JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 24 OF 2006

BEFORE:	**THE HON. MR. JUSTICE SMITH, JA.** **THE HON. MR. JUSTICE HARRISON, J.A.** **THE HON. MISS JUSTICE G. SMITH J.A. (Ag.)**

BETWEEN:	**HUNTLEY G. MANHERTZ**	**1ST APPELLANT**
	YVONNE P. MANHERTZ	**2NDAPPELLANT**
AND	**ISLAND LIFE INSURANCE COMPANY LTD.**	**RESPONDENT**

Mrs. Marvalyn Taylor- Wright instructed by Taylor-Wright and Company for the appellants.

Mr. Ransford Braham instructed by **Mrs. Suzanne Risden-Foster** of Livingston Alexander & Levy for the respondent.

September 24, 25, 26, & 28, October 1, 2, 3, 4, 5, 2007 & June 27, 2008

SMITH, J.A:

I have had the benefit of reading in draft the judgment of my colleague, G. Smith J.A. [Ag], and I agree with her conclusion and reasoning. However, I wish to make a small contribution.

1. In January 1995 the appellants borrowed $4.5 million from the respondent on the security of a mortgage over their property situate at 12

Gordon Town Road, Kingston 6 [the property]. The Instrument of Mortgage dated 8th January 1995 contained the usual power of sale and required repayment of the loan by monthly installments of $168,447.86 over a period of five years. The loan was disbursed in three tranches, the last of which was made on the 27th January 1995. The installments were to be paid on the first day of each month. The first of such installments became payable on the 1st February 1995. The appellants failed to pay the installments as agreed and, on occasion, their cheques tendered in payment were dishonoured by the bank. The respondent wrote several letters to the appellants about the arrears and demanded settlement. The first appellant made various proposals to pay but these were never honoured. After a prolonged period of non-payment, the respondent wrote to the appellants, demanding that the outstanding arrears be settled by a specific time, failing which the respondent would commence the exercise of its power of sale. The appellants failed to respond. Consequently, a Statutory Notice dated the 15th May 1998 was issued. The sum owing at that time was $ 7,953,690.64 comprising arrears plus interest. The property was advertised and, on the 9th July 1998, put up for public auction. No bids were received at the auction.

2. On October 12, 1998 the first appellant wrote to the respondent seeking confirmation of an agreement for the respondent to accept $3,600,000.00 in full and final settlement of the debt. By letter dated

November 3, 1998 the respondent agreed to accept $3,600,000.00 in full and final settlement of the debt of $7,953,590.64 which was claimed in the Statutory Notice. The first appellant had indicated that he had found a purchaser for the property. By letter dated November 25, 1998 the respondent requested from the appellants' Attorney-at-law a copy of the signed Agreement for Sale and their undertaking to pay to the respondent the sum of $3.6 million. The request was never granted and the sum of $3.6 million was never paid. Consequently, the respondent issued another Statutory Notice dated February 11, 1999 demanding the sum of $8,691,593.49 from the appellants. The demand was not met. On May 4, 1999, the respondent by letter, demanded $8,856,495.12 from the appellants and threatened legal action. This demand was followed by a third Statutory Notice dated June 10, 1999. The debt which had risen to $9,717,766.88 remained unpaid in spite of the many demands. The property was duly advertised for sale by public auction. A second public auction was held on August 12, 1999. A bid of $5,500,000.00 was to no avail because of the bidder's inability to provide the deposits.

3. On September 20, 1999 the appellant's Attorneys at law wrote to the respondent and apologized on behalf of the appellants for their inability to act on the negotiated agreement. By this letter the appellants made a new offer of $5,500,000.00 in full and final settlement. This offer was rejected by the respondent and the appellants were informed

that the debt was $14,707,764.00 at the time-(see letter dated September 29, 1999).

4. A valuation report dated September 20, 1999 was obtained from Easton Douglas and Company. The property was valued at $8,700,000.00 with a reserve price of $6,900,000.00. By an undated letter the respondent received an offer from one Mr. Clement Stevens to purchase the property for $ 6,200,000.00.

5. On September 22, 1999, the appellants obtained an injunction restraining the respondent from selling the property for a period of ten days. The injunction was extended to October 12, 1999. On October 21, 1999 Mr. Clement Stephens increased his offer to $7,000,000.00. By letter dated October 28, 1999 the respondent's Attorney-at- Law advised the appellants' Attorneys that the respondent intended to exercise its rights as mortgagee.

6. The Attorneys-at-Law for the parties made proposals and counter proposals in relation to the settlement of the debt. During this time offers and revised offers were made to the respondent by and on behalf of Mr. Stephens. Ultimately, an offer of $9,500,000.00 from Mr. Stephens was

accepted by the respondent subject to contract. The property was sold to Mr. Stephens on March 21, 2000.

7. On September 12, 2000 the respondent's Attorneys-at-Law wrote to the appellants Attorneys, requesting that they settle the balance of $9,036,732.18, the amount which remained outstanding together with interest.

8. On September 25, 2000 the respondent filed a suit against the appellants to recover the sum of $8,037,437.18.

9. On November 29, 2000, the appellants countered by filing a suit against the respondent claiming the sum of $5,500,000.00, that is the difference between $15,000,000 (which they claimed was the market value of the property) and $9,500,000.00, the sum for which the property was sold.

10. The suit went before Sinclair- Haynes J (Ag.) (as she then was). The learned judge heard both claims together. After a trial which lasted some 14 days, in a well reasoned judgment, the learned trial judge gave judgment for the respondent in the sum of $7,740,956.70 with costs. This appeal is against the decision of the judge.

