IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 16 OF 2013

NEW RIVER PARK LIMITED Appellant

v

(1) THE BELIZE BANK LIMITED
(2) REGENT INSURANCE COMPANY LIMITED Respondents

_____

BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

N Uk Myles for the appellant.
R RA Williams SC and L V Staine for the respondent The Belize Bank Limited.
Respondent Regent Insurance Company Limited not participating.

_____

23 March 2015 and 3 March 2017.

SIR MANUEL SOSA P

Introduction

[1] In the pre-dawn hours of 6 January 2004, a two-storey wood and concrete building ('the building') owned by the appellant New River Park Limited ('New River') and situate on the northern bank of the New River in Tower Hill, Orange Walk District was gutted by a fire in respect of which no one has ever been charged with arson. Amongst the circumstances in which this catastrophe occurred, the following are, for present purposes, salient: (a) the building stood on Parcel 723, Block 4, Registration

Section Tower Hill and was, together with such parcel, charged in favour of the respondent The Belize Bank Limited ('Belize Bank'); (b) although the liability of New River to Belize Bank was well in excess of the sum of $200,000.00, the legal charge ('the Charge') was only, to put it in local bankers' jargon, 'stamped to secure' such sum; (c) the building and other items of property inside it were insured against, amongst other perils, fire under a self-styled Fire Insurance Policy ('the Policy') issued by the respondent Regent Insurance Company Limited ('Regent'); and (d) the total sum insured under such policy was $835,000.00. On 22 March 2005, Belize Bank accepted from Regent payment of a sum of $200,000.00 'in full satisfaction of my (*sic*) claim in respect of Fire-New River Park Ltd.' (that being the language of the self-styled Final Discharge) only to then turn to New River with a dunning letter dated 4 May 2005 for 'the sum of $93,838.32 plus interest and cost', which it described as New River's 'loan account balance'. When New River failed to comply with the demand so made, Belize Bank took steps to exercise its power of sale under the Charge.

Pertinent documents and legislation

[2] It is convenient, before turning to New River's response to the taking of such steps, to set out as relevant certain portions of the Policy, the Charge, the Memorandum Accompanying Charge and the Final Discharge and certain provisions of the Stamp Duties Act and the Registered Land Act.

[3] The material clause of Endorsement No 9 dated 16 January 2003 to the Policy, referred to by counsel in their submissions to this Court as the 'Mortgage Clause', states as follows:

> 'Loss, if any, shall be payable to [Belize Bank] as Mortgages (*sic*) or Assignees of mortgagee interest to the extent of their interest. It is hereby agreed that in the event of loss or damage, the Company/Underwriters will pay the Mortgagees or said Assignees to the extent of their interest and that this insurance in so far as concerns the interest therein of the Mortgagees or said Assignees only shall not be invalidated by any act or neglect of the Mortgagor or Owner of the property insured …'

[4] The Charge, executed by New River in favour of Belize Bank and dated 16 April 2003, states -

> 'We, [New River] … HEREBY CHARGE our interest in the above mentioned titles (*sic*) … to secure the payment to [Belize Bank] … of the principal sum of TWO HUNDRED THOUSAND DOLLARS ($200,000.00) with interest at the rate of NINETEEN AND ONE HALF (19½) per centum per annum … The principal sum shall be repaid on Demand together with any interest then due.'

[5] Under the sub-heading Proviso to Discharge appearing at page 9 of the Memorandum Accompanying Charge, also executed by New River in favour of Belize Bank and dated 16 April 2003, there is found the following provision:

> 'If [New River] shall duly pay all principal moneys interest commission bank charges costs and expenses and other moneys secured by the Charge in accordance with his (*sic*) foregoing covenant and agreement in that behalf [Belize Bank] will at any time thereafter at the request and cost of [New River] discharge the security created by the Charge or assign the benefit of the Charge as [New River] may direct.'

[6] The Final Discharge, signed on behalf of Belize Bank upon receiving the sum of $200,000.00 from Regent and dated 22 March 2005, reads -

> 'Claim No FO3/016. Received from [Regent] The sum of Two Hundred Thousand Dollars and Nil Cents being the amount I have agreed to accept in full satisfaction of my claim in respect of Fire-New River Park Ltd which occurred on or about the 06th day of January 19 (*sic*) 2004.'

[7] As material for present purposes, section 59 of the Stamp Duties Act ('the SDA') provides as follows:

> '59.-(1) There shall be paid –
>
> (a) On every fifty dollars or part of fifty dollars of the amount or value secured, or which may at any time be secured, by any

mortgage for the payment … of money …, a duty of ……. $0.75

…

(4) Where the total amount or value secured or to be ultimately recoverable is in any way limited, the mortgage shall be deemed a mortgage for the amount or value so limited.

(5) Where such total amount or value is unlimited, the mortgage shall be deemed duly stamped for such an amount or value only as the stamp thereon is sufficient to cover according to the *ad valorem* scale, and if subsequently money … in excess of that amount or value is advanced or becomes owing, the mortgage shall, as regards that excess, be stamped as a new and separate mortgage executed on the date when such excess is advanced or becomes owing.

…

(7) Mortgagee's costs, charges and expenses, whether expressly secured by the mortgage or not, shall not be subject to an *ad valorem* duty.'

[8] The provisions of section 70(d) of the Registered Land Act ('the RLA') are –

'70. There shall be implied in every charge, unless the contrary is expressed therein, agreements by the chargor with the chargee binding the chargor –

...

(d) to insure and keep insured all buildings upon the charged land or comprised in the charged lease against loss or damage by fire or hurricane in the joint names of the chargor and chargee with insurers approved by the chargee to the full value thereof;'

[9] Section 83 of the RLA is in the terms following:

'83. Upon proof to the satisfaction of the Registrar -

(a) that all money due under a charge has been paid to the chargee or by his direction; or

(b) that there has occurred the event or circumstances upon which, in accordance with the provision of any charge, the money thereby secured ceases to be payable and that no money is owing under the charge,

the Registrar shall order the charge to be cancelled in the register, and thereupon the land, lease or charge shall cease to be subject to the charge.'

