IN THE COURT OF APPEAL OF BELIZE AD 2012

CIVIL APPEAL NO 27 OF 2012

CAHAL PECH LIMITED Appellants
RENE VILLANUEVA SR
RENE VILLANUEVA JR

v

DEVELOPMENT FINANCE CORPORATION Respondent

_____

BEFORE

The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal

M C Young SC along with M Balderamos Mahler for the appellants.
F Lumor SC along with Darlene Vernon for the respondent.

_____

6 November 2014 and 27 March 2015.

MORRISON JA

[1] I have had the pleasure of reading the reasons for judgment prepared by my learned sister, Hafiz-Bertram JA. I agree with them and have nothing to add.

_____
MORRISON JA

HAFIZ-BERTRAM JA

Introduction

[2] The first appellant, Cahal Pech Limited, is a private company incorporated under the laws of Belize. The second and third appellants are Chairman and Director of the first appellant, respectively. The Development Finance Corporation ("DFC"), the respondent is a statutory corporation established under the provisions of section 3 of the Development Finance Act.

[3] DFC sued the appellants for the sum of $898,408.39 being the balance of a loan of $1,428,562.90, which they granted to the appellants. The appellants denied the claim. Legall J in a decision dated 16 October 2012, allowed $400,000.00 of the sum claimed and awarded interest thereon at the rate of 6% per annum and costs to the respondent.

[4] The appellants appealed the whole decision of Legall J. The court heard the appeal on 6 November 2014, which it dismissed and ordered costs for the respondent, fit for two counsel, to be agreed or taxed. These are my reasons for concurring in this decision.

Factual Background

[5] On 31 January 2003, DFC gave the appellants a loan of $1,423,562.90 for the purchase of Cahal Pech Tavern & Cabanas ("the property") situate in San Ignacio Town, Belize. The loan was obtained as a result of a successful bid by the second and third appellants on the property which was operated by a previous owner, Derek Boyd. The agreed purchase price of the property was $1,350.000.00 and the appellants made a down payment of $40,000.00 leaving a balance of $1,310.000.00. The additional fees brought the loan balance to the sum of $1,423,592.90.

The loan agreement

[6] The terms of the loan were contained in a loan agreement dated 24 January 2003. The repayment terms included the following:

> "The sum of One Million Four Hundred and Twenty Three Thousand Five Hundred Sixty Two & 90/100 Dollars (BZ1,423,562.90) 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 instalments of $16,707.77 each payable on the last day of every month in each year (hereinafter called the Due dates), the first instalment being due and payable on April 30, 2003."

[7] The appellants executed several security documents to secure the loan, namely:

(a) Promissory Note executed by the first appellant dated 12 February 2003;

(b) Promissory Note signed by the second appellant dated 12 February 2003;

(c) Promissory Note signed by the third appellant dated 12 February 2003;

(d) A Deed of Conveyance dated 28 February 2003 whereby the title to the property was transferred to the first appellant;

(e) A Deed of Mortgage dated 21 March 2003 whereby the first appellant mortgaged the property to DFC as security for the loan of $1,423,562.90.

[8] On 26 July 2003, fire destroyed part of the property. On 21 August 2003, the Insurers of the property, Insurance Corporation of Belize Limited, paid the sum of BZ$781,950.00 to DFC as the insured beneficiary of the property.

[9] By a written agreement dated 3 April 2004, the appellants sold the property to Richard Hoare (who is now deceased) for the sum of BZ$1,850,000.00. The terms of payment as shown at Clause 3 were as follows:

> "a. An initial down payment of Fifty Thousand Dollars in the currency of Belize (BZ$50,000.00) shall be paid on April 16, 2004 to the Owners.
>
> b. One Million Four Hundred Thousand 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."

[10] At Clauses 4 and 5 of the said agreement, the Purchaser further agreed as follows:

> "4. The Purchaser further agrees to pay to the DFC the sum of Sixteen Thousand Seven Hundred and Seven Dollars and Seventy-seven Cents in the currency of Belize (BZ$16,707.77) on the 25th day of April, 2004 and to pay to the DFC the same amount on the 25th day of May, 2004, being the monthly loan instalment and insurance premium payable by the Owners to the DFC on the said dates.
>
> 5. The date of closing or completion of the sale shall be the 6th day of June, 2004 or such other day and date as agreed by the parties, whereupon the Owners and the Company will execute such documents as are necessary to transfer title of the land and assets to the Purchaser."

[11] By a letter dated 7 September 2004, Mr. Hoare (the Purchaser) wrote to DFC informing them that he would not proceed with the assumption of responsibility for the loan of the property.

[12] Thereafter, as a result of the letter from Mr. Hoare, DFC sent a letter to the appellants dated 22 September 2004, informing them that their account had not been transferred to Mr. Hoare and it was expected that they would continue to service same. They were also informed that as at 31 August 2004, the principal balance was $1,401,576.13, the principal arrears were $5,123.32 and the interest arrears were $42,044.45.

[13] Mr. Hoare delivered the keys to the property to DFC. By a letter dated 29 October 2004, DFC sent the keys to the appellants and reminded them that it was their responsibility to ensure security of the premises.