Grounds of Appeal

11. The appellants filed some fourteen grounds of appeal. It seems to me that these grounds embrace four main issues. These issues concern:

1. The sale of the property pursuant to Power of Sale-grounds 1,2 and 3.
2. Waiver by virtue of the $3.6 million agreement-grounds 4 and 5.
3. The compounding of interest-pursuant to Clause 3 (b) of the Mortgage Instrument.
4. Quantum of damages

I will confine my contribution to the issues concerning the $3.6M settlement agreement.

In The Court Below

12. The appellants in their further Amended Defence to Claim No. CL 2000/ 1-072 and in their Amended Statement of Claim in Claim CL 2001/M-225 averred, inter alia, that the respondent by letter dated November 3, 1998 agreed to accept $3.6 million in full and final settlement of the mortgage debt, thereby waiving the terms of payment under the mortgage. In the former, the appellants stated that, in reliance on such waiver, they altered their position to their detriment.

13. The learned trial judge found that the respondent's agreement to accept $ 3.6 million in full and final settlement of the debt did not amount to accord and satisfaction, as the respondent received no additional benefit by way of consideration. She applied the rule in ***Pinnels*** case which was approved by the House of Lords in ***Foakes v Beer*** (1884) A.C. 605. The learned judge relied on a statement of Danckwert L.J. in ***D& C Builders Ltd. v Rees*** *(1966) 2 Q.B. 617* to the effect that ***Foakes v Beer*** has settled the rule of law that part payment of a debt cannot be a satisfaction of the debt unless there is some benefit to the creditor added so there is an accord and satisfaction.

14. The English Court of Appeal has recently confirmed the rule in ***Foakes v Beer***- see ***Re Selectmore*** (1995) 1 WLR 474, (1995) 2 All ER 534 and ***Ferguson v Davis*** (1997) 1 All ER. 315.

15. Having found that the respondent's agreement to accept the $3.6 million in full settlement was not enforceable on the basis that the appellants did not provide any consideration, the learned judge proceeded to consider Mrs. Taylor- Wright's submissions on the equitable doctrine of waiver.

16. In considering the issue of waiver, one of the questions the learned judge posed was:

> " Did the Manhertzs in reliance on the agreement act to their detriment by not paying

> the installments and focusing instead on obtaining approval to effect Strata Titles, constructing parking lot and entering into contract and final sale agreement?"

17. The learned judge noted that the 1st appellant in his witness statement had stated that the respondent accepted his offer of $3.6 million because of his earlier proposal to convert the premises into Strata Shops. She preferred Miss Donna Stephenson's evidence, which refuted the claim that the respondent's acceptance was premised on the appellants obtaining Strata Titles. On the balance of probabilities the learned judge found that the respondent did not agree to accept the $3.6 million because of the 1st appellants' proposal to convert the premises into Strata Shops. The learned judge went on to say:

> "Assuming the Manhertzs were indeed given the assurance by Island Life that it could proceed to expand the building, the question is whether the Manhertzs acted to their detriment by relying on Island Life's waiver."

18. After considering the evidence she concluded that the appellants had not established that they had suffered detriment by relying on the respondent's waiver.

On Appeal

19. The relevant grounds are 4 and 5:

Ground 4

The learned trial judge erred in law when she treated detriment as the all-important factor in assessing the reliance of the appellants on the respondents' waiver

Ground 5

The learned trial judge erred in law when she failed to recognize that the impact of the waiver on the original loan agreement was to make the agreement to accept $3,600,000.00 the only relevant agreement in the circumstances where:-

> "(a) no notice to retract the waiver was given by the respondent; and
>
> (a) no further agreement was arrived at between the parties to replace the agreement for $3,600,000.00"

20. It should be noted that no ground of appeal was filed in respect of the judge's finding that the agreement was unenforceable because of the lack of valid consideration. The appellants did not seek leave to argue any such ground. Counsel for the respondent did not object to the appellants' submissions on this issue on the basis that no grounds were filed. In light of Rule 1.16 (2) and (3), the Court did not refuse to hear

counsel on the issue of consideration, the intention of the parties and, generally on accord and satisfaction.

21. I propose to deal briefly with this aspect of the appeal and then proceed to consider waiver and promissory estoppel.

22. The agreement between the parties, for the respondent to accept $ 3.6 million from the appellants in full and final settlement of the latter's indebtedness, is not in dispute. It is also not in dispute that at the time of the settlement agreement the amount the appellants actually owed the respondent was $7,953,590.00. By virtue of the rule in ***Foakes v Beer***, at common law, a creditor is not bound by a promise to accept part payment in full settlement of a debt. An accrued debt can be discharged by the creditor's promise only if the promise gives rise to an effective accord and satisfaction. According to the rule in ***Foakes v Beer*** the payment of a lesser sum than the amount due cannot be a satisfaction of the debt unless there is some 'added' benefit to the creditor so that there is an accord and satisfaction.

23. Mrs. Taylor- Wright for the appellants submitted that the two new elements which provided consideration were:

(i) the new method of payment (lump sum instead of installments); and

(ii) different time for payment (within a reasonable time since no precise time was expressed).