The Claim

[10] The response of New River to the taking by Belize Bank of the steps mentioned in the final sentence of para **[1]**, above was to commence legal proceedings in the court below by filing Claim No 630 of 2009. Sought against Belize Bank by the claim form, as amended, were:

'1. A Declaration of the Court that [New River] is not indebted to [Belize Bank] for any sums due or owing, or any sums at all by reason of a discharge duly signed by [Belize Bank] and amounting to a valid accord and satisfaction.

2. Damages suffered by [New River] as a result of his (*sic)* inability to freely transact with the property because of impending threats of sale advanced by [Belize Bank]'

together with interest and costs.

[11] At the time of the filing of the claim, Belize Bank was the sole defendant named in it; and, though Regent came later to be named as a second defendant in the heading of the amended claim form, there was never any corresponding amendment of the body of the form to transform the claim from one against Belize Bank only to one against both it and Regent. What is more, though the order for amendment of the claim form is stated to have been made by the court below on 3 February 2010, every indication is that Regent had become defunct as early as 2008. Thus, Anthony Flynn, a former senior officer of Regent, advised Ms Moody, counsel for Belize Bank at the trial below, by an

undated letter included in the record, of the dissolution of Regent in 2008; and, by letter dated 24 August 2010, also included in the record, the law firm of Barrow & Co advised that of M H Chebat & Co to similar effect. Unsurprisingly, Regent did not participate in the proceedings below and has not participated in those in this Court.

The Pleadings

[12] Amongst the allegations of fact which were pleaded by New River in its statement of claim and which continue to be of importance and interest in this appeal were the following:

> i) that, at the time of the fire, Belize Bank's interest, in the sense of sum owed to it by New River, was in the amount of $274,061.80 with interest and
>
> ii) that the sum claimed by Belize Bank from Regent after the fire was $286,000.00.

In regard to these allegations, Belize Bank admitted in its defence that its claim against Regent was indeed in the sum of $286,000.00, being made up of $235,000.00 representing principal and interest on 'loan facilities' and a figure which it chose oddly to state as 'approximately $52,000.00', rather than simply as $51,000.00, representing the balance under the 'overdraft facility'. The pleading was unambiguous as regards time: these two amounts were outstanding at the time of the fire. In other words, the claim did not include amounts that only came to be outstanding between the date of the fire and the date of the filing of the claim with Regent.

[13] Belize Bank, it should be underscored, further averred that on the date of the settlement of its defence and counterclaim, ie 22 February 2010, there was owing from New River a principal sum of $109,759.47 plus interest on the loan facilities and a further sum of $9,325.65 on the overdraft facility: para 19 of the defence and counterclaim.

The Counterclaim

[14] Belize Bank claimed against New River by way of its counterclaim:

‘i) $111,956.35 plus interest from 18 February 2010 at the rate of 19½% per annum on the demand loan;

ii) $9,329.65 on over draft (*sic*) facility’

together with interest and costs: 8th page, unnumbered, of the defence and counterclaim. (Belize Bank has not explained why these last-mentioned amounts were claimed if, indeed, the figures stated in para 19 of the defence and counterclaim, just set out at para **[13]**, above, are accurate.)

The judgment below (with issues and their resolution)

[15] The judge below, Hafiz Bertram J, as she then was (‘the judge’),dealt in her judgment with five issues said by her to have been agreed by the parties. The first and second, respectively, were:

‘Whether “to the extent of their interest” under Endorsement No 9 in the Policy means only the principal the Charge was stamped to secure or the sum due and owing by [New River] to [Belize Bank] at the time of the fire.’

and

‘Whether [the Charge] limits [Belize Bank’s] interest to the principal sum of $200,000.00 or covers the entire sum [Belize Bank] can demand as due and owing on the Loan.’

Considering them together, the judge concluded that the words ‘“to the extent of their interest” under Endorsement No 9 in the Policy means the sum the Charge was stamped to secure which was Two Hundred Thousand Dollars ($200,000.00)’ and that the Charge ‘limits Belize Bank’s interest to the principal sum of $200,000.00 and not the sum outstanding and owing to [Belize Bank] at the time of the fire which was Two Hundred and Eighty Six Thousand Dollars ($286,000.00)’.

[16] The third issue was:

> 'Whether [Belize Bank's] acceptance of Two Hundred Thousand Dollars ($200,000.00) as "Final Discharge" under Endorsement No 9 of [the Policy] amounts to an accord and satisfaction discharging [New River's] debt to [Belize Bank].'

The judge resolved it by deciding that such acceptance did not amount to 'an accord and satisfaction discharging the debt' in question.

[17] The fourth issue was:

> 'Whether there is a balance outstanding under the Demand Loan and the Overdraft Facility plus interest due and owing by New River to Belize Bank.'

It was resolved by the judge deciding that, on the date of her decision, balances were outstanding, with interest, under both the Demand Loan and the Overdraft Facility. She found that, as at 17 February 2012, such balances were, respectively, $125,399.39 plus interest at the rate of 19½% per annum and $9,329.65.

[18] The fifth issue was:

> 'Whether New River has suffered loss as a result of the inability to freely transact with the said property because of impending threats of sale advanced by Belize Bank and the property's state of deterioration.'

As I understood them, the conclusions reached by the judge in relation to this issue were (a) that whilst New River was indeed unable freely to transact with the property in question, that was simply the result of its continuing to be lawfully charged and (b) that Belize Bank was not responsible for the state of deterioration, if any, of such property.

[19] The judge accordingly dismissed the claim of New River and gave judgment for Belize Bank on the counterclaim, awarding it costs in the sum of $27,709.00.

The grounds of appeal (with the surviving issues)

[20] New River's non-acceptance of the judge's resolution of the issues is reflected in its grounds of appeal (real as well as apparent) before this Court, which, as stated in the notice of appeal, are as follows:

‘1. The … Judge erroneously found that “(i) ‘to the extent of their interest’ under Endorsement No 9 in [the Policy] means the sum the Charge was stamped to secure which was the Two Hundred Thousand Dollars ($200,000.00); (*sic*) The Charge on Parcel 723 limits Belize Bank’s interest to the principal sum of $200,000.00 and not the sum outstanding and owing to Belize Bank at the time of the fire which was Two Hundred and Eighty Six Thousand Dollars ($286,000.00) (See Paragraph 41 of the Judgment); [New River] contends that there was no evidence to support that finding and that the finding was inconsistent with the evidence.

