IN THE SUPREME COURT OF BELIZE, A.D. 2017

CLAIM NO. 431 OF 2012

BETWEEN:

AMELIA JOHNSTON
(for herself and as Administratrix of the Estate of Francis Johnston, Deceased) — **Claimant**

AND

BELIZE BANK LIMITED — **1st Defendant**
JEAN REYES — **2nd Defendant**

BEFORE: Hon. Chief Justice Kenneth Benjamin.

Appearances: Mr. Michel Chebat, SC for the Claimant.
Mr. E. Andrew Marshalleck, SC for the 1st Defendant.
Mr. Hubert E. Elrington, SC for the 2nd Defendant.

JUDGMENT

[1] The Claimant is a widow. She is the personal representative of her deceased husband's estate. In March 2006, there appeared in the Amandala newspaper a notice of a public auction to be held on March 20, 2006 by Alliance Bank of Belize Limited ("Alliance Bank"). The property to be auctioned was described as Parcel 1274/1 of Block 16 in the Caribbean Shores Registration Section ("the property"). The 2nd Defendant holds a lease to the property from the Government of Belize. Harold Johnston, the brother of the Claimant's husband, who was then in a common-law union with the 2nd Defendant, spoke to the Claimant by telephone on March 14, 2006 seeking

his brother's assistance to prevent the sale of the property. The mortgage held by Alliance Bank was paid off by a loan obtained by the Claimant and her husband from the 1st Defendant, the Belize Bank Limited.

[2] The present proceedings were brought by Claim Form filed on August 8, 2012 against the 1st Defendant for relief based on an alleged agreement to deliver title to the 2nd Defendant's property to the Claimant and her husband, Francis Johnston. Relief was also sought against the 2nd Defendant.

BACKGROUND

[3] The sequence of events leading up to the Claim is best chronicled by reference to the correspondence exhibited by the Claimant and the 1st Defendant. The document that triggered the events was the advertisement of the public auction of the property published on March 12, 2006.

[4] During the months of March and April, 2006 the Claimant and her husband approached the 1st Defendant to obtain a loan to purchase the property. The loan was subsequently granted on April 19, 2006 by the 1st Defendant secured by the hypothecation of a fixed time cash deposit in the names of Francis and Amelia Johnston. The document evidencing this was dated June 15, 2006 and referenced a Collateral Security Agreement dated March 14, 2006 signed by the Johnstons to secure the moneys advanced. It is commonly accepted that the loan for $220,000.00 has been repaid to the 1st Defendant.

[5] By letter dated March 17, 2006, the then Manager of the Punta Gorda Branch of the 1st Defendant, Domingo Reyes, to whom the Claimant and her husband had spoken to about the loan, wrote to the Manager of Alliance Bank stating the following:

> "As per our telephone conversation of today's date, we hereby undertake to pay you the sum of two hundred and twenty thousand dollars ($220,000.00) towards loan account No. 12001045 in the name of Betta Tees Co. Ltd. (Jean Reyes) with the condition that all documents pertaining to this loan along with a signed transfer of title be forwarded to us as soon as possible."

In reply, Mr. Kenneth Chinapen, the Retail Manager of Alliance Bank, wrote to Mr. Reyes on March 24, 2006 stating:

> "We refer to your letter dated the 17th March, 2006 in which you undertook to pay the sum of $220,000.00 to loan account No. 12001045 on condition that all documents and a signed transfer are forwarded to you. However, by telephone conversation (Reyes/Chinapen) of today's date, you agreed that we would substitute the signed transfer of title with a signed discharge of charge; and now send to you herewith, in duplicate, the duly executed Discharge of Charge by the Bank's Attorney in respect to the abovenamed customer. Also sent to you herewith, is the Original Charge dated the 23rd day of March, 2000 in respect to Parcel No. 1274/1, Caribbean Shores/Belize Registration Section, Block 16, which has been duly registered at the Land Registry in Belmopan as Instrument No. 2346/2000. Kindly acknowledge the receipt of these, by signing and returning the enclosed copy of this letter along with your cheque in the sum of $220,000.00."

