granted by

the claimant to the defendants on 31st January, 2003. The loan was acquired due to a successful bid by the second and third defendants who were the chairman and managing director respectively of the first defendant, a company duly incorporated in Belize. The loan was to purchase an entertainment business known as Cahal Pech Tavern, containing a night club and bar and nine cabanas (the property), which was operated by a previous owner, Derek Boyd, and then by the defendants, situated at San Ignacio Town, Cayo District. The agreed purchase price of the property was $1,350,000, but the defendants made a down payment of $40,000 leaving a balance on the purchase price of $1,310,000. The addition of fees brought that balance to the amount of the loan of $1,423,592.90. The terms of the loan were contained in an offer by the claimant, and accepted by the defendants, dated 24th January, 2003 and included the following repayment terms:

> "The sum of One Million Four Hundred and Twenty Three Thousand Five Hundred Sixty Two & 90/100 Dollars (BZE$1,423,562.90) is to be repaid as follows:
> The loan of $1,423,562.90 will be for a term of twenty (20) years inclusive of two months grace period on principal repayment.
> The loan of $1,423,562.90 will be paid together with interest at 13% per annum, or such other rate as may be determined by the Corporation from time to time, by TWO HUNDRED THIRTY EIGHT (238) amortized equal and consecutive monthly installments of $16,707.77 each payable on the last day of every month in each year (hereinafter called the Due dates), the first installment being due and payable on April 30, 2003.

The defendants also executed three promissory notes, dated 12th February, 2003, in which they promised and agreed to pay to the claimant the amount of the loan by 238 monthly payments of $16,707.77, commencing from 30th April, 2003, which make the period of repayment of the loan to be more than nineteen years, up to the year 2022. The loan was also secured by a deed of mortgage dated 21st March, 2003 between the parties. There was also a deed of conveyance dated 28th February, 2003 that transferred the property in the name of the first defendant from the previous owner.

Default On Loan

2. Not long after the mortgage and conveyance, a fire destroyed on 26th July, 2003, a part of the property that served as a night club and bar. In accordance with the terms and conditions of the loan agreement, a policy of insurance for the property had been entered into under the claimant's Group Insurance Scheme and assigned to the claimant, for the amount of $781,950. This amount was paid to the claimant on 21st August, 2003 to cover the loss due to the fire. The damage to the property, as a result of the fire, was rectified and remedied in December, 2003 at a cost, it would seem, less than the amount paid by the insurance company, by $30,278.38, described as the "insurance balance." The No. 3 defendant, by letter to the claimant dated 26th May, 2004, requested that payment with respect to the loan be deducted "for the month of May from the insurance balance." The claimant in the statement of claim pleaded that the amount of $30,278.38, the balance of the insurance payment was transferred "to

offset the account arrears." The claimant therefore submitted that the defendants defaulted in repaying the loan.

3. But the defendants gave evidence that they never defaulted in repaying the loan, or on payment of the installments on the loan. It is however to be noted that the defendants' own witness, Troy Gabb, testified that there were discussions between the claimant and the defendants "regarding the loan which was non performing at that time" to use the words of the witness. Another defence witness, Arsenio Burgos, in answer to a question from Miss Vernon for the claimant, that the defendants were falling into debt with their monthly obligations because they were not making their monthly payments as agreed, the witness answered that that was "why we came up with the settlement." The settlement is discussed below. In detailed and able cross-examination by Miss Vernon for the claimant, Mr. Burgos, agreed that the defendants were not performing their monthly obligations, no doubt, with respect to repayment of the loan.

4. In addition, the No. 3 defendant wrote a letter dated 11th November, 2004 to the claimant as follows:

> "Dear Mr. Bautista:
> CAHAL PECH
> Due to the problems encountered with the sale of Cahal Pech and the present financial situation, I regret to inform you that I am unable to pay the note on the loan and have no choice but to hand over the keys of the Cahal Pech property to your office in Belize City.

> Please make arrangements for security as I can no longer afford to make this payment.
> Sincerely.
> Rene Villanueva Jr.

I am satisfied on the evidence that the defendants defaulted in repayment of installments on the loan.