[14] On 11 November 2004, the appellant sent a letter to DFC indicating that due to problems encountered with the sale of the property they were "*unable to pay the note on the loan and have no choice but to hand 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."*

[15] On 10 December 2004, the appellants issued an action, Action No. 641 of 2004, against Richard Hoare claiming specific performance of an agreement dated 8 April 2004 for the sale of the property and damages for breach of contract in lieu of or in addition to specific performance.

[16] By a letter dated 21 December 2004, DFC informed the second appellant that the property would be advertised for sale as the arrears on the loan were long overdue.

[17] By a letter dated 7 April 2005, DFC informed the second appellant that the property had been published for sale. It furthered informed him that at the expiration of

the publications, the Auctioneer would sell the property to liquidate the outstanding loan accounts. DFC also informed the second appellant that, "..*should proceeds of the sale be insufficient to liquidate your loan account/s, you will be liable to effect immediate payment. Failure to comply, legal action will be taken through the court to collect the balance due to DFC."*

[18] DFC at a board meeting on 8 August 2005, reduced the balance owing on the loan to $0.4 million after considering an offer of $0.9 million from DALT Ltd.

[19] On 2 August 2006, DFC wrote a letter to the second and third appellants and informed them that the property had been sold for $900,000.00. Further, that the payment was applied to their account but was inadequate to liquidate the debt. They were informed that the balance due on the account as of 28 February 2006 was $782,435.66. The letter further stated that, "*As previously agreed, you will seek to settle this outstanding amount from proceeds of lawsuit against Mr. Richard Hoare. In this regards, we request that you submit a signed copy of the said lawsuit and also a letter undertaking to assign the proceeds of the Corporation if awarded by the court."*

[20] On 2 May 2012, there was a trial of the claim for specific performance against the estate of Richard Hoare in Action No. 641 of 2004. The court heard evidence from witnesses for the claimants (appellants) and no evidence was presented by the defendants (personal representatives of the estate of Richard Hoare). Judgment was entered for the claimants who were awarded damages in the sum of $879,594.46 together with interest and costs. The efforts made to enforce the judgment was unsuccessful.

[21] On 16 March 2010, DFC sued the appellants for $898,253.39, plus interest at 13% per annum from the date of the Writ to payment, and costs. The appellants' defence was grounded mainly in estoppel.

Trial judge's findings

[22] The findings of Legall J on the claim were as follows:

1. The defendants defaulted in repayment of instalments on the loan.
2. The debt on the loan agreement and promissory notes entered into by the defendants and DFC were not transferred to Richard Hoare.
3. The inevitable result of not getting any proceeds from the lawsuit against Richard Hoare, is that there was no compliance with the agreement of settlement, and consequently the balance of the debt remains with the defendants since Hoare refused to have the debt transferred to him.
4. The letter dated August 2, 2006 from DFC to the defendants, which states that the proceeds from the lawsuit are to be assigned to DFC, "if awarded by the court", does not support the contention that if no money is collected the matter is dead and that the debt of the defendants is non-existent.
5. The defence of estoppel failed because the learned judge did not accept the evidence that (a) DFC by the zero balance, gave an assurance or promise to the defendants that DFC forgave the debt or did not intend to recover the debt from them; (b) DFC 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.
6. The judge accepted based on the directive of the board that the principal balance of the debt is $400,000.00.
7. There was no merit in the counterclaim.

[23] As a result of the findings of the learned trial judge, he made 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 the costs in the sum of $10,000."

Grounds of appeal

[24] The grounds of appeal were:

1. The learned trial judge erroneously found that "*Perhaps defaults in paying the instalments pushed the Defendants to sell the property." (para 5)*

2. The learned trial judge erred in finding that:

   (a) "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." (para 10 of judgment)

   (b) The defendants contend that the agreement was clearly that the matter of the outstanding balance would be settled by the defendants suing Richard Hoare and DFC would look only to the proceeds of such claim (if any) for collection of such balance."

3. The learned trail judge erred in finding that the position of the defendants that if no proceeds were collected from the Hoare estate then the debt was dead, was inconsistent with the sworn evidence of Rene Villanueva Sr. (para 11)

4. The trial judge referred to the letter of 2nd August 2006 as containing nothing to support the contention that if no money is collected the debt is dead. But the absence of an express statement to that effect in the letter was not inconsistent with the position of the defendants. And the Court omitted to note that the letter did not state (which it could have) - that if the defendants did not collect moneys (or sufficient moneys) from the lawsuit against Richard Hoare that the defendants would be responsible for the balance. (para 11)

5. At paragraph 17 of the judgment, in dealing with the issue "Release from debt" the Court focused on the fact that the agreement by

which Richard Hoare took over Cahal Pech involved a "third party" and found that it was unfair for other parties to suffer when that third party does not fulfil his obligation. But the appellants contend that the court was addressing the wrong agreement. The "agreement" in issue was not that between the appellants and Richard Hoare but between the respondent and the appellants – that Richard Hoare was buying the place and the respondent was transferring the debt to Richard Hoare and releasing the appellants from the debt.

6. In addressing the issue of the "zero balance", the learned trail judge erroneously approached the determination of the matter exclusively on the issue of whether the zero balance in the accounts of the respondent signified (as a matter of technical accounting) that the balance that the appellants owed to the respondent was zero; the issue was instead whether the provision of the "zero balance" statements to the appellants led them as laymen to believe that the balance was indeed zero and to rely on that belief to their detriment.