24. The submission was roundly and, in my view, correctly rejected by the learned trial judge. The untenability of Counsel's submission can be demonstrated by reference to the facts in ***Foakes v Beer.*** Mrs. Beer had obtained a judgment against Dr. Foakes for £ 2,090. Dr. Foakes asked for time to pay. The parties agreed in writing that if Dr Foakes paid £ 500 at once and the balance by installments, Mrs. Beer would not take any proceedings whatsoever on the judgment. Dr. Foakes ultimately paid the whole amount of the judgment debt itself. Mrs. Beer then claimed the interest which a judgment debt bears as from the date of the judgment. Dr. Foakes refused to pay it. Mrs. Beer sued to recover the interest. Dr. Foakes pleaded the agreement. Mrs. Beer replied that it was unsupported by consideration. The House of Lords held that, even if Mrs. Beer had promised to forego the interest, it was an unenforceable promise because Dr. Foakes had provided no consideration for it.

25. The rule in ***Foakes v Beer*** was followed and applied by this court in ***Adams v R Hanna and Sons Ltd and Another*** (1967) 11 W.I.R 245. In that case a writ of seizure and sale was issued against a judgment debtor for the amount of a judgment debt and costs. Subsequently, the judgment creditor agreed to accept a smaller sum in settlement of the judgment debt. The judgment debtor paid the smaller sum which was accepted by the judgment creditor "in settlement of suit". There was a subsequent seizure and sale of the judgment debtor's goods. This court (Duffus, P,

Waddington JA and Eccleston JA) held that the payment of the lesser sum was not a satisfaction of the greater sum which was owed.

26. In the instant case the appellants wrote the respondent on October 12, 1998 asking the respondent "to confirm your agreement in writing to accept the sum of $3,600,000.00 as settlement in full." The respondent replied by letter dated November 3, 1998:

> "We refer to your letter dated October 12, 1998 and now confirm that we will accept three million six hundred thousand dollars ($3,600,000.00) as full settlement of debt."

27. This is clearly an agreement to accept a lesser sum than the amount due. There is absolutely no mention of any "additional benefit" to the respondent. The respondent is not bound by such an agreement. There is no consideration and consequently no accord and satisfaction. Further, as the learned judge said, even if there was a valid consideration the appellants were unable to perform their promise to pay the smaller amount. They apologized to the respondent for their inability to pay and they made a fresh offer.

28. This apology and the new offer came after the respondent had issued three Statutory Notices threatening to exercise its power of sale under the mortgage instrument unless the full amount due was paid and after an abortive sale by public auction. It is difficult, in my view, for the

appellants in the circumstances, to argue that the new agreement discharged the original debt and imposed a new and different binding contract. As Mr. Braham for the respondent submitted, the letters referred to above and the conduct of the respondent made it abundantly clear that it was the intention of the parties that the 'accord and satisfaction' would only arise on the actual payment by the appellants of the $3.6 million and not on their mere promise to pay.

29. In my judgment, the learned judge was correct in stating that it was clear that the 1st appellant himself regarded the agreement as no longer binding as a consequence of his failure to pay. There can be no doubt, in my view, that the intention of the parties was that actual payment was required to establish 'consideration'.

30. In any event, as I have stated before, the learned judge correctly applied the rule in ***Foakes v Beer*** and concluded that the respondent was not bound by its promise to accept the lesser amount in full settlement of the debt.

Waiver and Promissory Estoppel

31. The application of the rule in ***Foakes v Beer***, over the years, has been found to be too restrictive. Various concepts were used to give some force to an agreement to vary a contract even though the

agreement was not supported by consideration. One such concept is that of waiver. Waiver had its genesis in the common law courts but was gradually taken over by the chancery courts and is now mainly an equitable concept- *see Professor Richard Stone's The Modern Law of Contract- Fifth Edition 3.8.2*. By this principle a person who promises not to enforce certain rights under a contract may be stopped from later insisting on those rights in accordance with the letter of the contract, even though there was no consideration from the promisee- See ***Hughes v Metropolitan Railway Co.*** (1887) 2 App Cas. 439 at 448**.** The courts have developed the concept of equitable waiver into a broader doctrine generally referred to as promissory estoppel- paragraph 3.8.2 op cit. The modern law of equitable estoppel is based on Lord Denning's decision in ***Central London Property Trust Ltd. v High Trees House Ltd*** [1947] K.B. 130 (***The High Trees*** case).

32. The principle of promissory estoppel usually arises where one party to a contract grants to the other party a concession, not supported by consideration, that he will not enforce his rights or a particular right under the contract. It is different from estoppel by representation in that for the latter to apply there must be a representation of an existing fact. Promissory estoppel may apply even though the representation is of a future conduct.

33. I now turn to the complaint of Mrs. Taylor-Wright, on behalf of the appellants, in grounds 4 and 5.

Detrimental Reliance

34. Counsel for the appellants contended that detriment is not required for promissory estoppel to apply. She submitted that the law had long moved away from the requirement of detriment and relied on the following statement of Lord Denning in ***W.J. Alan and Co. Ltd. v El Nasr Export and Import Co.*** [1972] 2 QB, 189 at 213:

> "I know that it has been suggested in some quarters that there must be detriment. But I can find no support for it in the authorities cited by the judge. The nearest approach to it is the statement of Viscount Simmonds in the Tool Metal case, that the other must have been led to alter his position, which was adopted by Lord Hodson in ***Emmauel Ayodeyi v RT Briscoe (Nigeria) Ltd.*** But that only means that he must have been led to act differently from what he otherwise would have done."

35. However, the other members of the court left the question open. While it is clear that for estoppel by representation to apply the representee must have acted on the representation to his detriment, it is not clear what conduct by the promisee is necessary for promissory estoppel to apply. As Mr. Braham for the respondent pointed out, text book authors seem to differ on this issue.