The 2004 Agreement

5. Perhaps defaults in paying the installments pushed the defendants to sell the property. The evidence is that the defendants, after negotiations with a Mr. Richard Hoare to sell the property to him, made a written agreement dated 8th April, 2004 selling the property to him for BZ$1,850,000 on the following payment schedule contained in clause 3 of the agreement: –

> "a. An initial down payment of Fifty Thousand Dollars in the currency of the Owners.
> b. One Million Four Hundred Thousand Dollars in the currency of Belize (BZ$1,400,000.00) shall be paid by the Purchaser at the date of closing to the DFC in satisfaction of the mortgage currently held by the said DFC.
> c. The balance of the purchase price, namely Four Hundred Thousand Dollars in the currency of Belize (BZ$400,000.00) shall be paid to the Owners at the date of closing."

According to clause 4 of the said written agreement of 8th April, 2004, the defendants agreed with Richard Hoare that he would pay to the

claimant on 25th April, 2004, the sum of BZ$16,707.77, and to pay this same amount on 25th May, 2004 – the exact monthly installments the defendants agreed to pay the claimant each and every month in relation to the loan to them. Clause 7 of the said agreement states that Richard Hoare "shall be entitled to vacant possession of the property on the date of the agreement." Mr. Hoare, with the consent of the claimant, did take possession of the property: the claimant says it was possession for about two months; the second defendant, at first, says it was for six months; but in cross-examination he said that the property belonged to Hoare for two months. Mr. Hoare also paid two installments in relation to the loan.

6. Though Richard Hoare took possession of the property on the basis of the said written agreement with the defendants, there was no signed document by the claimant, Hoare and defendants transferring liability of the defendants for the loan or debt to Richard Hoare. But the defendants and Richard Hoare seem to have intended by clause 3 above of the said agreement, if complied with by Mr. Hoare, that it would discharge or cancel the loan or debt owed by the defendants to the claimant. The problem came about because Richard Hoare did not honour or comply with the agreement, including clause 3 above. The No. 2 defendant has admitted that there is no document signed by anyone that transferred the liability for the debt of the defendants incurred by virtue of the loan, mortgage and promissory notes above to Richard Hoare. The second defendant testified that he did not know that Hoare had not gone to the claimant to sign the documents transferring the debt to Hoare. No signed document by all sides to

facilitate the transfer of the debt from the defendants to Richard Hoare was executed or done. Richard Hoare did not agree to transfer the debt to him. In a letter dated 7th September, 2004 to the claimant, Richard Hoare stated his intention not to proceed with responsibility for the loan to the first defendant. The claimant, by letter dated 22nd September, 2004, informed the defendants of Hoare's decision, and said that consequently the loan was not transferred to Hoare "and it is expected that you will continue to service same" to use the words of the letter. Based on this evidence, the debt on the loan agreement and promissory notes entered into by the defendants and the claimant was not transferred to Richard Hoare.

The Settlement

7. Since Richard Hoare refused to take over the debt, the claimant and the defendants considered an option to repay the loan. There were meetings between the claimant and the defendants, and an agreement was reached to settle the outstanding amount on the loan. Terms of this settlement or agreement are contained in paragraph 31 of the witness statement of the second defendant as follows:

> "31. Time went by during which the premises was left closed and stagnant. During this interim period we had meetings with the claimant (from in late 2004) and the following was agreed:
> (a) That the claimant would try to sell the property;
> (b) That the defendants would file to claim damages from Richard Hoare (to include balance to the claimant);

(c) That if there was an outstanding balance after the sale of the property by the claimant, then such balance would be settled by any damages that the defendants could recover from Richard Hoare;
(d) That the claimant would honour the position that the loan balance was zero subject to the defendants' trying to collect additional monies through a court action against Richard Hoare;
(e) That the position on the loan was settled by this arrangement between the parties." (**emphasis mine**)

In his evidence in cross-examination, the second defendant also gave provisions of the agreement or settlement as follows:

> "A. At the beginning DFC maintained its position that we owed. We maintained ours that we did not owe. Then eventually we reached an agreement with the DFC after a back and forth for a while, for months, that they would sell the property, that we would take out a law suit against the Richard Hoare estate and that the balance if there are any balances remaining after the property is sold will be met from the awards in the lawsuit against Richard Hoare. The DFC made it clear to us and we understood that that was an honourable settlement of the matter, that the property would be sold, we even agreed to assist in the advertising of the sale of the property and that the proceeds if not enough, the balance would be met from the case against Richard Hoare's estate. (**emphasis mine**)