7. The evidence in the case was compelling that the respondent did engage in conduct that (at the very least) misled the appellants into believing that
(a) with the sale of the property by the respondent for $0.9 million and
(b) the agreement by the appellants to suing Richard Hoare for breach of the agreement for purchase of the property, the debt to the respondent was settled provided that they would pay the respondent any funds recovered through that law suit that would cover the shortfall.

8. The appellants contended that the evidence in the case compellingly established the defence of *estoppel* as a bar to the respondent's claim.

Relief sought

[25] The appellants sought (a) the setting aside of the orders made by the learned trial judge as set out in paragraph 20 above; and (b) the appellants be paid costs in the Court of Appeal and the Court below.

Determination of the grounds of appeal

Issue 1: *Whether the learned trial judge erroneously stated that "perhaps defaults in paying the instalments pushed the appellants to sell the property."*

[26] The learned trial judge at paragraph 5 of his judgment, which is headed "**The 2004 agreement**", stated in the first line of that paragraph that, "*Perhaps defaults in paying the instalments pushed the defendants to sell the property*." The appellants at ground 1 of the grounds of appeal stated that this was an erroneous finding by the learned trial judge. The statement made by the learned trial judge, in my opinion, was not a finding as to why the property was sold. He was merely making a statement after finding at paragraph 4 of his judgment that he was satisfied on the evidence that the **appellants had defaulted in repayment of instalments on the loan.** The word 'Perhaps' at the beginning of the sentence (and the paragraph itself) could not have been a finding by the learned trial judge as to the reason for the sale of the property. The central issue that was being considered under the heading, "**The 2004 agreement**", (between the appellants and Richard Hoare for the sale of the property) was whether the debt on the loan agreement and promissory notes entered into by the appellants and DFC were transferred to Richard Hoare. Legall J found that the loan agreement and promissory notes were not transferred to Richard Hoare. The evidence showed that though Hoare took possession of the property for two months, there were no signed documents by DFC, Hoare and the appellants transferring liability of the appellants loan to Hoare.

[27] The appellants were concerned as shown in their submissions at paragraph 6(3) that *"a defaulting disposition on the part of the Defendants may conceivably colour the Court's view and disposition.* It was further submitted for the appellants that they were not of a defaulting disposition, and the court was referred to paragraph 47 and 48 of the witness statement of Rene Villanueva Sr. which states:

> "*During material times we have borrowed $250,000 from the Claimant, paid it off and the Claimant has returned our collateral.*

We have taken out another loan with the Claimant and are up to date."

[28] The learned judge's finding on the default itself was based on evidence which he considered at paragraphs 2 to 4 of his judgment. At paragraph 3 of the judgment he said:

> "3. *But the defendants gave evidence that they never defaulted in repaying the loan, or on payment of the instalments 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 Ms. 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 evidenced that the defendants defaulted in repayment of instalments on the loan."*

[29] It was after making the finding on the default in the repayment of the instalments on the loan that the learned trial judge considered the 2004 agreement between the appellants and Richard Hoare for the sale of the property. In that context he made the statement that, "*Perhaps defaults in paying the instalments pushed the defendants to sell the property."* The court did not speculate on the default itself, which will be discussed further below, and therefore, this statement could not have coloured the Court's view and disposition as submitted by learned counsel for the appellant.

[30] Learned senior counsel, Mr. Lumor for DFC submitted that the finding by the learned trial judge that the appellants were in default of the loan was based upon an abundance of evidence produced during the trial. Learned senior counsel relied on the case of **Arthur Hoy Jr. & anor. v Aurora Awe & Ors.,** Civil Appeal No. 2 of 2006, Court of Appeal of Belize, 27 October 2006 (unreported), which shows the principles that should guide an appellate court in respect of findings of fact. At paragraph 4, Carey JA, as he was then, said:

> *"4. The approach of an appellate court to an appeal on the facts is not in doubt, and has been articulated in a number of cases, including Watt (or Thomas) v Thomas [1947] A.C. 484: Benmax v Austin Motor Co. Ltd. [1955] 1 All ER 326: Industrial Chemical Co. (Jamaica) Ltd. V Ellis [1982] 35 WIR 363. The principles to be derived from these cases counsel caution on the part of an appellate court in respect of findings of fact. Where the finding is based on the credibility of a witness, that is, on perception, then an appellate court ought not to interfere. Where, however, the finding is based on inferences drawn from proven facts or on the evaluation of evidence then this court is at liberty to form its own view and act on it. Thus guided, I now examine the findings of fact to see which side of the line they fall viz., findings based on credibility or findings based on evaluation by the judge below."*

[31] It can be seen from paragraphs 3 and 4 of the judgment (as shown above) that the learned trial evaluated the evidence which included documentary evidence and found that there was default. Legall J relied heavily on the evidence of default from the appellants' own witnesses, Troy Gabb and Arsenio Burgos. He further relied on the documentary evidence from the third appellant, Rene Villanueva Jr., a letter dated 11

November 2004, to DFC in which he informed DFC that he was unable to pay the loan note. As such, I see no reason to interfere with the finding of the learned trial judge that the appellants defaulted in repayment of instalments on the loan. It was based on the finding of default that the learned trial judge made the statement *"perhaps defaults in paying the instalments pushed the appellants to sell the property",* before moving on to look at the sale agreement and the issue of whether the debt on the loan agreement and promissory notes entered into by the appellants and DFC was transferred to Richard Hoare. Accordingly, there was no merit in saying that the learned trial judge erroneously made the statement.