The sum of $220,000.090 was subsequently paid over to Alliance Bank by the 1st Defendant.

[6] The Manager of the 1st Defendant wrote to the Bank's Attorneys, Barrow & Williams on May 4, 2006 forwarding the Charge and Discharge of Charge received from Alliance Bank together with "an application to transfer lease along with two Ministry of Natural Resources Information Sheet" (sic). The letter instructed their Attorneys-at-Law to register the Discharge of Charge between Jean Reyes and Alliance Bank and to prepare a transfer of the property into "the names of Francis and Amelia Johnston of Big Falls, Toledo District as beneficial joint tenants" at a purchase price of $220,000.00.

[7] By a letter dated August 16, 2006, the 1st Defendant informed the Claimant and her husband as follows:

> "We confirm that a demand loan of $220,000.00 was granted to you on April 2006 to pay Alliance Bank of Belize Ltd. for a parcel of land No.

1274/1 Registration Section. Caribbean Shores Block No. 16 which was charged to Alliance Bank of Belize Ltd. by Betta Tees Co. Ltd. – Jean Reyes. These funds were sent to Alliance Bank of Belize Ltd. Attn. Mr. Kenneth Chinapen on April 19, 2006. Our understanding from you when you first called on us on March 14, 2006 to discuss the loan was that Alliance Bank of Belize Ltd. was going to sell the property under the terms of the charge which they held for $140,000.00 and that your brother and Jean Reyes had called on you for assistance. We called Alliance Bank of Belize Ltd. on March 17, 2006 and spoke to Mr. Kenneth Chinapen who confirmed that the property was going to be sold but that they would require $220,000.00 in settlement without going to Public Auction and not $140,000.00 as mentioned by Jean Reyes. As a result of the above, Mr. Chinapen sent us the original Charge and a duly executed Discharge of Charge which we sent to our Lawyers, Barrow and Williams for them to register the Discharge and prepare a new document in the joint names of Francis Johnston and Amelia Johnston. As far as we know, you now own the property and have all rights to it. Meanwhile, Barrow and Williams are working on the documents to have the property in your name."

It was evident that the 1st Defendant was reporting to the Claimant and her husband on the progress made pursuant to instructions received relative to the transaction surrounding the loan.

[8] With regard to the transfer of the lease to the Claimant and her husband, Barrow & Williams wrote to the 1st Defendant on December 27, 2006 in response to the instructions in the letter of May 4, 2006 as follows:

> "... The Application for consent of the Minister of Natural (sic) is required in order to effect a transfer of leasehold property being Parcel 1274 Block 16, Caribbean Shores by Jean Reyes to Francis and Amelia Johnson (sic). We gave the application form to Francis and Amelia Johnson so they may obtain the consent and thereafter we can then proceed with the transfer of lease".

The Claimant has acknowledged being contacted by Barrow and Williams and being informed that permission to transfer the lease was required. She was further told that there was a form that the Bank had never gotten the 2nd Defendant to sign. She said that the 2nd Defendant had refused to sign any documents.

[9] Some time elapsed before Barrow and Williams sought further instructions from the 1st Defendant in relation to the Claimant and the property. The following letter dated August 18, 2006 was sent:

> "The Alliance Bank of Belize maintain (sic) that it did not foreclose and agree to or sell the captioned property to Francis and Amelia Johnston. They acknowledged receipt of $220,000.00 paid to them by Belize Bank to account of Jean Reyes as a result of which they agreed to and did release the charge to Belize Bank and execute a discharge of charge.
>
> In the circumstance Alliance Bank is not prepared nor obliged to transfer the property in exercise of power of sale under the charge. We also note that a total of $10,130.00 was paid to Government of Belize pursuant to their approval of a voluntary transfer of the lease by Jean Reyes to Francis and Amelia Johnston, but the transfer of the lease did not occur as Jean Reyes allegedly refuse (sic) to sign the transfer of lease form. The property is still registered in name of Jean Reyes subject to the charge.
>
> We therefore propose that Belize Bank take a transfer of charge from Alliance Bank as it were in consideration of the $220,000.00 it paid to Alliance Bank thus purchasing the debt and security of Jean Reyes from Alliance Bank. We have secured Alliance Bank agreement to transfer the charge to Belize Bank. The Belize Bank may then demand payment from Jean Reyes and in default enforce the charge in exercise of the power of sale thereunder and so transfer the property to Francis and Amelia Johnston, and they made in turn demand payment from Jean Reyes and enforce the charge were she to default in paying them the $220,000.00 ..."