8. After some attempts to sell the property failed, the property was eventually sold on 28th February, 2006 by the claimant to a company named DALT Limited for BZ$900,000. The claimant had by letter to the defendants on 7th April, 2005 informed them, prior to the sale, that the property had been advertised for sale. The amount derived from the sale was credited to the loan, but was not enough to completely discharge the debt, leaving a balance of $782,435.66 which included interest and other fees. As the settlement or agreement above states, if the amount from the sale of the property is not enough to settle the debt, the remaining balance would come from the proceeds of a law suit by the defendant against Richard Hoare. At a board meeting of the claimant dated 8th August, 2005, the board issued a directive with respect to the balance, as a result of the sale of the property, as follows:

> "**BOARD DIRECTIVE**
>
> Date: August 9, 2005
> To: Manager, Credit Administration, Mr. Roberto Bautista
> From: Chairman, Mr. Arsenio Burgos
> RE: Offer to Purchase Cahal Pech Property
> At a Board meeting of August 4, 2005, the Board **accepted** the offer of $0.9 million from DALT Ltd. for the acquisition of the Cahal Pech Property. The outstanding principal balance on the above account is $1.3 million. After considering the offer of $0.9 million from DALT Ltd., the remaining balance will be $0.4 million. The Board agreed to pursue the balance of $0.4 million interest free from Rene Villanueva Sr. and Jr. from settlement of a court judgment against Mr. Richard Hoare.

> The Board approved management's recommendation to write-off $258,630.19(principal of $94,710.76 and interest, escrow/others of $163,919.43)."

9. The lawsuit was brought in 2004 by the defendants against Richard Hoare, namely claim no. 641 of 2004. The court gave judgment on 2nd May, 2012, against the estate of Richard Hoare, as he was deceased since 2007, in favour of the defendants in the sum of $879,694.46, together with interest at the rate of 4% per annum from 2nd May, 2012. Though the defendants obtained judgment, they have not, up to the present, been able to collect any money or proceeds, as a result of the judgment, from the estate of Richard Hoare.

10. The agreement or settlement with the claimant, according to the evidence of the defendants, was that "the proceeds from winning the lawsuit will be used to offset whatever balances there were after the sale" to use the words of the second defendant. But as the defendants accepted, there were no "proceeds" from the lawsuit: they have not collected any money as a result of the lawsuit, though they got judgment. The inevitable result of not getting any proceeds from the lawsuit, is that the agreement or settlement has not been complied with, and consequently the balance of the debt remains with the defendants; for Richard Hoare refused to have the debt transferred to him.

11. But the defendants disagree and contend that a letter dated 2nd August, 2006 from the claimant to the defendants, states that the proceeds from the lawsuit are to be assigned to the claimant, "if awarded by the court." The defendants submit that that phrase in the letter means that if they got money from the lawsuit they are supposed to pay the claimant to settle the debt; and if they did not get that money, the matter was dead: that they did not owe the claimant any money because that was the agreement. This is not only inconsistent with the sworn evidence of the second defendant at paragraph 10 above, but as Miss Vernon in cross-examination has brought out, there is nothing in the letter to support the contention that if no money is collected the matter is dead: that the debt of the defendants is non-existent.

Estoppel

12. The defendants further contend that they are not liable for the debt on the claim; and placed much reliance, in their defence, on the equitable principle of estoppel. At paragraph 27 of the amended defence dated 28th February, 2012, the defence of estoppel is articulated as follows:

> "The defendants say that in any event the claimant is estopped from claiming or maintaining any remaining liability or any further sums on the part of the defendants or any of them in relation to the loan, interest, costs and any monies whatsoever by their words and conduct which unequivocally represented to the defendants that no such liability would be claimed or maintained and that the defendants would claim damages against Richard Hoare and the claimant's right to any further monies would be confined to damages recovered

> from Richard Hoare and that the right to the monies so collected are assigned to the claimant (the representations). (**emphasis mine**)

There are several pieces of evidence upon which the defendants ground the defence of estoppel. Firstly, the number two defendant in his witness statement swore, as we saw above, that before agreeing to the sale of the property to Richard Hoare for BZ$1,850,000, the defendants, Richard Hoare and the claimant met and agreed that Richard Hoare would purchase the property, and that the loan to the defendants would be transferred to Richard Hoare, and that he would assume the loan obligations the defendants had with the claimant, and that the defendants would be relieved from the said obligations. The defendants say that it was on the basis of the above agreement or assurance of the claimant that the defendants made the written agreement with Richard Hoare to sell the property and transfer possession of the said property to him. The claimant is therefore, according to the defendants, estopped from going back on that assurance or agreement.