Issue 2: *Whether the agreement between DFC and the appellants was that the debt would be settled only if proceeds were collected from the lawsuit.*

[32] The central issue in grounds 2, 3 and 4 was the meaning of the agreement between DFC and the appellants, that is, whether the debt would be settled only if proceeds were collected from the lawsuit. The three grounds of appeal were derived from paragraphs 10 and 11 of the judgment of Legall J which fell under the heading of "**The Settlement**". The learned trial judge considered the evidence of the settlement between the parties from paragraphs 7 through 11. He made his conclusions and finding at paragraphs 10 and 11.

[33] At paragraph 7, he stated that since Richard Hoare refused to take over the debt, DFC and the appellants considered an option to repay the loan. They had several meetings and an agreement was reached to settle the outstanding amount of the loan. That agreement was not put in writing by the parties. The terms of the settlement were stated in the witness statement of the second appellant and also his evidence in cross-examination. The evidence considered by the trial judge in relation to the agreement is stated at paragraph 7 of his judgment 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 added by the learned trial judge)

……..

"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 lawsuit 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 added by the learned trial judge)

[34] The learned trial judge at paragraph 8 of his judgment then considered the evidence on the sale of the property which occurred on 28 February 2006 for BZ$900,000.00. The money received from the sale was credited to the loan leaving a balance of $782,435.66 which included interest and other fees. DFC at a board meeting on 8 August 2005, reduced this balance to $0.4 million. This was evidenced by a board directive which was quoted at paragraph 8 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)."

[35] At paragraph 9 of his judgment, the learned trial judge considered the evidence in relation to the lawsuit brought against Richard Hoare by the appellants. That evidence was that the lawsuit was brought by claim no. 641 of 2004 and Richard Hoare died in 2007. Judgment was entered by default on 2 May 2012 against the estate of Hoare, in the sum of $879,694.46, together with interest at the rate of 4% per annum from 2 May 2012. The appellants were unable to collect any money or proceeds as a result of the judgment as ordered, from the Richard Hoare estate.

[36] The highlighted portion of paragraphs 10 and 11 quoted below show the cause for grounds 2, 3 and 4 of the grounds of appeal:

"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 the phrase in the letter means that if they got the 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."*
> (emphasis mine)

Impact of not getting any proceeds from the lawsuit

[37] The undisputed evidence was that the appellants were unable to get any proceeds from the lawsuit. The question that was considered by Legall J, was the effect on the agreement to settle, as a result of not obtaining any proceeds from the lawsuit. The learned trial judge quoted the evidence of defendants as saying that, *"the proceeds from winning the lawsuit will be used to offset whatever balances there were after the sale."* This statement, in my view, was crucial and showed that the appellants had good intentions to make the balance of payment to DFC from the proceeds of the lawsuit. The second defendant's evidence at paragraph 31 (c) also showed the true arrangement between the parties where he stated, "*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."* There was a balance which was reduced by the Board to $0.4 million. The possibility of not getting any proceeds from the lawsuit was never discussed and it cannot be read into the agreement that if no proceeds were collected from the lawsuit then the debt was not recoverable. There was no evidence of such a directive from the Board. The Board was clear in its directive that it will *"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."* Since there were no proceeds from the lawsuit, then the $0.4 million could not have been paid under this agreement. The appellants' argument that "DFC would look only to the proceeds of such claim (if any) for collection of such balance," cannot be

accepted. 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). There was no approval to write off the entire debt if no monies were collected from the judgment. It was clear from the evidence of the second defendant that "*the proceeds from winning the lawsuit will be used to offset whatever balances there were after the sale".* Unfortunately, for the appellants, there were no proceeds from the lawsuit, and this in my opinion, meant that the debt could not be settled through this agreement. As a result, this meant that the debt remained unpaid.

[38] The appellants, as submitted by learned senior counsel, Mr. Lumor, were required to pay DFC "money" recovered from the lawsuit against Richard Hoare. In my view, the agreement between the parties must be interpreted in accordance with business common sense. See **Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd.** [1977] AC 749, where Lord Steyn said at page 771 that:

> " *….In determining the meaning of the language of a commercial contract, and unilateral contractual notices,* ***the law therefore generally favours a commercially sensible construction****. The reason for this approach is that a* ***commercial construction is more likely to give effect to the intention of the parties****. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language…"*
> (emphasis added)

[39] For the above reasons, the learned trial judge, in my opinion, did not err in his finding that, "*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*." As such, grounds 2, 3 and 4 are without any merit.

Issue 3: Whether the learned trial judge was addressing the wrong agreement at paragraph 17 of his judgment.

[40] The central issue in ground 5 of the grounds of appeal was whether the learned trial judge was addressing the wrong agreement. The appellants stated at ground 5 that: "At paragraph 17 of the judgment, in dealing with the issue "Release from debt" the Court focused on the fact that the agreement by which Richard Hoare took over Cahal Pech involved a "third party" and found that it was unfair for other parties to suffer when that third party does not fulfil his obligation. But the appellants contend that the court was addressing the wrong agreement. The "agreement" in issue was not that between the appellants and Richard Hoare but between the respondent and the appellants – that Richard Hoare was buying the place and the respondent <u>was transferring the debt to Richard Hoare and releasing the appellants from the debt</u>."