[10] There is no evidence of a written response by the 1st Defendant. However, the 1st Defendant admitted withdrawing from the Claimant's account on December 2, 2009 the sum of $3,866.00 which was paid to its Attorneys. Barrow & Williams sent a further letter on October 21, 2010 purporting to confirm compliance with instructions received from the 1st Defendant. It was stated that a written notice dated August 31, 2010 was prepared and served on Jean Reyes. The notice was done pursuant to section 75 of the Registered Land Act, and required compliance by December 1, 2010. The letter further invited instructions as to whether an auctioneer should be engaged to sell the property. A copy of the notice demanding payment from the 2nd Defendant of a loan account balance to the 1st Defendant was requested. Curiously, the claim was stated to be "for money loaned and advanced by our client at your request and as your bankers".

[11] The property has never been transferred to the Claimant and remains in the possession and occupation of the 2nd Defendant in whose name the lease is registered. No money has been paid by the 2nd Defendant or by Harold Johnston to the Claimant.

PLEADINGS

[12] In the Amended Statement of Claim it was alleged that there existed an agreement between the Claimant and the 1st Defendant for the grant of a loan to purchase the property owned by the 2nd Defendant that was up for auction and that the 1st Defendant would be responsible for obtaining the transfer of title to the property into the names of the Claimant and her husband. It was averred that the terms of the agreement are contained in the letters of March 17, March 24, May 4 and August 16, 2006 previously referred to in paragraphs 5, 6 and 7 above.

[13] The Claimant pleaded that the 1st Defendant had failed to obtain the transfer of the title of the property into the name of the Claimant. Accordingly, the Claim against the 1st Defendant is for specific performance of the agreement to deliver title to the property or alternatively for damages for breach of the alleged agreement with the 1st Defendant.

[14] Further, it was stated that despite the property having been sold to the Claimant, the 2nd Defendant remained in possession and occupation. It was contended that the

2nd Defendant had unjustly benefitted from the sum of $220,000.00 paid by the 1st Defendant to the Alliance Bank. Against the 2nd Defendant, the Claimant seeks an order for possession of the property or alternatively, a declaration that the 2nd Defendant has been unjustly enriched by the payment of the $220,000.00 by the 1st Defendant on behalf of the Claimant to the Alliance Bank and an order that the 2nd Defendant pay to the Claimant the sum of $220,000.00 with consequential damages. Interest and costs were also sought.

[15] In its Amended Defence, the 1st Defendant denied agreeing to be responsible for obtaining the transfer of title of the property although it was admitted that the Claimant and her husband negotiated a loan to purchase the property. It was stated that the Claimant had represented that the 2nd Defendant would transfer title to the Claimant. The 1st Defendant said that it was its understanding that the 2nd Defendant would voluntarily execute the documents for the transfer and that it was simply facilitating the transaction by providing the loan to purchase the property and legal services by engaging Attorneys-at-Law, which obligations had been fulfilled.

[16] It was said that the 1st Defendant was not a party to any agreement between the Claimant and the 2nd Defendant and that the refusal of the 2nd Defendant to sign the documents to effect the transfer was not caused by the 1st Defendant and was not within its control.

[17] In her Amended Defence filed on May 10, 2013, the 2nd Defendant asserted that she had no knowledge of the negotiations between the Claimant and the 1st Defendant. It was stated that she was at all material times the fee simple owner of the property (which was palpably incorrect by her own admission). She admitted the property was subject to the rights of the mortgagee but that it was never auctioned by the Alliance Bank or any other person. The 2nd Defendant denied ever having sold the property to the Claimant or to anyone through whom she was claiming. She further denied that she had unjustly benefitted from the payment by the 1st Defendant to Alliance Bank of the said sum of $220,000.00.