36. Counsel for the respondent referred to ***Hughes v Metropolitan Railway*** [1887] 2 A.C. 439 at 448. ***Emmanuel Ayodeyi Ajayi v RT Briscoe (Nigeria Ltd)*** [1964] 1 WLR 1326 at 1330; ***Commissioner of Inland Revenue v Morris*** [1958] NZLR 1126 at 1136; ***Steria Ltd. and Others v Hutchinson and Others*** [2006] EWCA Civ 1551/2007 1 CR 445 paras 93-94 *and* ***The Commonwealth v Verwayen*** 170 CLR 394 at pp 9-11, among other cases. These cases, he said, support the view that in order to establish promissory estoppel there must be detrimental reliance on the part of the promisee.

37. The question as to whether or not detriment is required for the operation of promissory estoppel has been judicially described as controversial. However, what is clear is that the long list of cases on this point establishes that in order for promissory estoppel to arise, it must be unconscionable for the promisor to resile from his promise- see ***D&C Builders Ltd. v Rees*** *[1966] 2 Q.B. 617 and* ***Emery v. UCB Corporate Services Ltd.*** [2001] All ER (D) 226 (Apr,) [2001] EWCA Civ. 675. In the ***Enroy*** case Peter Gibson, L..J, said at para 27:

> "A promissory estoppel in my judgment, arises where:
>
> (1) there is a clear and unequivocal promise that strict legal rights will not be insisted upon;
>
> (2) the promisee has acted in reliance on the promise; and
>
> (3) it would be inequitable for the promisor to go back on his promise.

At paragraph 28 he continued:

> "Some commentators express the second condition in terms of the promisee altering his position to his detriment (see for example **Snell's Equity 13th Edition** 2000) paragraph 39-08) but that is controversial, see for example **Chitty on Contracts, 28th edition** 1999) paragraph 3-089]. However, the fact that the promisee has not altered his position to his detriment is plainly most material in determining whether it would be inequitable for the promisor to be permitted to act inconsistently with his promise."

38. The promisor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties. If the promisee shows that he had acted to his detriment in reliance on the promise then clearly it would be inequitable to allow the promisor to resile from his promise. However, it may not be necessary to show detriment in order to establish such inequity. Where, for example, the promisee shows that he had been led to act differently from what he otherwise would have done, that might suffice to enlist the helping hand of equity. However, as Gibson LJ said the fact that the promisee has not altered his position to his detriment is most material in determining whether it would be inequitable for the promisor to be permitted to act inconsistently with his promise (see the ***Emery*** case (supra) and ***Hughes v Metropolitan Railway*** (supra).)

39. In the instant case the appellants averred detrimental reliance in their pleadings and sought to substantiate this averment in the 1st appellant's witness statement. After careful consideration of the evidence the learned judge rejected the evidence of the 1st appellant and found that he suffered no detriment in reliance on the respondent's promise. In my view the judge was justified in arriving at this conclusion.

40. Further, I agree entirely with Mr. Braham that the appellants having failed to honour their own obligations under the settlement agreement cannot claim that it would be unconscionable for the respondent to resile from its promise.

41. By letters of demand and Statutory Notices the respondent gave the appellants reasonable notice of its intention to enforce its rights under the mortgage instrument. The appellants were certainly left in no doubt that they must not expect further indulgence.

42. In the circumstances it was not inequitable for the respondent to reassert its claim for the full amount. I am left in no doubt that this is not a case for the operation of the doctrine of equitable estoppel.

43. In ***Adams v R Hanna and Sons Ltd*** (supra) Duffus, P said that for a debtor to obtain the benefit of the principle of equitable estoppel he must not only show that the creditor's conduct was inequitable but that

his own conduct was such that he ought to be given the helping hand of equity.

44. In my judgment grounds 4 and 5 are without merit. The appellants have not shown that in the light of the settlement agreement or any representation made, the respondent was not entitled to demand payment of the full debt. As stated before, I have read the draft judgment of my colleague, G.R. Smith JA (Ag.), and agree with her that the appeal should be dismissed with costs to the respondent for the reasons stated therein.

HARRISON, J.A.:

I have read in draft the judgments of Smith, JA and Smith J.A. (Ag.), I agree with their reasons and conclusions. There is nothing further that wish to add.

SMITH, J.A. (Ag):

HISTORICAL BACKGROUND

1. Mr. Huntley Manhertz and his wife Mrs. Yvonne Manhertz (the appellants) on January 8, 1994 executed a Mortgage Instrument to secure a loan of $4.5M from Island Life Insurance Company Ltd. (the respondent). The appellants used their jointly owned premises situated at 12 Gordon Town Road in the parish of St. Andrew, as collateral for this loan which was to be repaid by monthly instalments of $168,447.86, payable over five years at an interest rate of thirty-eight percent (38%) per annum. These terms were encapsulated in a letter of commitment from the respondent dated October 25, 1994.

2. The Mortgage Instrument provided for two separate and distinct rates of interest chargeable during the lifetime of the mortgage. Under Clause 2(a) of the Instrument there was provision for the aforementioned 38% per annum simple interest on the $4.5M principal which is to be distinguished from the 36% per annum interest which the respondent was authorized to levy by virtue of Clause 3(b). This latter rate was referred to as "the rate of interest on arrears of instalments" and designated under the Mortgage Instrument as "Capitalized" interest. One of the main issues in this appeal is whether, on a proper construction of Clause 3(b) of the Mortgage Instrument, the respondent was entitled to treat the 36% interest as

compound interest when computing the total outstanding arrears owed by the appellants on their mortgage account. The appellants contend that they were not entitled.