2. The … Judge erred in finding that the Final Discharge signed by [Belize Bank] in relation to its claim under the Endorsement No 9 of [the Policy] was a separate and distinct issue from the discharge of liability of [New River] under the loan it had with [Belize Bank]; specifically that “the receipt signed by Belize Bank was in relation to the assignment of [the Policy] and not a discharge of the liability of [New River]. Accordingly, the court finds that Belize Bank’s acceptance of Two Hundred Thousand Dollars as “Final Discharge” under Endorsement No 9 of [the Policy] does not amount to an accord and satisfaction discharging the debt of [New River] to Belize Bank”. [Paragraph 50 of the Judgment]

3. Having found that the [Final Discharge] did not amount to an accord and satisfaction discharging the debt of [New River] the … Judge further erred in finding that [Belize Bank] is entitled to the sum of $125,399.39 on the demand loan plus interest at the agreed rate and the sum of $9,329.65 on the overdraft facility and even further that [the Charge] was rightfully not discharged when the [Final Discharge] was signed and $200,000.00 accepted by [Belize Bank]. [Paragraph 53 of the Judgment].

4. [New River] contends that the discharge of the claim under Endorsement No 9 also discharged [New River’s] debt to Belize Bank in that the (*sic*) Parcel 723 fundamentally linked the claim under Endorsement No 9 and the Loan obligation. [The Policy] covered Parcel 723 and [the Charge] was

a charge on Parcel 723; therefore the acceptance of the $200,000.00 as "Final Discharge" under Endorsement No 9 amounted to an accord and satisfaction discharging the debt of [New River] and discharging [the Charge].

5. [New River] contends that the evidence in the case compellingly established that the "extent of their interest" meant the $286,000 owed to Belize Bank and that due to [Belize Bank's] failure to discharge [the Charge], [New River] suffered loss and damages.'

My reason for speaking in the opening sentence of this paragraph of 'apparent' grounds of appeal should now be obvious: 'grounds' 4 and 5 in fact consist of no more than contentions urged in support, largely, of the actual grounds of appeal (which actual grounds are all stated at 1, 2 and 3) and, to a lesser extent, of one non-existent ground. As far as New River's rejection of the judge's resolution of the issues is concerned, ground 1 reflects rejection in respect of the first and second issues; ground 2 reflects rejection in respect of the third and fourth issues; and ground 3, overlapping ground 2, reflects rejection in respect of the same fourth issue. So-called ground 4 amounts only to a submission propounded in support of ground 2; whilst so-called ground 5 amounts only to a submission propounded in support both of ground 1 (which, as already pointed out, reflects New River's rejection of the judge's resolution of the first issue) and of what I would describe as an unstated ground questioning the judge's resolution of the fifth issue. In short, then, making very generous allowance for the imperfections in Mrs Uk Myles's statement of grounds, the issues remain the same on this appeal as they were in the court below, a state of things accepted, to all intents and purposes, by Mr Williams SC, as I understand him, in his 'Arguments on Behalf of the 1st Respondent', at para 28.

The respective arguments before this Court (in summary)

i) Regarding ground 1

[21] Mrs Uk Myles, tying together ground 1 and the contention masquerading as ground 5, places heavy reliance on the language of the Charge, which, she points out,

is that New River charges its interest in Parcel 723 "to secure the payment to [Belize Bank] … of the principal sum of … ($200,000.00) with interest at the rate of … (19½) per centum per annum or any other such rate as [Belize Bank] shall charge from time to time …". It may indeed be stated without unfairness that, as far as her submission is concerned, this language is 'the be all and the end all' in this appeal. That said, however, it has to be noted that she clearly regards the first and third issues as matters of evidence and nothing more.

[22] Mr Williams, for his part, argues on behalf of Belize Bank that its interest is determined and measured by the payment of stamp duty on the Charge and that the amount so paid sufficed to cover no more than the principal sum of $200,000.00, from which, it follows, as he contends, that Regent paid, and Belize Bank accepted, no less than the sum of money which ought properly to have been so paid and accepted under Endorsement No 9 of the Policy. In advancing this argument, Mr Williams makes no more than passing reference to the SDA, to which, it should be noted, the judge adverted in her judgment notwithstanding a surprising silence on it from counsel on both sides in their respective submissions to her.

ii) Regarding grounds 2 and 3

[23] In relation to grounds 2 and 3, also combined by Mrs Uk Myles for ease of presentation of her argument, the gravamen of the submissions made on behalf of New River is, for the most part, uncomplicated. Belize Bank had originally submitted to Regent a claim for $286,000.00 as being the extent of its interest in the insured property, viz Parcel 723. Thereafter, however, the latter had offered to pay it the lesser sum of $200,000.00 as being the sum which the Charge was stamped to secure. Belize Bank had accepted such lesser sum and signed the Final Discharge, which was produced by Regent. That was enough, so concludes the argument, to give rise, in law, to an accord and satisfaction operating to the benefit and advantage of New River. But, to the extent that Mrs Uk Myles, notwithstanding her labelling, so to speak, of her argument as one of accord and satisfaction, explicitly relies on the decision in *Hirachand Punamchand & Ors v Temple* [1911] 2 KB 330, her position is, in the final analysis, not altogether devoid of complexity.