13. Further, the defendants say that the claimant's borrower ledger card for the period 1st June, 2004 to 31st July, 2006 reflects or shows the above agreement or assurance, in that the ledger card shows clearly that the claimant "cemented that assurance in the minds of the defendants by transferring the loan balance to Richard Hoare which resulted in zero balance to them." This is, according to the defendants, evidence that, in accordance with the agreement above,

that debt or loan was transferred to Richard Hoare in accordance with the assurances or agreement between the claimant and the defendants, and the claimant is therefore estopped from claiming the debt from the defendants. The defendants in the amended defence gave further particulars to support the defence of estoppel as follows:

> "(f) The assurance was again cemented by Executive Chairman of the claimant Arcenio Burgos when Mr. Burgos called in the second and third defendants and confirmed that if the defendants were successful in their claim for damages against Richard Hoare/the Estate of Richard Hoare then the proceeds were to be paid to the claimant but if the defendants were not successful then the claimant would call the balance of the claim a loss.
>
> (g) In reliance on the representations the defendants gave up possession of the Cahal Pech property including their capacity to earn income from the said property and service the loan to the claimant and make profit therefrom.
>
> (h) The defendants have relied upon the representations for all these years to their detriment.
>
> (i) Richard Hoare was killed on the 1st of August 2007.
>
> (j) The Defendants have filed suit against the Estate of Richard Hoare claiming damages for breach of contract.
>
> (k) The claim against the Estate of Richard Hoare has proceeded and at the last hearing the representatives of the Estate told the court that the defendants (claimants in that case) were right in everything they said.

(l) The defendants will pay over to the claimant any monies recovered from the Estate of the late Richard Hoare."

The defendants say that the claimant is estopped from going back on its word, especially in a situation where the defendants suffered detriment by giving up possession of the property to Richard Hoare in reliance on the understanding created by the claimant that the defendants were no longer responsible for the loan and therefore suffered a detriment as shown in paragraph (g) above. The defendants say that, on the facts, it would be unjust, inequitable and unconscionable for the claimant to go back on the agreement or assurances, and the claimant is, on the basis of estoppel, not entitled to the debt claimed in the claim.

14. It is further submitted by the defendants that the Directive above, in particular the following words "The Board agreed to pursue the balance of 0.4 million interest free from Rene Villanueva senior and junior from the settlement against Mr. Richard Hoare" gave the assurance to the defendants that the claimant "would look only to the lawsuit against Richard Hoare for the collection of the balance of 0.40 million." The defendants have submitted that the claimant has made representation to the defendants that it would not seek to recover any loan balance other than by the court action against Richard Hoare, and that the claimants cannot say that that is not true or is not to be relied upon. The claimant by its management, according to the defendants, led them to believe that they would not have to pay any more funds

out of their pockets in relation to the loan. It is instructive to note that the claimant has denied making any such representation as claimed by the defendants. It is said that the directive above led the defendants to that belief; but it depends what is meant by the words "from settlement of a court judgment against Mr. Hoare" as appear in the directive? Do the words mean obtaining judgment in court without receiving proceeds or money from that judgment, or do they mean simply obtaining the judgment? I will return to this matter below.

15. On the issue of the equitable principle of estoppel, reliance was placed on several authorities by the parties. The authorities proclaim that the general principle of promissory estoppel is that when one party to a contract in the absence of fresh consideration agreed not to enforce his rights, an equity will be raised in favour of the other party. The equity so raised is "subject to the qualifications: (1) that the other party has altered his position; (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity to resuming his position; (3) the promise only becomes final and irrevocable if the promisee cannot revoke his position": see ***Lord Hodson in Ajayi v. RT Brisco Nigeria Ltd., 1964 1 WLR 1326 a p 1330***.