[18] The Defence of the 2nd Defendant went on to allege that Harold Johnston with whom she was living at the time, asked his brother, the Claimant's husband to assist

them in saving the house from being put up for sale by auction and the Claimant's husband agreed to help by making arrangements to ensure the property was not sold. She said she was not privy to the arrangement but that it was not demanded or requested of her that she sell the property to him. It was averred that it was a family arrangement not intended to create legal obligations.

[19] The 2nd Defendant's Defence pleaded that the Claimant was, in any event, barred from bringing proceedings having failed to do so before six years had elapsed.

[20] By way of Reply to the Defence of the 2nd Defendant, the Claimant responded that Harold Johnston had alerted his brother about the impending sale by auction of the property. It was denied that there was a family agreement. It was further denied that there was any agreement for the Claimant and her husband to become the mortgagees of the 2nd Defendant but that the 1st Defendant had been instructed that they would buy the property.

[21] The Reply stated and repeated that there was never any discussion or communication between the Claimant or her husband and the 2nd Defendant.

FACTUAL CONCLUSIONS

[22] The facts are to be drawn from the testimony of the witnesses and the documents exhibited. Each party presented one witness, namely the Claimant and the 2nd Defendant on their own behalf and Mr. Mario Sabido on behalf of the 1st Defendant. The latter witness was presented as a manager of the Belize Bank Limited. However, he was not the manager who dealt with the Claimant and her husband as it was Mr. Domingo Reyes, the then manager of the Punta Gorda Branch of the 1st Defendant, who handled all transactions with the Claimant and Francis Johnston. Mr. Sabido was unable to shed any light on the dealings between the Bank and its customers except by reference to the records of the 1st Defendant.

[23] The Claimant told the Court that she received a telephone call from her brother-in-law, Harold Johnston after seeing the publication of the notice of the sale by public auction of the property. The evidence of the 2nd Defendant and the documents exhibited confirmed that the property was and is still held in the name of the 2nd

Defendant under a lease from the Government of Belize. The Claimant said that she and her husband decided that they would purchase the property and that they both went to the Punta Gorda Branch of the 1st Defendant to obtain a loan for that purpose. In cross-examination, she responded repeatedly that the arrangement was for the 1st Defendant to take care of all the proper documents required for the purchase of the property. At some point, she accepted a suggestion that the 1st Defendant was expected to send a representative to bid for the property at the public auction, but as the questioning continued she explained that Mr. Reyes "willingly offered his help to do everything for us because we were getting the loan from the Bank". To this end, she said she never communicated or discussed their plans with the 2nd Defendant, which she herself corroborated. The Claimant insisted that the loan was for a real estate transaction to acquire the property.

[24] The elements of the arrangement between the Claimant and the 1st Defendant clearly emerged from the correspondence exhibited. In the letter of March 17, 2006, the 1st Defendant's Manager, Domingo Reyes, wrote to the Manager of Alliance Bank, Mr. Kenneth Chinapen, undertaking to pay $220,000.00 towards the 2nd Defendant's loan account on condition that the loan documents and 'a signed transfer of title' were first forwarded to the 1st Defendant. This evidenced that the 1st Defendant was acting on behalf of the Claimant with a view to acquiring the property. One week later, Alliance Bank sent the Original Charge over the property and a signed Discharge of Charge. The accompanying letter referred to a conversation between the Manager of the Bank on March 24, 2006, in which they agreed that the Discharge of Charge would be sent in place of the signed transfer of title. The obvious conclusion is that Alliance Bank was not in a position to and were not willing to take steps to obtain the transfer of title signed by the 2nd Defendant.