[24] Mr Williams, combining, for his part, grounds 2 and 3 and also the so-called ground 4 (in reality, as has been pointed out above, no more than a submission), argues in reply to them that there was no accord and satisfaction and seeks to rely, in so doing, on the decision in *D & C Builders Ltd v Rees* [1966] 2 QB 617. He says that there has been neither an accord nor a satisfaction in the instant case. In his submission, an accord was absent in that, on the evidence, Belize Bank never agreed to accept the sum of $200,000.00 in satisfaction of the mortgage debt; and so, too, was a satisfaction in that, on the evidence, Regent was not acting on any accord when it paid such sum to Belize Bank. The final discharge effected by what he chooses to call the 'receipt' signed by Belize Bank related to Regent's liability under Endorsement No 9 to the Policy, the amount of which was $200,000.00 (given the amount of stamp duty paid on the Charge), not to the liability of New River to repay the loans it had obtained from Belize Bank, the amount of which, at the relevant time, was $286,000.00. Although Belize Bank had initially claimed the latter sum from Regent, it had, by the time of actual payment, come to accept Regent's view that 'the sum of $200,000.00 was the maximum amount that Belize Bank could claim from [Regent] under the Mortgage clause". Mr Williams contends that the judge was right to see in the sum of $200,000.00, which she described as 'the amount of the stamps charged at the time of the incident', the limit to the amount which Belize Bank was entitled to claim from Regent. This means, in his submission, that, as the judge had concluded, Belize Bank was not in any sense 'giving up' any balance of $86,000.00 when it accepted the sum of $200,000.00 from Regent. Put shortly, there was no relevant accord, a conclusion which, in the submission of Mr Williams, also follows from what to him is the absence of any consideration enuring to the benefit of Belize Bank. Mr Williams further contends that the Mortgage Clause was 'a separate and distinct arrangement as between Regent and Belize Bank and could therefore operate only in favour of Belize Bank. It was not there to protect the interests of New River. Moreover, says Mr Williams, the policy was 'a separate and independent contract from the agreements for the Loan Facilities and the Charge and does not serve to replace the said agreements or the Charge'. It follows, so runs the argument, that acceptance of funds under the policy, as relevantly endorsed, 'cannot estop' Belize Bank from taking steps to recover the loan balance. Mr Williams wraps up his

submissions by saying that it is clear from both the language of the Charge and the provisions of section 83 of the RLA that a mortgage debt can only be discharged upon full payment of monies owed to the Chargee under a charge.

Discussion

[25] Given the extent to which two of the only three grounds of appeal interlock as well as their interrelationship with the third, it is most convenient, in my view, that there should now follow a single discussion touching on all germane questions rather than three separate compartmentalised discussions, each addressing a single ground. I shall, of course, keep in mind throughout the discussion two points already noted at para **[20]**, above, viz that these three grounds together address only the first, second, third and fourth issues and that, whilst Mrs Uk Myles did indeed evince dissatisfaction with the judge's resolution of the fifth issue, she did so without actually formulating an appropriate corresponding fourth ground of appeal.

[26] In my opinion, the first crucial question in this appeal is one as to the meaning of the word 'interest' as used in the phrase 'to the extent of their interest' in Endorsement No 9 to the Policy. I can see no reason why the word should not be held to bear one of its ordinary dictionary meanings in the present case. In my view, that meaning is 'a financial stake', one of the many meanings assigned to the word in The Concise Oxford Dictionary of Current English, 8th ed.

[27] What, then, was the financial stake of Belize Bank in the insured property affected by the fire of 6 January 2004? That, as I see it, is a purely legal question. It is, to my mind, answered, but only partially, by Mrs Uk Myles when she submits that 'to the extent of their interest' refers not only to the principal sum of $200,000.00 but also to the interest which had accrued on it up to the date in question. Her answer is incomplete because she goes no farther than to say that that is so for the reason that the Charge expressly secures both principal and interest. Given, however, that the question before the Court is a legal one, its answer is best sought not in the Charge, which may well reflect its author's erroneous understanding of the law, but in the law of Belize. For that law, one needs to turn to the SDA, an excerpt from which was usefully appended by Mr Williams to his Arguments on Behalf of the 1st Respondent. The SDA, as earlier noted,

was cited by the judge in her judgment although it appears not to have been relied upon by either side in the submissions made to her. But whilst the judge, thus deprived of the assistance of counsel, gave some attention to section 59 of the SDA, she said nothing in her judgment of its seventh subsection, which, despite its having already been reproduced above, I will again set out here for the sake of convenience. It reads as follows:

> 'Mortgagees' costs, charges and expenses, whether expressly secured by the mortgage or not, shall not be subject to an *ad valorem* duty.'

That subsection, to my mind, is decisive in the instant appeal for the reason that it leaves free from the burden of stamp duty all mortgagees' charges, of which interest (in the sense of money paid for the use of money lent, for which see the dictionary already cited above) is undoubtedly one. Charge, according to that dictionary, means 'a price asked for goods or services'. (It is noted, in passing, that, while section 59(5), by which stamp duty is imposed, speaks not only of money which is 'advanced' but also of money which 'becomes owing', which latter term may, arguably, be broad enough to include interest, the principle against doubtful penalisation, to which expression was notably given by the House of Lords in *R v Winstanley* (1831) 1 Cr & J 434, is the one which governs in situations of this kind.) In these circumstances, it cannot be the case, as Mr Williams contends and as the judge held, that Belize Bank's interest is determined and measured by the amount of stamp duty paid on the Charge. His argument fails to take into account the undoubted meaning and effect of section 59(7), by which all accrued interest on the relevant loans was secured every bit as well as the principal. That Belize Bank should have meekly accepted Regent's contrary view of the legal position, awkwardly expressed by Mr Flynn of Regent, rather than by a lawyer, in the letter dated 27 April 2004 ('the Regent letter'), is a matter that truly 'passeth all understanding'. (The Regent letter spoke of Regent's being bound to pay no more than 'the amount on the stamps charged', an expression which, with respect, borders on gibberish.) The natural and expected response to Mr Flynn would have been to invoke section 59(7) and, if necessary, seek a declaration from the Courts as to its true interpretation. That

pontifical pronouncement of Regent's notwithstanding, the Charge was good, to put it colloquially, for both principal and interest as at the date of the fire.

[28] Where, then, does that leave New River in terms of its application for a declaration? The researches of Mrs Uk Myles have not enabled her to place before this Court any authority in which it was decided that the doctrine of accord and satisfaction applies in a case where a debt owed by A to B purports to be settled by C, acting in his or her own right. Nor do I know of any such authority. In the circumstances, I cannot countenance Mrs Uk Myles' attack on the conclusion of the judge that there was no accord and satisfaction in the instant case.(It may be observed here that Mr Williams omits to deploy this particular point in his submissions in reply.)