3. The instrument specified that the appellants were to service the loan "on the first day of every calendar month" the first such instalment becoming payable on the first day of the month succeeding the month in which the respondent disbursed the entire $4.5M principal to the appellants. It is not disputed that the respondent advanced the principal in three (3) tranches. The final tranch of $1,989,455.35 was disbursed on January 27, 1995. Based on Clause 2(a) stipulation of the Mortgage Instrument, the first payment to service the mortgage loan would have become due on February 1, 1995.

4. The appellants' pattern of payments to service their mortgage loan did not conform to the terms of the Mortgage Instrument. This caused the respondent to send a statutory notice to them in May 1998 for the sum of $ 7,953,690.65 being the sum outstanding. The appellants' failure to respond resulted in the respondent seeking to exercise its powers of sale. The mortgaged property was advertised on five occasions in the **Daily Gleaner** and a public auction was held on July 9, 1998. This auction was abortive as no bids were received in respect of the property.

5. Following this abortive sale, on October 12, 1998 the first appellant, Dr. Huntley Manhertz wrote to Island Life seeking written confirmation of an offer he had made to them by telephone to pay $3,600,000.00 in full and final settlement of their mortgage account. On November 3, 1998 a written confirmation of the respondent's acceptance of the appellants' offer was furnished.

6. The appellants failed to honour this settlement as they defaulted in the payment of the sum agreed. This caused the issuance of another statutory notice of February 11, 1999 to the appellants demanding the payment of $8,691,593.49 as the de facto sum now due on the appellants mortgage account. The appellants' failure to comply with this demand resulted in a further formal letter of demand dated May 4, 1999 requiring the payment of $8,856,495.22 and threatened legal action.

7. Continued non-payment of these sums resulted in another statutory notice being issued on June 10, 1999 requesting the payment of $9,717,766.88. This sum was never paid. Based on the persistent default in payments by the appellants, the respondent caused the mortgage property to be advertised in the **Daily Gleaner** on four occasions for a second public auction. This auction was conducted on August 12, 1999. One bid was received from a Mr.

McFarlane for $5,500,000.00 but this sale was again abortive due to Mr. McFarlane's inability to produce the deposit.

8. Subsequently, in a letter dated September 20, 1999 the first appellant, Dr. Huntley Manhertz offered the respondent the sum of $5,500,000.00 in full and final settlement of the mortgage debt. This offer was refused by the respondent in a letter dated September 29, 1999. During this period the respondent sought and obtained a valuation report from Easton Douglas & Company, which valued the mortgaged property at $8,700,000.00 with a reserve price of $6,960,000.00.

9. Subsequently, Mr. Clement Stevens made an offer to purchase the mortgaged property for the sum of $6,200,000.00. This offer was thereafter revised by Mr. Stevens in a letter dated October 21, 1999 when he increased his offer to $7,000,000.00. On February 8, 2000 the respondent received an offer of $8,100,000.00. Without any apparent reason Mr. Stevens again increased his offer to $9,500,000.00. The property was eventually sold to Mr. Clement Stevens on March 31, 2000 for the sum of $9,789,995.00.

10. On September 25, 2000 the respondent filed a suit in the Supreme Court to recover the mortgage debt of $8,037,437.18 from the appellants. They averred that the balance owed had increased from $4,651,022.50 in April 2000 to $8,037,437.18 by September

2000 due to the continual accrual of capitalized interest on the appellants' mortgage account based on their continued failure to discharge their obligation to pay the debt.

11. The appellants in their defence and counter-claim, stated that the respondent had agreed to accept the sum of $3.6M as full settlement of the mortgage debt and claimed the sum of $11,400,000.00 from the respondents.

12. The learned trial judge in her judgment delivered on March 17, 2006 adjudged that there be judgment for the Claimant Island Life in the sum of $7,740,956.70 with costs to be agreed or taxed.

13. The appellants filed their Notice of Appeal on April 12, 2006 containing the following Grounds of Appeal:

> "1. The learned trial judge's finding that there was no collusion between Island Life and Mr. Stevens cannot be supported by the cumulative weight of the evidence.
>
> 2. The learned trial judge erred in law and fact when she concluded that Island Life obtained a fair market value for the property even though they sold the property for $1,500,000.00 less than it was valued at the date of sale.
>
> 3. The learned trial judge failed to correctly apply to the evidence the legal principles relevant to the exercise of a mortgagee's power of sale by private treaty in arriving at her conclusion that the respondent had obtained a fair market value for the property.
>
> 4. The learned judge erred in law when she treated detriment as the all important factor in

assessing reliance of the appellant on the respondent's waiver.

5. The learned trial judge erred in law when she failed to recognize that the impact of waiver on the original loan agreement was to make the agreement to accept $3,600,000.00 the only relevant agreement in circumstances where:-

(a) no notice to retract the waiver was given by the respondent; and

(b) no further agreement was arrived at between the parties to replace the agreement for $3,600,000.00

6. The learned trial judge erred in law in concluding that the respondent was entitled to compound interest under Clause 3(b) of the mortgage deed notwithstanding her clear recognition that:

(a) The method of calculation was open to several interpretations; and

(b) There was no consistency regarding the method of calculation applied by Island Life Insurance Co. Ltd. throughout the life of the mortgage.