[41] The appellants contended that DFC was the representor or encourager and the appellants were the representees or the persons encouraged. They argued that the proper perspective is that DFC led the appellants to believe that the loan had been transferred to Hoare and the balance on their account was zero. The appellants further contended that in making this representation, DFC was taking a risk that Hoare would not perform the obligations under the loan. As such, Hoare was just a happenstance in the conduct of the parties which gave rise to the estoppel.

[42] Learned senior counsel, Mr. Lumor, in response submitted that the debt was not transferred to Richard Hoare and this is evidenced by the letter of DFC dated 22 September 2004. Further, that the doctrine of subrogation was intended if the account was transferred. He further contended that the appellants knew that the account was not transferred before they informed the respondent of their inability to "pay the note on the loan."

[43] The letter of 22 September 2004 was from DFC to the Managing Director of Cahal Pech Limited and it addressed the reason the account was not transferred to Richard Hoare. That letter states:

"……

Re: Transfer of Account #130540 to Richard

Dear Mr Villanueva

Further to the request of Mr. Richard Hoare for the transfer of your account into his name, please be advised that the client is no longer interested in assuming the said account (see attached letter).

Consequently, your account has not been transferred to Mr. Hoare and it is expected that you will continue to service same. At August 31st 2004, the account position was as follows:

Account : #130540

Principal Balance	*$1,401,576.13*
Principal Arrears	*$ 5,123.32*
Interest Arrears	*$ 42,044.45*

We look forward to your payments to update the account.

Sincerely
DEVELOPMENT FINANCE CORPORATION
R.A. Bautista
Chief Operations Officer"

[44] It was about two months later, on 11 November, 2004, the second defendant sent a letter to DFC informing them that they were unable to pay the loan note and had no choice but to hand over the keys of the Cahal Pech property to the DFC office. See para 26 above for the letter which the judge quoted in his judgment. The evidence without a doubt proved that the appellants had knowledge that the account was not transferred to Hoare. As such, it cannot be accepted, as argued by the appellants, that DFC led the appellants to believe that the loan had been transferred to Hoare and the balance on their account was zero. The zero balance will be fully addressed at ground 6.

Did the trial judge address the wrong agreement?

[45] Legall J addressed the agreement between the parties at paragraph 17 under the heading "Released from the debt?" which fell under the general heading of '**Estoppel'.** The appellants in their claim had placed great reliance, in their defence, on equitable estoppel and Legall J dealt with the issue of 'Estoppel' from paragraphs 12 to 22 of his judgment. The learned trial judge looked at the law on the equitable principle of estoppel and thereafter dealt with three issues (a) Released from the debt? (b) Zero balance and (c) Proceeds from the lawsuit. Under this ground , the appellants complained about the agreement discussed at paragraph 17 which is headed "Released from debt?" It should be noted that Legall J not only considered submissions on equitable estoppel but, applied the principles to the facts as proven. (The principles of estoppel will be discussed below when dealing with grounds 7 and 8). Legall J considered whether DFC by words or conduct made an unequivocal representation that it did not intend to enforce its strict legal rights.

<u>Paragraph 17 of the learned trial judge's judgment</u>

[46] It would be worthwhile quoting paragraph 17 of the judgment to see the learned trial judge's approach to the agreement. Legall J, under the heading of "**Released from the debt?",** said the following at paragraph 17 of his judgment:

> "*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."

[47] As can be seen from the above paragraph, Legall J first asked himself the question as to whether DFC represented to the appellants that it had no intention of enforcing its legal rights for the balance of the loan against them. He then accepted that there was an agreement by DFC, Richard Hoare and the appellants for Hoare to assume the loan obligations (which arose from the agreement for the sale of the property to Hoare). Thereafter, the learned trial judge correctly took into consideration the evidence which showed that **Hoare refused to honour the agreement to purchase the property and to accept the appellants loan obligations.** As such, he concluded, and rightly so in my opinion, that it cannot be said that DFC "*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."*

[48] In my opinion, the learned trial judge had not addressed the wrong agreement. He addressed the agreement between DFC and the appellants and the reason why the appellants could not be released from the debt. The evidence proved that Hoare breached the agreement to purchase the property and take over the loan obligations. DFC therefore could not transfer the debt to Hoare and release the appellants from their debt.

[49] The appellants had not established that DFC had made by their words or conduct, an unequivocal representation that it did not intend to enforce its strict legal rights. Hoare had refused to accept the loan obligations and there is no evidence which suggested that DFC would have accepted a loss if there was a breach by Hoare. The agreement between DFC and the appellants was conditional upon the agreement for Hoare to accept the loan obligations. The trial judge cannot be faulted for his approach to the agreement. This ground is therefore, without merit.