[29] But the matter cannot end there, for, as already adumbrated above, Mrs Uk Myles, even though marching under the banner of accord and satisfaction, undeniably also places heavy reliance on *Punamchand's* case. And the decision of the English Court of Appeal in *Punamchand's* case, in contrast to that of Scrutton J at first instance, is not one turning on the law of accord and satisfaction. In that case, after Scrutton J had held in the lower court that there had been no accord and satisfaction when Sir Richard Temple's solicitor's paid to creditors of his son ('the son'), by way of a draft, a lesser sum than that owed, under a promissory note, to them, all members of the appellate panel proceeded to give judgment in favour of the son (who was the appellant) even whilst assuming that there was indeed no accord and satisfaction. Thus Vaughan Williams LJ said, at pages 335-336:

> 'The learned judge dealt with the case largely on the footing that the question was whether the effect of the transaction between the plaintiffs and the father was that there had been an accord and satisfaction in respect of the debt due upon the note, and he came to the conclusion that there had been no such accord and satisfaction. Personally, I am inclined to agree that prima facie such an accord and satisfaction must be by virtue of an agreement made between a person who is under an obligation to another person, which he ought to have and has not performed, and that other person.'

Fletcher Moulton LJ, in his own judgment, made no mention whatever of the principle of accord and satisfaction. For his part, Farwell LJ, having opened his judgment by saying that he agreed with the judgment of Fletcher Moulton LJ, went on immediately to add that -

> '[w]hether the facts in this case would support a plea of accord and satisfaction appears to me to be really immaterial …'

and to make it clear that, for purposes of his own judgment, he was '[a]ssuming that an accord and satisfaction must be by agreement between the debtor and the creditor': pages 340-341.

[30] On what basis, then, did the English Court of Appeal allow the appeal of the son? From my own reading of the three judgments, I conclude that there was a consensus amongst all three judges on what Fletcher Moulton LJ said at page 338, viz that –

> '[t]he facts of this case are such that this result [a reference to the allowing of the appeal] may be arrived at by more than one course of reasoning …';

and the judgments certainly reveal the adoption of more than one such course.

[31] Hence, in the case of Vaughan Williams LJ, the kernel of his judgment is found in the following passage, which occurs at page 336:

> '… [S]peaking for myself, I think that this case may be regarded in the following manner. In my judgment, this draft having been sent to the plaintiffs by Sir Richard Temple, and retained and cashed by them, we ought to draw the conclusion that the plaintiffs, who kept and cashed the draft, <u>agreed to accept it on the terms upon which it was sent</u>.' (emphasis added)

A little later, the learned Lord Justice said, *ibid*:

> 'Under these circumstances, assuming there was no accord and satisfaction, what form of defence, if any, could be pleaded by the defendant? In my judgment it would be that the plaintiffs had ceased really to be the holders of the negotiable instrument on which they sued. They had ceased to be such holders, because, in effect, in their hands <u>the document had ceased to be a negotiable instrument</u>

quite as much as if there had been on the acceptance of the draft by the plaintiffs an erasure of the writing of the signature to the note. There was not in fact such an erasure, but to my mind the case must be considered as standing on the same footing as if there [had] been an erasure of the signature, and a cancellation by reason of that erasure of the promissory note, in which case, I think, the maker of the note would have had a defence, though he was not a party to the transaction in pursuance of which the note was cancelled, in the sense of being a contracting party.' (emphasis added)

At page 337, the learned Lord Justice gave an alternative reason for judgment, saying:

'But, alternatively, assuming that this was not so, and that the instrument did not cease to be a negotiable instrument, then, in my judgment, from the moment when the draft sent by Sir Richard Temple was cashed by the plaintiffs a trust was created as between Sir Richard Temple and the money-lenders in favour of the former, so that any money which the latter might receive upon the promissory note, if they did receive any, would be held by them in trust for him. I wish to say here that I do not think that it makes any difference under the circumstances that the amount of the draft sent by Sir Richard Temple was not the full amount of the promissory note, but a smaller amount, because, as between Sir Richard Temple and these plaintiffs there was an agreement by the plaintiffs for good consideration to receive that amount in satisfaction of the note, which agreement arose from their having retained and cashed the draft. Under these circumstances, it may be asked, how could the defendant plead by way of defence? In my judgment, if I am right in saying that any moneys received on the note by the plaintiffs would be held by them in trust for Sir Richard Temple, then, without any question of resort to a Court of Equity, there might have been a defence in a Court of law on the ground that any money recoverable on the note by the plaintiffs was recoverable by them merely as trustees for Sir Richard Temple, and that, under the circumstances disclosed by the correspondence, the relations between the father and son were such that it was impossible to suppose that the father wished to insist on payment of the note by the son.'

[32] The finding of a crucial underlying agreement between the plaintiffs and Sir Richard Temple was also central to the judgment of Fletcher Moulton LJ, who said, at page 338:

> 'I am clearly opinion that there must be taken to have been an agreement between the plaintiffs and Sir Richard Temple, by which the plaintiffs agreed to accept the money sent by him in satisfaction of the note.'

Like Vaughan Williams LJ, Fletcher Moulton LJ went on to explain the consequences of the agreement so found, stating, at page 339:

> 'I am of opinion that by that transaction between the plaintiffs and Sir Richard Temple the debt on the promissory note became extinct.' (emphasis added)

Extending his line of reasoning, the learned Lord Justice said, at pages 339-340:

> 'The way in which this is worked out in law may be that it would be an abuse of the process of the Court to allow the creditor under such circumstances to sue, or it may be, and I prefer that view, that there is an extinction of the debt; but, whichever way it is put, it comes to the same thing, namely that, after acceptance by the creditor of a sum offered by a third party in settlement of the claim against the debtor, the creditor cannot maintain an action for the balance.' (emphasis added)

[33] Farwell LJ, agreeing, as already indicated above, with Fletcher Moulton LJ, said, at page 340:

> 'In my opinion, it is clear that in the events that have happened the debt became extinguished.'

He went on to venture the view that a plea of accord and satisfaction might perhaps have been appropriate on the basis that there was a tripartite agreement. Thereafter, he said, at page 342:

> 'The plaintiffs could only accept the money on the terms upon which it was offered … In [the case where the money is sent by a third party] the creditor has

no excuse or justification for retaining the stranger's money, unless he complies with the condition on which it was paid.'