7. In the face of the clear evidence of the witness for the respondent that the interest rate of 36% was a penalty rate, the learned trial judge erred in accepting the calculation of Vinnate Hall as correct and enforceable against the appellant.

8. The learned trial judge failed to correctly apply the relevant principles in ***Financial Institutions Services Ltd. V Negril Holdings Ltd.*** and ***Negril Investment Co. Ltd., and Hew v National Commercial Bank Jamaica Ltd.*** to the facts of the case before her thereby causing her to fall into error in concluding that the respondent who are insurers

had a power/right to compound interest similar to the banks in those two cases.

9. The learned trial judge failed to correctly interpret clause 3(b) of the mortgage deed when she held that the clause was enforceable against the appellant and gave the respondent a "clear right to compound interest."

10. The learned trial judge misinterpreted the evidence in holding that Dr. Manhertz never complained about the compounding of interest on the mortgage prior to the court action. In fact there was no evidence led from which it could reasonably have been inferred that the appellants accepted that Island Life had a right to compound the interest under the mortgage.

11. The learned trial judge failed to recognize the fact that the interest rate of 38% at simple interest was the only applicable interest rate payable by the appellant on the principal amount loaned of $4.5M for the period of 5 years.

12. The learned trial judge erred when she disregarded the calculations of Mr. Condell because he omitted to credit the Manertz (sic) with four payments.

13. The learned trial judge erred in accepting that the respondent had proved their claim against the appellants in circumstances where;

(a) They had failed to prove that the amount claimed was owing.

(b) Their witnesses gave conflicting evidence concerning the correct amount due.

(c) She recognized that the respondent's accounting was subject to erroneous calculating; the claim filed having been based on the erroneous calculations

which she accepted was used by the respondent during the life the mortgage.

14. The learned trial judge erred in concluding that the respondent was entitled to judgment in the sum of $7,740,956.70 in the face of her acceptance of Vinnate Hall's testimony. Further there is no basis to the discerned in the reasoning (sic) which shows how the judgment sum was computed."

14. The focal issues which may be gleaned from the grounds of appeal filed are as follows:

(i) Whether the transaction resulting in the sale of the mortgaged property to Mr. Clement Stevens was tainted by collusion. (Grounds 1, 2 and 3).

(ii) Whether or not the respondent's initial acceptance of the settlement of $3.6M constituted a waiver of the Mortgage Instrument, thereby rendering the Instrument irrelevant for the purposes of governing the rights and obligations of the parties to the mortgage.

Further whether the $3.6M settlement (despite the respondent treatment of it as no longer existing) continues to subsist and is nevertheless enforceable, so as to fix the sum owed by the appellants at $3.6M and no more.

(Grounds 4 and 5)

(iii) In the event that the $3.6M settlement is found to be no longer subsisting and the Mortgage Instrument is regarded as still in effect, governing the rights and obligations of the parties to the mortgage agreement, whether or not Clause 3(b) of the Mortgage Instrument should be properly construed as granting the respondent the right to impose the interest rate of 36% on the arrears

and further the right to compound that interest on the appellants account.

(Grounds 6 – 11)

(iv) Whether the respondent's calculations of the sums owed by the appellants were grossly inflated and entirely erroneous as a result of inaccurate calculations and/or faulty record keeping.

Issue No: (i) – Collusion

15. "Collusion" is defined by the authors of **Words and Phrases Legally Defined** 2nd Edition Volume I, and cited by the learned trial judge in her judgment in the following manner:

> "To be a 'collusive' sale, it must have some secret term or aspect designed for the purpose of deceiving or imposing upon the mortgagors or the person entitled to redeem ... and defeating his interest in some way ... under other legal systems collusion has been defined as a fraudulent arrangement between two or more persons to give a false or deceptive appearance to a transaction to which they engage."
>
> [Emphasis supplied]

This definition in my view is adequate and appropriate in these circumstances and may be of some assistance in the determination of this issue.

16. What has to be determined is whether the factual circumstances as alleged by the appellants can substantiate their contention that

there was collusion between the respondent and Mr. Clement Stevens in the execution of the sale of the mortgaged property.

17. The first factual circumstance to be analysed is the appellants' assertion that the respondent deliberately (in the furtherance of its collusive intent) omitted to properly advertise the August 12, 1999 public auction and its subsequent intention to proceed with sale by private treaty. The appellants contend that these omissions resulted in the narrowing of the pool of potential purchasers from whom a better price than the $9.5M received from Mr. Clement Stevens might have been obtained. This provides, they argue, a reasonable basis from which it can be inferred that the respondent intended to defeat the appellants' interest in the property, by restricting the focus of the sale negotiations exclusively to Mr. Clement Stevens.

18. As it relates to the August 12 auction, I am of the view that the appellants' contention that the respondent failed to post advertisements after August 8, 1999 is without merit as is evidenced by the newspaper advertisements dated August 11 and 12, 1999. What is therefore left to be determined on that issue is whether the number of postings of the advertisements and the amount of time between the first posting and the date of the auction, allowed enough time for adequate public exposure of the auctions and the particulars of the mortgaged property.

19. Guidance may be had from the judgment of this Court, in ***Diane Jobson v Capital and Credit Merchant Bank, Roland Taylor, Ronald Taylor (Appointed by Order of the Court to represent Carmen Taylor)***. SCCA No. 113/2002 delivered July 29, 2005.