[25] The 1st Defendant proceeded to release the $220,000.00, proceeds of the loan to the Claimant and Francis Johnston, on April 19, 2006. This was confirmed by the letter of August 16, 2006 from the 1st Defendant to the Claimant and Francis Johnston. It was stated that the Charge and duly executed Discharge of Charge were received and sent to the Bank's lawyers for registration and to "prepare a new document in the joint names

of Francis Johnston and Amelia Johnston". The final paragraph of the letter unequivocally conveyed to the Claimant and her husband that, the moneys having been paid over to Alliance Bank towards the charge, they were the owners of the property and that the 1st Defendant's lawyers were processing the transfer of title into their names. This was even more emphatic confirmation that the 1st Defendant was acting on behalf of the Claimant and her husband with instructions to obtain the transfer of title of the property into their names. It was suggested to the Claimant by learned Senior Counsel for the 1st Defendant that the Bank never undertook to negotiate the purchase of the property; the Claimant rejected the suggestion. This suggestion was not supported by any other evidence; in any event, this took the matter no further as the Bank acknowledged in writing that it was seeking the transfer of title to the Claimant and her husband in its letter of May 4, 2006 to Barrow and Williams instructing that a transfer of the property be prepared in the names of Francis and Amelia Johnston as beneficial joint tenants.

[26] The 1st Defendant has to date been unable to obtain title of the property in the name of the Claimant, Francis Johnston having died in 2009. The Claimant has repaid the loan and the lease of the property remains in the name of the 2nd Defendant. The Claimant's assistance was sought by the 1st Defendant's lawyers to procure the signature of the Minister of Natural Resources on behalf of the Government of Belize for permission to transfer the lease, which is a legal requirement under the terms of the lease. There is no evidence that this was ever obtained. In response to the Court, the 2nd Defendant denied ever being approached to sign any documents for the transfer of the lease. This ran counter to the allegation in the letter of August 18, 2009 from Barrow and Williams to the 1st Defendant to the effect that the 2nd Defendant had refused to sign the transfer of lease form. There was no evidence of anyone approaching the 2nd Defendant for her signature. Whether or not that was done, it was pellucid to the Court that the 2nd Defendant was not prepared to transfer the lease to the Claimant.

[27] The 2nd Defendant characterised the liquidation of the charge as a family matter and not a commercial matter and that it was to be repaid whenever she and Harold

Johnston were able to do so. In her testimony, she spoke of once speaking to Francis Johnston on Central American Boulevard when he told her he would 'take care of it'. She did not accept the suggestion by Learned Senior Counsel for the Claimant that Francis Johnston had intended to buy the mortgage held by Alliance Bank and hold it for himself. This was put to her on the basis of paragraph 5 of her Amended Defence where it was pleaded that, to her knowledge, the purpose of the loan was to buy out the Alliance Bank's mortgage and to hold the charge over the property until she could pay off the charge. This arrangement was not supported by the evidence.

[28] Contrary to the evidence of the 2nd Defendant, the Johnstons intended to enter into a strict business arrangement for the purchase of the property by means of a loan from the 1st Defendant. There is no demur from any side that the 2nd Defendant was not included in the transaction. It is fair to say that she relied on the fraternal relationship between her then common-law companion and his brother for assistance in having the auction sale averted. As she did say, she was not privy to the arrangement although it was her understanding that the outlay to liquidate the charge was to be repaid at some point.

[29] The 1st Defendant was unable to carry out its agreement with the Claimant. As evidenced by the letter of August 18, 2009 from Barrow & Williams to the 1st Defendant, Alliance Bank had maintained that it had not foreclosed on the property nor had it sold or agreed to sell the property to the Claimant and her husband. Indeed, Alliance Bank as the mortgagee/chargee did not exercise its power of sale under the charge. Consequently, Alliance Bank had released the charge to the 1st Defendant with an executed discharge of charge, upon receipt of the $220,000.00. Faced with a stalemate on account of the 2nd Defendant refusing to sign the transfer of lease form, Barrow and Williams proposed as a solution that the 1st Defendant accept a transfer of the charge. This was evidently done, as the letter of October 21, 2010 from the lawyers to the 1st Defendant sought instructions to proceed to engage an auctioneer to sell the property. There was no evidence from either the Claimant or the 1st Defendant that their arrangement was for the 1st Defendant to take a transfer of the charge. This latter step

was taken in an attempt to safeguard the funds released without first obtaining a transfer of title to the Claimant.