Farwell LJ evidently also agreed, however, with the view of Vaughan Williams JA that a trust was created between the creditors and Sir Richard Temple for he further said at page 342:

'If there be any difficulty in formulating a defence at common law in such case [a continuing reference, as I understand it, to the case where the money is sent by a third party], I have no hesitation in saying that a Court of Equity would have regarded the plaintiffs as disentitled to sue except as trustees for the father, and would have restrained them from suing under such circumstances as existed in the present case.'

[34] In the instant case, I am unable to accept that Belize Bank, with (in 2004) some 17 long years of experience in the business of lending, did not at all material times know that it had in its hands, in the form of the Charge, a security which (on the basis of the payment of $3,000.00 in stamp duty, evidenced at the top right corner of the face of the Charge) covered the principal sum of $200,000.00 and, as well, (on the basis of the exemption provided for by section 59(7) of the SDA) all accrued interest. The claim that it had no such knowledge strains credulity to breaking point, not least because, as previously noted above, it, on its own showing, required payment of the entire sum of $286,000.00 by Regent from the outset. But there is, apart from the fact of such requirement, the unexplained and (to me) disturbing failure to produce the letter by which, according to Mr Norman Kaufman, it was evidenced, a letter whose existence Belize Bank was plainly not prepared to deny. (Mr Kaufman was a director and the majority shareholder of New River.) Why was such letter not produced? Was there something about its language which rendered it undesirable, from Belize Bank's standpoint, that the courts should see it? It is not as if New River made no issue of the omission to produce whilst there was still time to repair it. The following excerpt from the cross-examination of Elmer Herrera, a Senior Recovery Officer of Belize Bank and it's sole witness at trial (record, pages 59-60), reveals the commendable diligence of Mrs Uk Myles in this regard:

‘Q. And [Belize Bank] put in a claim for [$]286,000.00, correct?

A. That’s correct.

Q. And [Belize Bank] was aware that [the Charge] was stamped for two hundred thousand dollars plus interest and any other amount that was added to or modified, correct, yet it only accepted the two hundred thousand dollars as evidenced by [the Final Discharge], correct?

A. That’s correct.

Q. Thank you. Now Mr Herrera, here in your disclosure you didn’t disclose the actual claim that [Belize Bank] put forward to [Regent], correct?

A. That’s correct.

Q. I put it to you that you did not disclose it because [Belize Bank] in that claim admitted and knew and acknowledged that its claim was [$]286,000.00 and if it was brought here in court it would counter the defence that you have put forward that there is still a balance owing because when [the Final Discharge] was signed the two hundred thousand dollars settled completely what [New River] owed [Belize Bank].

…

Q. My Lady, I just put it to him that [Belize Bank] did not disclose it because [Belize Bank] would acknowledge before the court that they themselves believe their claim to be $286,000.00.’ (emphasis added)

(The suggestion made by Mrs Uk Myles to Mr Herrera and underlined by me above was followed by an ill-timed interruption on the part of the judge and was, as a result, never responded to by him.) The credibility of Belize Bank is not, in my view, enhanced by its omission to produce this letter.

[35] Nor is it enhanced by the similarly unexplained inconsistencies in the figures presented in the amended defence and counterclaim. As indicated earlier in this judgment, the differences in the manner of setting out the figures in para 19 and in the

claim set out on the unnumbered 8th page of the defence and counterclaim call for some explanation. To repeat for ease of reference: on the one hand, the figures provided at para 19 were '$109,759.47 principal plus interest' on the loan facilities and $9,325.65 on the overdraft facilities. No applicable date being given in para 19, one is left to assume that it is the date of the defence and counterclaim, ie 22 February 2010 which applies. The figures provided at para 32 of the same amended defence and counterclaim, on the other hand, were '$111,956.35 as of the 18th February 2010 plus interest at the rate of 19½% per annum on the demand loan' and $9,329.65 on the overdraft facility. It is difficult to understand how the loan balance on 18 February could have been greater than that on 22 February when New River was not making any payments on the loans at that time. One is left wondering as to, if nothing more, the reliability of the figures advanced by Belize Bank in this litigation.

[36] I also find unsatisfactory and unsettling Belize Bank's reliance on approximation in these proceedings. At para 15 of its amended defence and counterclaim, as has been earlier noted, Belize Bank pleads that the sum of $286,000.00 claimed from Regent after the fire was made up of two smaller figures, viz $235,000.00 and 'approximately $52,000.00'. The difficulty with the use of that approximation is, however, that the difference between $286,000.00 and $235,000.00 is exactly $51,000.00, not 'approximately $52,000.00.' This difficulty is not lessened when, at para 13 of his witness statement, Mr Herrera indicates that the sum of $286,000.00 was made up of smaller sums of $235,000.00 and $52,000.00. If these last two figures were accurate, the sum claimed would be $287,000.00, not $286,000.00. But, as if that were not confusing enough, Mr Herrera asserts at para 17 of the same statement that the lesser of the two smaller sums in question was 'approximately $52,000.00'. It should be noted before departing from this topic that, in the cross-examination of Mr Herrera, neither he nor the cross-examiner showed appreciation of the fact that, in the witness statement, the figure of $52,000.00 is treated as both an exact amount and an approximate amount. This appears in the following exchange (page 58, lines 4-11, record):

> 'Q. Can I refer you to your witness statement, please, at paragraph 13. It says: [Belize Bank] under endorsement 9 of policy F16024 submitted a claim of

$286,000.00 to [Regent] being two hundred and thirty five thousand dollars as principal and interest balance on the loan and $52,000.00 as overdraft facility.

A. That's correct.

Q. And you mentioned it again at paragraph 17.

A. That's correct.'

[37] The judge did not speak in her judgment of having had any difficulty with believing the evidence of the Bank that it regarded the charge as a security that was good for only $200,000.00. But there can be no question that she did believe it. It is just as clear, however, that she herself was of the view that the charge was a good security for a liability of no more than $200,000.00. If she had been of the view, which I respectfully hold, that, as a matter of law, and trite law at that, the Charge was a good security for both the principal sum of $200,000.00 and all interest accrued thereon up to the date of the fire, it is difficult to imagine that she would have believed Belize Bank's evidence in question. I have already drawn attention above to the lamentable fact that, from all indications, neither side adverted to section 59 of the SDA in the course of their submissions to her, from which it is to be gathered that she consulted the SDA on her own initiative. In fairness to, and out of respect for, the judge, I do so again.