In answering the appellants' complaint in that case as to the mortgagee's alleged improper exercise of its powers of sale through its failure *inter alia* to adequately advertise the details of the public auction, Cooke, J.A. stated:

> "The advertisement appeared in The Gleaner, a national newspaper on the 26th April 1990, the same day on which the auction took place. This is inadequate. Apparently, the general practice is to have two inserts in suitable publications. Enough time was not given to persons who may have been interested." (pg. 16)

[Emphasis mine]

On the basis of that case, the inference which may be drawn is that this court has accepted that the placement of a minimum of two (2) advertisements as being a reasonable practice.

20. In the present case, the respondent issued four advertisements. All four advertisements were placed in "The Gleaner" which based on its wide national circulation, would have been a "suitable publication" for sufficiently advertising the public auction. In addition, these advertisements were posted over a period of thirteen (13) days between July 31 and August 12, 1999, which period would have been

adequate to afford any prospective purchasers ample opportunity to locate, view and inspect the mortgaged property. In my view, there was no justification to say that the respondent thwarted the success of the August 12, 1999 auction by failing to properly advertise the property.

21. The appellants further complained that the advertisements mis-described the dimensions of the mortgaged property by stating that the complex consisted of six shops instead of eight shops. This they argued combined with the alleged failure of the advertisements to highlight the attributes of the property, resulted in the presentation of an unflattering image of the property. This was done by deliberate design or through negligence and diminished the marketability of the property in the public arena and by inference resulted in the poor performance at the auction. The appellants thus challenged the learned trial judge's finding that the description of the premises as having six shops instead of eight was not a statement of such gravity as would have gone to the heart of the competence and legitimacy with which the sale transaction was conducted. The learned trial judge held as follows:

> "I accept the evidence of Mr. Stair that it is the gross area of the property that matters, not the number of shops. The square footage of the property was accurately advertised by D.C. Tavares and Finson Co. Ltd. on behalf of Island Life."

22. Of great significance is that the issue as to whether the complex had six shops or eight shops was not conclusively resolved by the end of the trial in the court below. This difficulty seems attributable to certain structural alterations which had been done within the complex such as the removal of a partitioning wall which previously separated one unit from another. This uncertainty becomes clear on careful reading of the evidence arising from the cross-examination of Mr. Connel Steer, a chartered surveyor, retained by the appellants in 2003 to conduct "a retrospective" valuation of the mortgaged property (i.e. to determine in 2003 what would have been the value of the property in 1999). In cross-examination of this aspect of the case he had this to say:

> "Q. When you state at third paragraph gross building area 3,018 square metres [R.B. reads] – isn't that a representation of 6 shops?
>
> A. Yes.
>
> Q. So, having seen this - in relation to earlier question – is it 6 shops – do you still maintain answer?
>
> A. My recollection is that 8 shops.
>
> Q. So how would you explain this reference?
>
> A. May I consult notes?
>
> Judge: Permission granted

A. There are 7 shops – farm store, cycle repair store, a bar on first floor, bar, meat shop and office – 7 – some discrepancy in my numbering.

R.B. As I understand it – you said 8 shops yesterday – your report said fully occupied and you list operations which when added comes to 6 and then you said your notes had 7 shops ... you said from your observation – being used as 7 shops – you told Judge 8 shops being used as 7.

A. Yes.

Q. Having regard to fact that in your notes you have diagram showing 7 shops having regard to your report saying fully 6 shops and your statement saying 8 shops and your statement later that premises currently used as 6 shops – those matters did not affect your valuation?

A. Same area but 2 shops – so even though numbering of shops is 6 or 8 – working with gross area.

Q. So, that the mention of 6, 8 and 7 would not affect value as long as get that total area correct.

A. Correct.

Q. Would you agree that in this context whether described as 6, 7, or 8 shops not material?

A. It does in a way have some material effect but once gross area correct that's what's important."

23. The learned judge sitting as a tribunal of law and fact, no doubt took into consideration that Mr. Steer a professional land surveyor, had difficulty determining the precise number of shops housed in the complex, despite having visited the premises. She took into account that the appellants' own witness while acknowledging that there was some relevance in the number of units, nevertheless went on to state that the issue of greater importance was the correctness of the statement as to the gross area of the premises. In The Gleaner of July 31, 1999, D.C. Tavares and Finson Company Limited, described the property's dimensions as being 320.6 square meters or 3,451.0 feet when they advertised the premises for public auction. In his cross-examination Mr. Steer concurred with that statement.

24. In the circumstances outlined, it could not be justifiably argued that the learned trial judge was unreasonable when she held that: "It is the gross area of the property that matters not the number of shops." If the expert land surveyor had a difficulty determining the precise number of shops in the complex, then the respondent should not be held to have acted deceitfully or negligently by asserting in its advertisement that there were six shops in the complex.

25. It should be noted also, that the respondent proceeded with the sale in reliance on a valuation report dated September 30, 1999 which

was prepared by Easton Douglas & Company, Chartered Surveyors, the firm having surveyed the premises described it as follows:

> "Lot size : registered by survey as lot 112 on the plan of Hope Estate in the parish of St. Andrew, the lot contains an area of 320.60 m squared (3451.0 sq. ft.)
> Facilities: this site accommodates a split level commercial building disposed over a gross floor area of 339.92 m squared (3,659.0 sq. ft.) Both the upper and lower levels consist of three (3) separate shops with sanitary facilities. Additionally there is (sic) storage and bathroom facilities on the lower level which is connected to one of the shops on the upper floor via an internal stairway.
>
> There are two (2) concrete stairways, one (1) at each end of the building which connects both floor levels."