16. In ***Amalgamated Investment Property Co. Ltd., v. Texas Commerce International Bank Ltd., 1982 QB 84***, followed in the House of Lords in ***Johnson v. Gorewood Co. 2001 1 AER 481***, Lord Denning gave the principle of estoppel. "When the parties to a transaction" says the Master of the Rolls, "proceed on the basis of an underlying

assumption – either of fact or law – ……. on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the court will give the other such remedy as the equity of the case demands." To invoke successfully the principle of equitable estoppel, the party who seeks to do so has to establish that the other party made by words or conduct, an unequivocal representation that he did not intend to enforce his strict legal rights: see ***Woodhouse AC Isreal Cocoa Ltd SA v. Nigerian Produce Marketing Co. Ltd., 1972 AC 741***; and ***Allied Marine Ltd. v. Vale Do Rio Doce Navaegacao SA 1985 1 WLR 925 at p 941***.

(a) Released from the debt?

17. On the facts, did the claimant make, by words or conduct, any unequivocal representation to the defendants that it did not intend to enforce its legal rights against the defendants for the balance owing on the loan? Accepting that there is an agreement by the claimant, Richard Hoare and the defendants that Richard Hoare would assume the loan obligations of the defendants due to the agreement to sell the property to Hoare, and thereby release the defendants from the debt, the evidence as shown above is that Richard Hoare refused to honour that agreement to purchase the property and to accept the loan obligations of the defendants. It ought not, considering the above refusal of Hoare, be truly said that the claimant went back on its promise or made an unequivocal promise or agreement that it did not intend to enforce its legal rights to the debt, when that agreement or

promise or assurance was made on the condition that Hoare would perform the above act, which he refused to do. In a case of an agreement made between two parties, neither of the parties would be allowed to go back on that agreement when it would be unfair to do so; and if one goes back on that agreement to the detriment of the other, the principle of estoppel arises. But, as in this case before me, where an agreement involves a third party on the condition or assurance that the third party is to perform a certain act in relation to the agreement, and the third party refuses to perform that act, it would, it seems to me, not only be a breach of the agreement by the third party; but also inequitable to hold that any of the other parties is estopped from securing his lawful incidental rights against any of the other parties, which in this case would mean rights to the loan that remained owing by the defendants under the mortgage.

(b) Zero Balance

18. In relation to the borrower ledger card above showing a zero balance, it is submitted for the defendants that the zero balance on the card is conduct by the claimant, that assured the defendants to their detriment that they did not owe the claimant the debt, and led the defendants to believe that the claimants would not seek to recover any loan balance from them. The defendants, to prove that the balance owing on the debt was zero, rely on a statement of account, which they say the claimant delivered to them, and which was tendered as exhibit J.L. 2 covering the period 1st June, 2004 to 31st July, 2006, showing, according to the defendants, a balance owing on the defendants' account as zero. The defendants submit that by the claimant's own

statement of account, their indebtedness to the claimant is zero. Therefore, say the defendants, the claimant cannot go back on its own conduct and accounting record: it is estopped from claiming the amount of the debt from the defendants.

19. Mr. Arsenio Burgos, who was chairman and Chief Executive Officer of the claimant from July 2005 to July 2008 and who is a chartered accountant and member of the Belize Institute of Chartered Accountants, and who was called by the defendants as their witness, in giving his opinion on the zero balance, states:

> "Generally it means when you get to a 0 it either has been paid off or arrangements have been made for it to be paid off. If it has not been paid off it has been transferred to another account because at the DFC what would have happened and I am beginning to speak as an expert now of DFC and a chartered accountant. You could transfer account balances between borrowers once persons agreed that they have taken over a loan. So for example if someone has bought over your house and the payment is in full, they would have zeroed your account and opened a new customer's account.

20. Mr. Burgos agreed that the zero balance was not really a zero balance. It was a transfer from one category to another; or as I understand it, from one account to another account. In effect, the position, according to him, is that when Hoare agreed to purchase the property and take over the loan, it became an arrangement to have the loan paid off, and the debt was consequently transferred to Hoare, and