THE ISSUES

[30] The following issues arose for the determination of the Court based on the foregoing conclusions of fact:

A) In relation to 1st Defendant:

(i) Whether there existed a valid agreement between the Claimant and the 1st Defendant

(ii) Whether the 1st Defendant is liable to the Claimant for breach of the said agreement.

B) In relation to the 2nd Defendant:

(iii) Whether the 2nd Defendant has been unjustly enriched by the payment of the amount due on the charge to the Alliance Bank by the 1st Defendant on behalf of the Claimant.

(iv) Whether the Claim is statute-barred by virtue of section 4(a) of the Limitation Act, Chapter 270.

Issue (i) - Was there a valid agreement between the Claimant and the 1st Defendant?

[31] As previously iterated, the evidence of the Claimant and the letters exhibited provide satisfactory proof that the 1st Defendant through its Manager, Domingo Reyes, in all probability, agreed to act on behalf of the Claimants in securing the purchase of the property. The 1st Defendant acted as an intermediary. The terms of the agreement were gleaned from the *viva voce* testimony of the Claimant in the letters written to and by the 1st Defendant of March 16, March 24, May 4 and August 16, 2006.

[32] At law, a simple contract, can be made orally or in writing or partly orally and partly in writing. See: Halsbury's Laws of England, 4th ed (Re-issue Vol. 9(1), para. 620; **Transmotors Ltd. v Robertson, Buckley & Co. Ltd. [1970] 1 Lloyd's Rep. 224**. The contract is to be construed from the documents and from what the Claimant said in her

witness statement and in cross-examination. She stated in her witness statement: "... our clear and explicit instruction to the 1st Defendant was to obtain title in the joint names of my husband and I to the said property". This was reflected in the 1st Defendant's letter of May 4, 2006 giving instructions to Barrow & Williams. She also stated as follows:

> "... the 1st Defendant agreed that apart from providing us with the said loan, it would act on our behalf in the purchase of the said property".

When cross-examined, she detailed what the 1st Defendant was expected to do when she said in response to Learned Senior Counsel for the 1st Defendant:

> "When we went in to borrow the loan we told the manager that we want to borrow the loan then he told us how much it was. We told him we never knew exactly how much. He said I will take up that responsibility and find out exactly what is the cost of the property. Make sure that all legal documents come to me, and that he would be responsible to take to Chinapen from Alliance Bank."

She continued as follows:

> "And he would make all arrangements with Chinapen and he will see that he gets all proper documents. In return I told the manager make sure before he ever send any money to Chinapen, make sure he gets the proper documents for us, and he said don't worry I know how to do everything."

The agreement was for the 1st Defendant to deal with all the arrangements for payment and obtaining the transfer of title to the Claimant.

[33] The 1st Defendant did not obtain the transfer of title as it was agreed. Accordingly, the 1st Defendant is in breach of the agreement with the Claimant.

Issue (ii) - Is the 1st Defendant liable to the Claimant for breach of the agreement?

[34] It would appear that the agreement began to unravel from as early as March 24, 2006 when the 1st Defendant's manager agreed to accept the Original charge and the signed Discharge of Charge from Alliance Bank in place of the signed transfer of title previously requested by letter of March 17, 2006. Nevertheless, the 1st Defendant must have remained convinced of the viability of the agreement as in its letter to Barrow & Williams of May 4, 2006, instructions were given for the preparation of a transfer of title of the property to the Claimant and her husband. *A fortiori*, the Claimant and Francis Johnston were written to on August 16, 2006 and told that they were the owners of the property and that the lawyers were working on getting the documents in their names.

[35] The relationship established between the Claimant and Francis Johnston on the one hand and the 1st Defendant acting through its manager, Domingo Reyes, on the other hand, was one of agency. The 1st Defendant agreed to act as intermediary in dealing with Alliance Bank to carry out the instructions of the Claimant which formed the sub-stratum of the agreement.