Issue 4: (Ground 6) *Whether the learned trial judge erroneously approached the determination of the "zero balance" exclusively on the issue of whether the zero balance in the accounts of the respondent signified (as a matter of technical accounting) that the balance that the appellants owed to the respondent was zero.*

[50] The appellants contended that the issue that should have been considered by the learned trial judge was whether the provision of the "zero balance" statements to the appellants led them as laymen to believe that the balance was indeed zero and relied on that belief to their detriment. Learned senior counsel, Mr. Young contended that the appellants believed that DFC would not enforce the loan against them for two reasons: (a) The belief was inculcated when the appellants went to DFC with Richard Hoare for the approval of the sale to him of the property and the assumption by Mr. Hoare of the loan debt to DFC; (b) It was created when the parties agreed that (i) the property would be sold and (ii) the balance of the loan would be recovered through a claim to be filed through the appellants against Richard Hoare. The appellants submitted that the learned trial judge seemed to make great stock of what the Ledger Sheets meant in accounting terms and principles and as such fell into error.

The judge's findings on the zero balance

[51] DFC had recorded on the borrower's ledger card a zero balance which was later reversed as a result of Hoare's non acceptance of the appellant's debt. It was submitted for the appellants before the learned trial judge that the zero balance on the card was conduct by DFC that assured them to their detriment that they did not owe the debt. The appellants had relied on a statement of account which they tendered as exhibit J.L.2 showing the balance owing as zero. As such, the appellants submitted before the learned trial judge that DFC was estopped from claiming the amount of the debt from them. The learned trial judge faced with this submission considered the evidence of Mr. Arsenio Burgos who was a witness for the appellants and gave his opinion on the zero balance. Mr. Burgos was the chairman and Chief Executive Officer of DFC and he is a chartered accountant and member of the Belize Institute of Chartered Accountants. The learned trial judge at paragraph 19 of his judgment quoted Mr. Burgos's opinion on the zero balance. Mr. Burgos said:

> "*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.*"

[52] The judge's understanding of Mr. Burgos's evidence as shown at paragraph 20 of his judgment was that the zero balance was not really a zero balance. The reason being, as shown by the evidence of the witness Gabb, was that DFC transferred the debt to Richard Hoare on the condition that he and the appellants would execute the transfer documents. Richard Hoare later refused to accept the debt and the transfer documents were not executed. The learned trial judge said that 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."*

[53] The zero balance was a live issue before the learned trial judge and it was not erroneous for him to look at the significance of the zero balance. Whether it was a mistake or premature to record the zero balance as stated by the learned trial judge, the reality of the situation was that when the transfer of the debt was done by DFC, the condition to do so was not met. That is, the transfer documents were not executed. Therefore, I was not in agreement with the submission of the appellants that the issue that the trial judge should have considered was whether the provision of the "zero balance" statements to them (the appellants) led them as laymen to believe that the balance was zero and they relied on that belief to their detriment. It was pertinent for the learned trial judge to examine DFC's ledger sheets and what it meant in accounting terms and principles. Legall J had expert evidence from the appellants' own witness who explained that an account is zeroed when there is a payment in full. Hoare did not live up to his end of the agreement so there was no payment in full and the "zero balance" was not in fact a "zero balance". DFC's promise or assurance as stated by Legall J was dependent on compliance by Hoare to take over the debt and execute the transfer documents.

[54] The learned trial judge also looked at the knowledge of the appellants in relation to whether they were aware that the debt was not transferred to Hoare. He said that the appellants "*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 they were not indebted to the claimant."* By the letter dated 22 September 2004, DFC informed the appellants of the amount owing on the account and requested that the appellants make payments to update the account. Thereafter, on 11 November 2004, the third appellant informed DFC that he was unable to pay the note on the loan. The learned trial judge was therefore, in my opinion, correct when he stated that it would be unconscionable, unjust and inequitable to hold that the claimant is *estopped* from obtaining the balance of the loan. The learned trial judge was also correct when he stated that he could not accept that DFC, by the zero balance, gave an assurance or promise to the appellants that they (DFC) forgave the

debt or did not intend to recover the debt from him. The undisputed evidence was that Hoare breached the agreement to take over the debt and he did not execute the transfer documents. As a result, the ledger sheets could not have maintained a zero balance in favour of the appellants. The learned trial judge was therefore, not erroneous in his approach to the "zero balance" based on the evidence that was before him. This ground in my view, was therefore without any merit.

Issue 5: *Whether the evidence in the case established the defence of estoppel as a bar to the claim by DFC.*

[55] The appellants grounds 7 and 8 are:

> "7. The evidence in the case was compelling that the respondent did engage in conduct that (at the very least) misled the appellants into believing that (a) with the sale of the property by the respondent for $0.9 million and (b) the agreement by the appellants to suing Richard Hoare for breach of the agreement for purchase of the property, the debt to the respondent was settled provided that they would pay the respondent any funds recovered through that law suit that would cover the shortfall.
>
> 8. The appellants contended that the evidence in the case compellingly established the defence of *estoppel* as a bar to the respondent's claim."

[56] The central issue under the above grounds was whether the evidence in the case established the defence of estoppel as a bar to the claim by DFC. In the claim before the learned trial judge, the appellants in their defence, relied on the equitable principle of *estoppel.* At paragraph 27 of their amended defence, they pleaded 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 or 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."
> (emphasis added)

The learned trial judge dealt with the appellants defence of *estoppel* from paragraphs 12 through 22 of his judgment and found that the defence of *estoppel* failed for several reasons. Before looking at the reasons given by Legall J, I will briefly outline the law on equitable estoppel.