zero balance was placed on the defendants' account. The defence witness Gabb testified that the claimant transferred the debt to Richard Hoare on the condition that he, along with the defendants, would execute the transfer documents, which was not done. On the transfer of the debt to Richard Hoare, the zero balance appeared; but due to the non-execution of the transfer documents – the refusal of Richard Hoare to accept the debt – the claimant transferred back the loan to the defendants. It was a mistake or premature for the claimant to transfer the debt, and record the zero balance before the transfer documents were signed or executed by the parties. That mistake may have led or led the defendants to believe that they did not owe the claimant and had a zero balance. But it ought to be noted that the defendants knew, as we saw above, that they did not sign any such transfer documents, and that Hoare not only refused to take over the debt, but did not sign any such documents transferring the debt to him. Therefore the defendants could not have believed or have been assured that the debt was transferred to Hoare, and that they were not indebted to the claimant. In those circumstances it would, in my view, be unconscionable, unjust and inequitable to hold that the claimant is estopped from obtaining the balance of the loan. The claimant's promise or assurance was based, or dependent on compliance by Hoare of what he agreed to do. I do not therefore accept, based on the evidence, that the claimant, by the zero balance, gave an assurance or promise to the defendants that the claimant forgave the debt or did not intend to recover the debt from them.

(c) Proceeds from lawsuit

21. The defendants further submit that the claimant had given them assurances, based on the settlement above, that proceeds from the lawsuit would settle the balance owing. Mr. Arsenio Burgos, testified that the Board Directive of 9th August, 2005 above, was never changed, and that it was expected that money would be recovered from the lawsuit and paid to the claimant towards the outstanding debt. He swore that the claimant and the defendants agreed, that they would settle the outstanding amount from the proceeds of the lawsuit against Mr. Hoare. He also testified that the expectation was that monies would be recovered from the lawsuit and paid to the claimant towards the debt. Mr. Burgos swore that at all times the claimant intended to recover the monies due and owing and at all times the claimant maintained that the debt was owed by the defendants.

22. From the evidence of Burgos and Gabb and especially the defendants' evidence and submissions given emphasis at paragraph 7 and 12 above, the parties contemplated monies coming from the lawsuit which would be used to pay the debt. The directive speaks of "settlement from the court judgment" which from the evidence of Burgos indicates collection of monies from the court judgment. In my interpretation of the directive based on the evidence of Burgos, Gabb and the defendants, the words "settlement from court judgment" means money or proceeds from the court judgment, and not simply the act of getting the court judgment. No monies were collected from the court judgment. Based on the above evidence, I do not accept that the claimant promised or gave the assurance to the defendants that if it did not collect monies from the lawsuit, the defendants would be

released from the outstanding debt. For the above reasons, the defence of estoppel fails.

Claimant's loss

23. The defendants also claim that by virtue of the said alleged agreement, the defendants understood that if they were not successful in their claim against Richard Hoare, or did not collect money from the lawsuit, then the claimant would call or accept the balance of the claim as a loss: see second defendant's witness statement. In the said witness statement the said defendant said: "As stated before, if it cannot be collected it would be the claimant's loss." When the evidence above of Mr. Burgos and Mr. Gabb and the defendants is considered, I am not satisfied, on a balance of probabilities, that there was an agreement that if nothing was collected from the lawsuit, the loss would be the claimant's.

The Principal Balance, Other fees, Attorney Fees

24. The claimant, in the statement of claim, claims a principal balance of the debt, after deducting the $900,000 purchase price paid for the property, of $494,710.76; and interest on that amount at the rate of 13% per annum in the amount $268,794.28. The defendants say based on the above directive, that there was a mutual arrangement with the claimant that the principal balance was $400,000, interest free, and a write off of $258,630.19. Although the governing body of the claimant in the directive agreed that the remaining balance on the debt was $400,000 interest free, and approved the write off of the interest, yet interest is claimed in the claim. The claimant states that

the interest of 13% was based on the mortgage deed which specified 12% interest plus 1% percent penalty in the event of default. But the claimant admitted that the board never changed the directive. In addition, the CEO of the claimant at the time, Arsenio Burgos, who signed the directive, referred to the directive as an agreement which was never changed as far as he was aware. Apart from the position that there is evidence that there was a mutual arrangement or an agreement that the balance of the loan would be interest free, which would by mutual arrangement or agreement vary or alter the deed of mortgage as far as interest was concerned, I do not think that the claimant should be allowed to renege on its own directive; be allowed to blow hot and cold, approbate and reprobate, on this issue. The claimant, in my view, has to comply with its own directive which I accept was a mutual arrangement or agreement between the parties.

25. The claimant also claimed the amount of $11,706.70 as "Other Fees up to December" which amount was incurred, according to the claimant, "during the foreclosure process where we published an auction and paid whatever taxes and legal fees." But there is no supporting documents or accounts or evidence showing how this amount was arrived at, or any receipts proving this expense. This is also the case in relation to the claim for $5,878.17 (escrow fees) in the statement of claim.