[36] It was submitted on behalf of the 1st Defendant that not being the owner of the property or competent to transfer same and deliver title to the Claimant, the 1st Defendant could only have agreed to engage Attorneys-at-Law to advise and carry the transaction into effect, which was done. The point was made that by virtue of section 78(1) of the Registered Land Act the charge was restricted to exercising its power of sale by way of public auction in the absence of the court's intervention.

[37] It was argued that the Claimant is not entitled to either specific performance or damages as claimed. In its submissions, the Claimant did not pursue relief by way of specific performance. In any event, the argument was directed to the entire claim against the 1st Defendant.

[38] It was urged that the contract is not legally enforceable as the agreement amounted to one of gratuitous agency there being no consideration for the agreement to act as agent. The Claimant did not respond to the contention as to the absence of

consideration and it was only stated by Learned Senior Counsel in reply that the agreement went beyond that of one with a gratuitous agent.

[39] The Court finds that this contention is unanswerable. As exuberant as the 1st Defendant's Manager was, the plain fact was that the 1st Defendant was not paid or given any consideration for the service it accorded to the Claimant.

[40] At law, a gratuitous agent cannot be held liable in contract although he can be made liable in negligence. The following passage appears in Halsbury's Laws of England, Fifth Edition, Vol. 1 at paras. 78 and 79:

> "78. Every agent, including a gratuitous agent, is responsible to his principal for any loss occasioned by his want of proper care, skill or diligence, in the carrying out of his undertaking, even though the principal has himself been negligent in not discovering the agent's breach of duty ... In the case of a gratuitous agent this duty is founded on the law of tort ...
>
> 79. Where an agent acts without reward he is only bound to use such skill as he has ... The care and diligence required are such as persons ordinarily use in their own affairs."

The principle was applied in the case of **Chaudhry v Prabhaker et al [1988] 3 All E R 718** where Stuart-Smith, LJ said (at p. 721 f-g):

> "I have no doubt that one of the relevant circumstances is whether or not the agent is paid. If he is, the relationship is a contractual one and there may be express terms on which the parties can rely. Moreover, if a paid agent exercised any trade, profession or calling, he is required to exercise the degree of skill or diligence reasonably to be expected of a person exercising such trade, profession or calling, irrespective of the degree of skill he may possess. Where the agent is unpaid, any duty of care arises in tort."

[41] The present Claim was brought in contract and the Claimant alleged a breach of an agreement with the 1st Defendant. Having determined that the 1st Defendant acted as a gratuitous agent, the Claim against the 1st Defendant must fail and be accordingly dismissed with costs to be paid by the Claimant to the 1st Defendant.

Issue (iii) - Was the 2nd Defendant unjustly enriched by the payment to Alliance Bank?

[42] The Claimant alleged against the 2nd Defendant that the payment of $220,000.00 by the 1st Defendant to the Alliance Bank towards the charge held against the 2nd Defendant's property amounted to the 2nd Defendant being unjustly enriched, rendering her liable to repay the Claimant. The 2nd Defendant denied the allegation and joined issue.

[43] The evidence is that the sum of $220,000.00 was paid for the Claimant by the 1st Defendant to Alliance Bank and that the said sum was applied towards the discharge of the charge against the property held by a lease in the name of the 2nd Defendant. Being no longer liable to pay Alliance Bank, there can be no dispute that the 2nd Defendant has benefitted from the payment.

[44] The question to be decided is whether the Claimant is entitled to be subrogated to the rights of Alliance Bank by virtue of the unjust enrichment of the 2nd Defendant or, put another way, whether the Claimant is entitled to restitution against the 2nd Defendant. For clarity, it is salutary to refer to the speech of Lord Steyn in **Banque Financière de la Cité v Parc (Battersea) Ltd and others [1998] 1 All E R 737** at page 740, where he explained that unjust enrichment is classified as belonging to the law of obligations alongside contract and tort and as 'an independent source of rights and obligations'. The learned Law Lord prescribed the following questions to be answered: (1) Has the defendant benefitted or been enriched?; (2) Was the enrichment at the expense of the Claimant?; (3) Was the enrichment unjust?; (4) Are there any defence? Lord Hoffman posed the last question as: Whether there existed any policy considerations for denying the restitutionary remedy (Ibid. p. 747).