[38] Proceeding, then, on the footing that the Bank well knew that it had in its hands a security good not only for a liability in the amount of $200,000.00, as a result of the payment of $30,000.00 by way of stamp duty, but also for a further liability in the amount of all interest accrued to date (ie 6 January 2004), as a result of interest being exempt from stamp duty under section 59(7) of the SDA, it seems to me to be an ineluctable conclusion that Belize Bank accepted Regent's payment to it of only $200,000.00 in full satisfaction of the liability of New River on 6 January 2004, be that $274,061.80 or $286,000.00. The clear language of the Final Discharge was that payment was being accepted 'in full satisfaction of [Belize Bank's] claim in respect of' the fire in question. That was not a claim which was legally enforceable against Regent under the Policy. Belize Bank was, after all, not a party to the Policy and could therefore claim no contractual right thereunder against Regent. The only parties to the Policy

were Regent and New River. As was made clear, in response to a pointed question by the President at the hearing before this Court, the Policy was taken out well ahead of the creation of the Charge. (Belize Bank could, of course, have insisted, by virtue of the provisions of section 70(d) of the RLA, set out at para **[8]**, above, on the taking out of a new policy of insurance to which it was a party; but it evidently chose not to do so.) Nor was Belize Bank an assignee stepping into the shoes of New River under the so-called mortgage clause of Endorsement No 9 to the Policy. That clause, obviously a standard form one, referred to Belize Bank as 'Mortgages (*sic*) or Assignees of mortgagee interest'. It is a clause clearly drawn up so as to apply not only to an original mortgagee (here referred to as 'Mortgages' through what is plainly a typographical error) but also to any other entity, eg another bank, to whom the original mortgagee might assign its 'mortgagee interest'. It is such other entity, not the original mortgagee, who is being referred to in the clause as an assignee. (Thus the Endorsement goes on repeatedly to speak of 'the Mortgagees or said Assignees'.) Moreover, that clause provides for Belize Bank to be paid not all, but a portion only, of the sum insured, the amount of such portion to be determined by the extent of Belize Bank's interest. The rest of the sum insured is to be available to indemnify New River against its own losses. It would surely have been otherwise had there been an outright assignment as such to Belize Bank. Regent is agreeing under the Policy, which, as betokened earlier, constitutes a contract between it and New River only, to pay part of the sum insured to Belize Bank in the event of loss. Put in different language, the contractual obligation here (ie to pay Belize Bank) is one owed by Regent to New River, not to Belize Bank. Finally, New River is the sole debtor from whom the amount in question, whether $274,061.80 or $286,000.00, was owing on 6 January 2004 and the sole chargor under the Charge. For all these reasons, I am unable to agree with the judge that the payment made to Belize Bank by Regent was accepted in full satisfaction of a claim of Belize Bank against Regent. In my opinion, it was accepted in full satisfaction of a claim by Belize Bank against New River, in whose interests Regent, for all its suspicion of wrongdoing by the latter, was necessarily acting. (I say this fully mindful of my reference at para **[28]**, above to a third party acting in his or her own right and entirely accepting that Regent was, in the instant

case, acting in its own right, which, in my view, was not incompatible with acting at the same time in the interests of New River.)

[39] What this all boils down to, so to speak, is that there was in the instant case a critical underlying agreement, comparable to that in *Punamchand*, under which Belize Bank accepted the payment by Regent of $200,000.00 on the terms on which such sum was tendered, ie in satisfaction of the sole demand which, on the evidence as this Court has it, was ever made by Belize Bank, ie a demand for $286,000.00. Accordingly, in my view, the relevant transaction between Regent and Belize Bank had, like that between Sir Richard Temple and the creditors of the son in *Punamchand*, an extinguishing effect on the pertinent debt. Just as surely as the debt under the promissory note became extinct in *Punamchand*, the debt secured by the Charge in the present case became extinct. As Fletcher Moulton LJ put it in the last of the three passages from his judgment in *Punamchand* reproduced at para **[32]**, above:

> '... it comes to the same thing, namely that after acceptance by the creditor of a sum offered by the third party in settlement of the claim against the debtor the creditor cannot maintain an action for the balance.'

No one has suggested before the courts in the instant case that the critical words of the Final Discharge do not reflect the condition on which the sum of $200,000.00 was paid by Regent to Belize Bank. Those words, already seen above, are 'accept in full satisfaction of my claim'. The condition which they reflect is that the money was to be accepted in full satisfaction of the relevant claim. In that context, there is irresistible force in the choice of words of Farwell LJ in the second of the passages from his judgment in *Punamchand* quoted at para **[33]**, above, which diction, as here material, was -

> 'In [the case where the money is sent by a third party] the creditor has no excuse or justification for retaining the stranger's money, unless he complies with the condition on which it was paid.'

It is not difficult to understand why Fletcher Moulton LJ, in the last of the three passages from his judgment in *Punamchand* set out at para **[32]**, above, said that -

> '... it would be an abuse of the process of the Court to allow the creditor under such circumstances to sue ...'

In short, I apply to the present case the law as explained by both Fletcher Moulton LJ and Farwell LJ in *Punamchand's* case and hold that the debt in question was extinguished upon the signing by Belize Bank of the Final Discharge.

[40] But I do not stop there. I also consider that the reasoning of Vaughan Williams LJ and Farwell LJ which led them to conclude in *Punamchand* that a trust was created between the creditors of the son and Sir Richard Temple applies in the instant case. It is my opinion, therefore, that a trust was here created between Belize Bank and Regent (from all indications, as earlier noted, now defunct) which would disentitle the former from suing except as trustee for the latter. The pertinent words of Vaughan Williams LJ in *Punamchand*, already quoted in the last of the three passages from his judgment set out at para **[31]**, above bear repetition here. The learned Lord Justice said:

> '... a trust was created as between Sir Richard Temple and the money-lenders in favour of the former, so that any money which the latter might receive upon the promissory note, if they did receive any, would be held by them in trust for him.'