26. In relation to the claim for the amount of $117,163.48 representing a claim for attorney fees, the claimant admitted that no document was exhibited to support the claim for these fees. Moreover, the witness

who testified in relation to these fees, which were allegedly incurred in 2003, began working on loan recovery in 2007, and based her evidence on what was in a file prepared by persons who did not testify at the trial.

27. For all of the above reasons, I disallow the amounts in the statement of claim of $268,794.28 (interest); $11,706.70 (other fees); $5,878.17 (escrow) fees and $117,163.48 (attorney fees). The claimant claims the principal balance of $494,710.76. This is different from the directive above which sets the principal balance at $400,000. The witness, Miss Leslie for the claimant admitted that the Board of Directors is the highest authority for the claimant, and that she has to agree with the board. For the reasons given above, I accept based on the directive of the board that the principal balance of the debt is $400,000.

Counterclaim

28. The defendants filed a counterclaim against the claimant for $30,278.38 being monies that allegedly belonged to the defendants as part of the proceeds from amount paid to the claimant from the insurance company as a result of the fire. But, according to the policy of insurance, the claimant was the beneficiary under the contract of insurance which had two parties; namely the claimant and the insurance company. The defendants do not appear in that contract, neither as a beneficiary nor as a party. The defendants also claim negligence against the claimant for failure of the claimant to secure the signature of Richard Hoare to transfer to him the liability for the

loan under the mortgage contract and promissory notes. The defendants, not only failed to plead particulars of the alleged negligence; but the evidence shown above proves that it was Richard Hoare who refused to have the loan transferred to him and had refused to comply with the agreement he had with the defendants to purchase the property. There is therefore no merit in the counterclaim. In any event learned senior counsel for the defendants said that the court was advised that the counterclaim "would not be proceeded with."

Conclusion

29. The claimant granted a loan to the defendants who defaulted on the loan. It was the intention of the claimant and the defendants that liability for repayment of the loan was to be transferred to Richard Hoare who had made an agreement with the defendants to purchase the property which was the security for the loan, but that intention was not crystallized by any written and signed document transferring the liability for the loan to Richard Hoare who refused to sign any such document and refused to accept any such liability, and who died in 2007. In spite of Hoare's refusal and though there was no signed document by the parties transferring the loan to Hoare, the claimant had prematurely and mistakenly showed in its accounts Richard Hoare as a debtor and the defendants with a zero balance. On the evidence, this conduct, and a directive issued by the claimant did not estop the claimant from obtaining judgment from the defendants for the debt.

30. The claimant made a settlement or agreement with the defendants to sell the property to pay off the loan; but if the price obtained from the

sale was not enough to satisfy the loan, the agreement was that the defendants would sue Richard Hoare on his written agreement with them to purchase the property, and the proceeds from that lawsuit would fill the shortfall or balance on the loan, and any remaining monies from the lawsuit would be paid to the defendants. The defendants filed the lawsuit and got judgment in May, 2012 against the estate of Richard Hoare; but no proceeds or monies were derived from that judgment. The debt therefore remained with the defendants; and the claimant, on the evidence, is not estopped from getting judgment for the debt. The remaining balance on the debt, having sold the property to another party for $900,000, is in the sum of $400,000 in accordance with the directive issue by the claimant's board of directors, and not the amount claimed in the statement of claim.

31. In relation to interest, escrow, other fees and attorney fees claimed in the statement of claim, these are disallowed based on the said directive and the lack of receipts or other documents or evidence showing how these amounts were arrived at and showing, in the case of other fees, and escrow, that these expenses were incurred by the claimant. There is no merit in the counterclaim. In relation to costs, it is well known that costs follow the event, and the court, in the exercise of its discretion, can consider, on the issue of costs, the conduct of the parties.

32. I therefore make the following orders:

(1) The defendants shall pay to the claimant the sum of BZ$400,000 being a debt owing to the claimant by the defendants.

(2) The defendants shall pay interest to the claimant on the said sum at (1) above at the rate of 6% per annum from 16th March, 2010 until the said sum is fully paid.

(3) The counterclaim is dismissed.

(4) The defendants shall pay to the claimant costs in the sum of $10,000.

Oswell Legall
JUDGE OF THE SUPREME COURT
16th October, 2012