[45] Learned Senior Counsel for the 2nd Defendant challenged the entitlement of the Claimant to a remedy for unjust enrichment firstly on the basis that the money was paid

pursuant to a family arrangement and, secondly, it was asserted that upon payment of the money Alliance Bank's security was converted into an unsecured loan payable within six (6) years. On the facts, as reasoned earlier, the transaction was never intended to be a family arrangement given the instructions given to the 1st Defendant by the Claimant and Francis Johnston. Further they both expected to acquire the property in exchange for the payment financed by the loan from the 1st Defendant, which does not support the conversion of Alliance Bank's charge into an unsecured loan.

[46] Lord Hoffman in the **Banque Financière** case was at pains to review the authorities to show that there is no requirement that there be a common intention between the parties and the third party as was the case in that matter. Although, it was conceded that questions of intention are potentially highly relevant to the question of whether or not there has been unjust enrichment.

[47] The principles applicable to subrogation were helpfully explained by Millett, LJ (as he then was) in **Boscawen et al v Bajwa et al [1995] 4 All E R 769** at p. 775:

> "Subrogation ... is a remedy, not a cause of action ... it is available in a wide variety of different factual situations in which it is required in order to reverse the defendant's unjust enrichment ... The equity arises from the conduct of the parties on well-settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff ... Once the equity is established, the court satisfies it by declaring that the property in question is subject to a charge by way of subrogation ..."

[48] It cannot be gainsaid that the 2nd Defendant was enriched by having the indebtedness on the charge on her property paid off by the Claimant, who is now out of pocket to the extent of $220,000.00. This fact was not challenged. The Claimant intended to derive a benefit for making the payment and that has not materialised. Meanwhile, the 2nd Defendant enjoys possession of the property which remains in her name without fear of foreclosure by Alliance Bank. It seems to me that the 2nd Defendant has been enriched at the expense of the Claimant and that the enrichment is unjust. I do not accept the 2nd Defendant's assertions that it was a family matter and the

money was payable whenever and however she could. Accordingly, the Claimant is entitled to a restitutionary remedy.

Issue (iv) - Is the Claim statute-barred by section 4(a) of the Limitation Act, Chapter 170?

[49] The 2nd Defendant pleaded and relied upon section 4(a) of the Limitation Act as a bar to the Claim. The section reads:

> "4. The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued –
>
> (a) actions founded on simple contract or on tort";

The written submissions of the 2nd Defendant were not clear but it seemed to me that it was being argued that the payment by the 1st Defendant given rise to a chose-in-action what was actionable within six years.

[50] The Claim against the 1st Defendant was based on contract and, hence fell under section 4(a). But, this is of no moment having regard to the absence of a pleading of limitation by the 1st Defendant and to the earlier finding as to the 1st Defendant being a gratuitous agent.

[51] The Claim against the 2nd Defendant for unjust enrichment is founded upon an equitable principle, which as explained by Lord Hoffman is grounded in neither contract nor tort. It follows that the Claim against the 2nd Defendant does not fall under section 4(a) of the Limitation Act.

ORDERS

[52] The following are the orders of the Court:

(1) The Claim for specific performance and damages against the 1st Defendant stands dismissed.

(2) It is declared that the 2nd Defendant has been unjustly enriched to the extent of $220,000.00 by the payment by the 1st Defendant to Alliance Bank on behalf of the Claimant.

(3) It is further declared that the property of the 2nd Defendant is subject to a charge by way of subrogation in favour of the Claimant.

(4) The 2nd Defendant shall pay the Costs of the Claimant, such costs to be assessed if not agreed.

(5) The Claimant shall pay to the 1st Defendant its costs as assessed if not agreed.

DATED this 17th day of November, 2017.

KENNETH A. BENJAMIN
Chief Justice