In this case, however, there is not even the slightest suggestion on the part of Belize Bank that it is suing as the trustee of Regent.

[41] I further consider that, the debt secured by the Charge having been extinguished, New River became entitled in law to have its charge formally discharged under the terms of the Memorandum Accompanying Charge and the provisions of section 83 of the RLA respectively set out at paras **[5]** and **[9]**, above. This is so, as I see it, for the reason that, given such extinction, it can neither properly be (a) asserted that there are other 'moneys secured by the Charge' for the purposes of the clause in question of the Memorandum Accompanying Charge nor (b) denied 'that all money due under [the] charge has been paid to the chargee' within the meaning of section 83. In my view, New River is entitled now to proceed, at its own expense, to procure the signature by Belize Bank of a Discharge of Charge instrument and thereafter to procure the filing of such instrument at the Land Registry.

[42] The contention of Mrs Uk Myles that Belize Bank is responsible for alleged deterioration, since the date of the fire, of the property the subject of the Charge, although deployed without the necessary umbrella of a corresponding ground of appeal, may now be considered, with appropriate brevity. I am unable to agree with it. The evidence does not satisfy me to the required standard that, assuming there was such deterioration, things would have turned out any differently and the property would have fared off any better if Belize Bank had from the outset, ie from its acceptance of the payment of the sum of $200,000.00, indicated a willingness to discharge the Charge. It is an important consideration in this context that, on his own evidence, Mr Kaufman was, at the time of trial, dwelling in and amongst the ruins to which, nigh on nine years earlier, the building had been reduced by the fire. I cannot but regard that as the most telling commentary on the woeful state of his finances, which, plainly, mirrored that of New River's own finances as revealed in the evidence of Mr Herrera. What could Mr Kaufman realistically, have done to prevent deterioration of the property even if Belize Bank had indicated a willingness to sign the necessary discharge of charge? I would not, therefore, award any damages to New River in that regard.

Formal statement of resolution of issues

[43] Returning, then, for the sake of formality, to what I would generously (given the absence of an 'umbrella' for the fifth 'issue') treat as the five issues in this appeal, I would, adopting as far as possible the language found in the judgment of the judge, conclude as follows:

(i) 'to the extent of their interest' under Endorsement No 9 in the Policy does not mean only the principal the Charge was stamped to secure but means rather the sum due and owing by New River to Belize Bank at the time of the fire;

(ii) the Charge does not limit Belize Bank's interest to the principal sum of $200,000.00 but rather covers the entire sum Belize Bank can demand as due and owing on the Loan;

(iii) Belize Bank's acceptance of $200,000.00 as 'Final Discharge' under Endorsement No 9 of the Policy does not amount to an accord and

satisfaction discharging New River's debt to Belize Bank but the debt was nevertheless thereby extinguished;

(iv) there is no balance outstanding under the Demand Loan and the Overdraft Facility and no interest due and owing by New River to Belize Bank; and

(v) loss, if any, suffered by New River has not been proved to be the result of inability freely to deal with the property in question because of impending threats of sale advanced by Belize Bank and, if it has to any extent been the result of the property's undoubted state of deterioration, such deterioration has not been proved to be the fault of Belize Bank.

Fate of grounds (in thumbnail sketch)

[44] The proper fate, in my opinion, of the three actual grounds of appeal may, although already clear from the foregoing analysis, be sketched, thumbnail-style, as follows:

i) ground 1 is meritorious to the extent that the judge did err in holding that 'to the extent of their interest' in Endorsement No 9 in the Policy means to the extent of the sum the Charge was stamped to secure, ie $200,000.00, and not to the extent of the larger sum owing to Belize Bank at the time of the fire, whatever sum that may have been;

ii) ground 2 is meritorious to the extent that the judge, even although she did not err in concluding that payment and acceptance of the sum of $200,000.00 coupled with the signing of the Final Discharge did not give rise to an accord and satisfaction, did nevertheless err in holding that the Final Discharge was a separate and distinct issue from the discharge of liability of New River under the loan it had with Belize Bank; and

iii) ground 3 is meritorious to the extent that the judge did err in holding that Belize Bank is entitled to the sum of $125,399.39 plus interest on the demand loan and to the sum of $9,329.65 on the overdraft facility.

For completeness, I reject the submission advanced for the appellant, despite the stark absence of a corresponding ground of appeal, to the effect that New River suffered loss and damage as a result of failure on the part of Belize Bank to discharge the Charge.

Disposal

[45] For my part, therefore, I would allow the appeal to the extent of setting aside the orders of the judge and granting to New River a declaration that it is not indebted to Belize Bank in the sum of $125,399.39, or any other sum, plus interest on the relevant demand loan nor in the sum of $9,329.65, or any other sum, on the relevant overdraft facility. I would, however, dismiss the appeal to the extent of refusing to award damages to New River for damage allegedly suffered by it as a result of its supposed inability freely to deal with the relevant property owing to impending threats made by Belize Bank. In terms of costs, I would order that New River have 75 per centum of its costs here and below and that Belize Bank have 25 per centum of its costs here and below, all such costs to be taxed, if not agreed. I would further order (a) that this costs order be provisional in the first instance but become final after 10 clear working days from the date of delivery of this judgment, unless either party shall file application for a contrary order within such period of 10 clear working days and (b) that in the event of the filing of such an application, the matter of costs be determined on the basis of written submissions to be filed and delivered within 14 days from the filing of the application.

Apology

[46] The instant appeal having been heard in March 2015, there is no denying that preparation of this judgment has been very long delayed. Although I only assumed personal responsibility for its preparation in late November 2016, I unhesitatingly apologise to both parties for not having been able, owing to the usual great and unrelenting pressure of work, earlier to discharge the responsibility so assumed.

_____

SIR MANUEL SOSA P

MORRISON JA

[47] I have had the advantage of reading in draft the judgment prepared by the learned President. I agree with his reasoning and conclusions and there is nothing that I can usefully add.

_____
MORRISON JA

AWICH JA

[48] I concur.

_____
AWICH JA