Equitable *Estoppel*

Meaning of *estoppel*

[57] " '*Estoppel'* has been described as a principle of justice and equity which prevents a person who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable (unconscionable) for him to do so. See **Moorgate Mercantile Co Ltd v Twitchings *[1976] QB 225*** at 241, [1975] 3 All ER 314 at 323 per Lord Denning MR;…. The person making the statement, promise or assurance is said to be estopped from denying or going back on it; 'estopped' means 'stopped'. **McIlkenny v Chief Constable of West Midlands Police Force [1980] QB 283** at 316, [1980] 2 All ER 227 at 325, per Lord Denning MR; ……." See Halsbury's **Laws of England 5th Edition, Volume 47** at paragraph 301.

Kinds of estoppel

[58] At common law, Coke identified three kinds of estoppel: (1) estoppel by record or quasi by record; (2) estoppel by deed; and (3) estoppel in pais.

Common law estoppel by representation has since developed from estoppel in pais and in equity two further kinds of estoppel by representation have developed; promissory estoppel and proprietary estoppel. (See **Halsbury's Laws of England 5th Edition, Volume 47** at paragraph 302).

[59] The appropriate estoppel relied on by the appellants in this appeal as shown by the defence and submissions of the appellant was estoppel by representation, in particular, promissory estoppel.

The general principle of *estoppel* as stated by Lord Denning

[60] In **Amalgamated Investment Property Co. Ltd., v Texas Commerce International Bank Ltd**., **[1982] QB 84** (a case cited by the appellants and relied on by Legall J), Lord Denning at page 122 speaking on the doctrine of estoppel said that it can be seen to merge into one general principle as follows:

> "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - 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 courts will give the other such remedy as the equity of the case demands."
> (emphasis added)

Johnson v Gore Wood & Co. [2001] 1 All ER 481

[61] In **Johnson's case,** which was cited by the appellants before this court and in the trial before the learned trial judge, the general principle, as stated by Lord Denning in **Amalgamated Investment Property Co. Ltd.,** was discussed. Lord Goff of Chieveley said that Lord Denning did not mention estoppel by convention and he suspected that

his statement may be too categorical but, accepted that it embodies a fundamental principle of the law of contract. Lord Goff concluded that the "many circumstances capable of giving rise to an estoppel cannot be accommodated with a single formula, and that it is **unconscionability** which provides the link between them".

Focus of *estoppel* - prevention of unconscionable conduct

[62] The appellants relied on many authorities which dealt with unconscionability. These authorities show that the doctrine of estoppel is a fundamental principle in equity with its focus being to prevent unconscionable conduct. See for example (1) **Halsbury's Laws of England 4th Edition at paragraph 1072**; (2) **Theresa Henry, Marie Ann Mitchell v Calixtus Henry [2010] UKPC** at paragraph 41; (3) **Helena Fanis v Housing and Urban Development Corporation & another SLUHCV 2006/0861**; (4) **Westminster Oil Limited and others v International Investments House Co. LLC and others HCVAP 2009/004.**

Promissory estoppel

[63] In **Halsbury's Laws of England, 5th Edition, Volume 47 (2014)** at paragraph 385, promissory estoppel, in general, is stated as follows:

> "When one party has, by his words or conduct, made to the other a **clear and unequivocal promise or assurance** which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced…"

[64] Estoppel must therefore be clear and unequivocal as was discussed in **Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] AC 741 at 768, [1972] 2 All ER 271 at 291,** HL. Lord Cross of Chelsea said that: "… in **Marquess of Bute v. Barclays Bank Ltd. [1955] 1 Q.B. 202,** McNair J. … said,

at p. 213, "that to found an **estoppel a representation** must be clear and unequivocal "or at least reasonably understood to be clear and unequivocal." See also **Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade [1983] 2 AC 694, [1983] 2 All ER 763,** HL.

Representation required in promissory estoppel

[65] As shown in **Halsbury's Laws of England 5th Edition, Volume 47,** at paragraph 386**,** representation is a promise not to enforce legal rights. It states:

> "The representation required in promissory estoppel is a representation that one party will not enforce his strict legal rights and may be a representation of present or future intention not to do so. The principle usually arises where there is a contract between A and B, and B subsequently grants to A a concession, not supported by consideration, that he will not enforce a particular provision of their contract. In the *High Trees* case usually regarded as the basis for the modern law of promissory estoppel, a lease was entered into in 1937 in respect of a new block of flats in central London. The tenant experienced difficulty in sub-letting the flats due to war-time conditions and so the parties agreed that, whilst war-time conditions remained, the landlord would accept only half the ground rent. After the war, the landlord successfully claimed the other half of the ground rent in respect of the period after war-time conditions had ceased, but the judge said that, if the landlord had claimed the other half of the rent in respect of the period whilst war-time conditions persisted, he would have failed. Thus, as in *High Trees*, a person may promise to forgo part of a contractual payment; or to allow more time for the performance of an obligation; or to accept a less onerous way of performing the obligations under a contract …"

Unconscionability required for promissory estoppel to arise

[66] As shown by **Halsbury's Laws of England, 5th Edition, Volume 47** at paragraph 389, unconscionability is required for promissory estoppel to arise. It states:

> "**In order for a promissory estoppel to arise, it must be unconscionable for the promisor to resile from his promise.** The promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position and the promise becomes final and irrevocable only if the promisee cannot resume his position. The fact that the promisee

has not altered his position to his detriment is most material in determining whether it would be inequitable for the promisor to be permitted to act inconsistently with his promise.

Unconscionable conduct by either party may decide the case against him because of the principle that he who comes to equity must come with clean hands. …"

Application of the law by Legall J

[67] The learned trial judge considered the authorities cited by the parties and stated at paragraph 15 of his judgment that 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." He then stated that this equity is subject to qualifications which he discussed at paragraph 15 of his judgment and relied on Lord Hodson's speech in **Ajayi v RT Brisco Nigeria 1964 1 WLR 1326** at page 1330.

[68] Legall J rightly concluded that the party who seeks to invoke that principle 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." The learned trial judge relied on **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.

[69] In the case of **Allied Marine Ltd.,** Robert Goff L.J at page 941 **said** that a party who invokes the principle of equitable estoppel "has to establish that the other made, by words or conduct, an unequivocal representation that he did not intend to enforce his strict legal rights" Goff LJ relied on the **Woodhouse A.C. Israel Cocoa Ltd. S.A.** case, at page 7*55* per *Lord Hailsham* of St. Marylebone L.C.

Reasons given by Legall J for the failure of the defence of estoppel

[70] The reasons given by Legall J for the failure of the defence of *estoppel* have been discussed in issues already addressed above. Briefly, these reasons are: (i) Legall J stated that it ought not, considering the refusal of Hoare to honour the agreement to purchase the property and accept the loan obligations, to be said that DFC went back on its promise or made an unequivocal promise that it did not intend to enforce its legal rights to the debt, since the promise was made on the condition that Hoare would perform the agreement. (See paragraph 46 above - "Release from debt" for his full reasons); (ii) Legall J did not accept that DFC, by the zero balance, gave an assurance or promise to the appellants that it forgave the debt or did not intend to recover the debt from them (See paras 50 - 54 above); (iii) Legall J did not accept, based on the evidence, that DFC promised or gave any assurance to the appellants that if it did not collect monies from the lawsuit, the appellants would be released from the outstanding debts (See paras 32 – 39 above).

Discussion on the representation made by DFC

[71] The appellants contended that they were mistaken in their belief that DFC would no longer hold them responsible for the loan since DFC made representations to them that (a) the loan was being transferred to Hoare and (b) the entries in DFC's books corroborate the representation. They further contended that after DFC made known to them that they were still liable for the loan they thought that the agreement made between the parties (the agreement discussed above at paragraph 33) would be "an agreement to settle the whole matter."

[72] In my view, the representation made by DFC to the appellants was done under the condition that Hoare would take over the loan obligations. The evidence as proven showed that Hoare breached that agreement as he refused to purchase the property and take over the loan obligations. The appellants were given notice by DFC that Hoare refused to accept the loan obligations as was evidenced by the letter dated 22

September 2004 (See para 43 above). As such, it is my opinion, that it was not unconscionable for DFC to enforce its legal rights against the appellants for the balance of the loan. Further, DFC has not shown any conduct that was unconscionable towards the appellant. DFC had in fact reduced the loan balance to 0.4 million in favour of the appellants.

[73] The reasons given by the learned trial judge to show why the defence of estoppel failed have been discussed under the grounds already discussed above (See paragraph 70). As such, it would not serve any useful purpose to revisit same. The learned trial judge has also considered at paragraph 17 of his judgment, when the principle of *estoppel* would arise. He stated if there was an agreement between two parties and one party went back on that agreement to the detriment of the other, then it would have arisen. He considered the evidence before him in which the agreement involved a third party, Richard Hoare, who had agreed to purchase the property and take over the loan, but later refused to do so. He correctly concluded that since Hoare breached the agreement, it would have been inequitable for him to hold that DFC was *estopped* from securing its lawful rights to the balance of the loan. In my view, promissory estoppel could not have arisen in this case as DFC had not acted unconscionable when it requested the balance of the debt from the appellants. DFC had informed the appellants that Hoare was no longer interested in assuming the account and as a result the account was not transferred to him and they (the appellants) were required to service the account. Further, there was no clear and unequivocal representation by DFC to the appellants that if Hoare did not take over the loan obligations, they (DFC) will not enforce its strict legal rights against the appellants.

[74] Learned senior counsel, Mr. Lumor submitted that for the appellants to succeed on grounds 7 and 8, they would have been required to meet the threshold established by the Privy Council in **Industrial Chemical Co. (Jamaica) Ltd. v Ellis (1986) 35 WIR 303.** (See the principles governing the approach of an appellate court to review the decision of a trial judge on disputed issues of fact, discussed at paragraph 30 above).

[75] In my opinion, the learned trial judge gave satisfactory reasons for his findings of fact. He also relied heavily on the appellants' own witnesses Mr. Troy Gabb and Mr. Arsenio Burgos. Legall J stated that when the evidence of these two witnesses and the appellants are considered, he was not satisfied, on a balance of probabilities, that there was an agreement that if nothing was collected from the lawsuit, the loss would be that of DFC. I see no reason to disturb this finding and the other findings by the learned trial judge. Grounds 7 and 8 are also without any merit.

Conclusion

[76] It was for all the above reasons that I agreed that the appeal should be dismissed and the order of the learned trial judge upheld. Further, that the appellants pay DFC its costs fit for two counsel, to be agreed or taxed.

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HAFIZ BERTRAM JA

BLACKMAN JA

[77] I agree.

_____
BLACKMAN JA