It is noteworthy, that this report agrees with Mr. Steer's findings as to the total area of the mortgaged property and also states that there were six (6) shops. Also expressly mentioned in The Gleaner's advertisements under the heading facilities were "sanitary facilities" and "storage facilities" being assets of the mortgaged property which might have been of interest to prospective buyers. It therefore could hardly be said that the respondent deliberately failed to properly market the property's assets or that it deliberately or negligently misdescribed its facilities, given that it had taken care to proceed on the basis of the land surveyor's expert assessments.

26. On the issue of collusion what remains to be determined is whether the appellants are correct, in challenging the learned trial judge's dismissal of the submission that the respondent's omission to advertise their intention to proceed with sale by private treaty after the failed August 12, 1999 auction, was a default of significant importance.

27. The learned trial judge conducted a methodical analysis of the case law in this area. She firstly considered the Supreme Court decision in ***Joan Adams v Workers Trust & Merchant Bank Ltd***. (1992) 29 JLR 447. That case also concerned the mortgagee's exercise of its power of sale. The plaintiff's sourcing of purchasers willing to pay $500,000.00 for the mortgaged property was to no avail. The defendant mortgagee had already sold the premises by way of private treaty for $395,000.00. The defendant had not advertised its intention to proceed by way of private treaty, thereby leading to the reasonable inference that had it done so, a price more commensurate with the property's actual value could, on a balance of probabilities, have quite reasonably been obtained. James, J. held that:

> "In the instant case the defendant did not advertise the property before sale but chose to sell by private treaty. Such failure to advertise, coupled with the fact that he misdirected himself to whether there was a binding agreement, leaves me to conclude that the defendant fell short of the standard of the duty of care owed to the plaintiff. I therefore

> hold that the defendant is liable for the loss suffered as a result of the sale for $395,000.00. By advertising, the property could have been exposed to prospective purchasers in the open market."

28. The learned trial judge in the present case sought assistance from the Court of Appeal's judgment in ***Diane Jobson v Capital & Credit Merchant Bank, Ronald Taylor et al*** (supra). Cooke, J.A. having cited ***Moses Dreckett v Rapid Vulcanizing Company Ltd***. (1988) 25 JLR 132 and ***Cuckmere Brick Co. Ltd v Mutual Finance Ltd.*** [1971] 2 WLR 1207, the landmark cases dealing with a mortgagee's duty when exercising its powers of sale summarized the guiding principle as follows:

> "Therefore the guiding principle is that a mortgagee in exercising the power of sale owes a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decided to sell."

The learned judge of appeal proceeded to note however that:

> "It would seem to be that if land was sold at a true market value, then the question of whether or not the mortgagee took reasonable precautions to achieve that result becomes purely academic."

The learned trial judge having considered the above Court of Appeal authority came to the following conclusion:

> "It would have been prudent to advertise the property. However, the crux of the matter is whether a proper price was obtained."

29. The learned trial judge went on to find that the respondent was successful in securing a fair market value. The appellants have challenged this finding. Was the learned trial judge correct in holding that "Island Life obtained a fair market value for the property."?

30. The appellants' first complaint as regards the sufficiency of the sale price is that the valuation report on which the mortgagee relied in March 2000, the time of the sale, was dated September 30, 1999. This report was done by Easton Douglas & Company Limited, Chartered Surveyors. The appellants argued that, the respondent having acted on a valuation which was six months old, failed to secure a price which was reflective of the current market value.

31. It is my view that the approach adopted by my learned brother Cooke, J.A. in ***Diane Jobson v Capital & Credit Merchant Bank et al*** (supra) is applicable to the present case. In it he stated:

> "... it is true that immediately prior to the sale the mortgagee did not obtain a valuation specifically for that exercise. The valuation which the appellant challenged was done for the purpose of granting the mortgage. This was in September 1989. The report of C.D. Alexander Company said that the valuation was good for six months. By my calculation the property was sold in the eight month after the valuation. Accordingly, it was submitted, there was no valid valuation at the time of sale. I regard this submission as somewhat pedantic. There was no evidence to indicate that in respect of the land there were any factors arising between the sixth and the

> eighth month which could cast doubt on the validity of the September 1989 valuation. It is my view that, bearing in mind the valuation which the mortgagee had in hand it was not imprudent on its part in not obtaining a current valuation." (pg.15) [Emphasis mine]

32. In this regard it is necessary to refer to the estimate stated in the September 30, 1999 valuation report. The report provides:

> "Appraised Value: Based on the factors examined, given the trend of building costs and the level of prices for facilities comparable in quality and location, we are of the opinion that, offered for sale on bona fide terms, the unencumbered fee simple estate and interest in these premises would fetch a market price of EIGHT MILLION, SEVEN HUNDRED THOUSAND DOLLARS ($8,700,000.00) and we value accordingly.
>
> Reserve Price: On the assumption that the physical condition of the premises as well as the state of the market, as applicable, remain equally applicable in the event of foreclosure, we recommend a reserve price of SIX MILLION, NINE HUNDRED & SIXTY THOUSAND DOLLARS ($6,960,000.00)."

33. The appellants have contended that this valuation is far too low in light of the fact that they had secured building approval for the construction of strata lots. This approval they argued, would have boosted the overall market value of the mortgaged property.

The problem however, with the above assertion is that no sub-division approval or building approval for strata lots had been secured

by the appellants at March 2000. What the appellants had in fact received was formal approval "... for the construction of a building and/or addition to an existing building." See the valuation report from D.C. Tavares & Finson Company, of July 25, 2004 which states:

> "... [this] in our opinion does not relate to the stratification of the property, only construction. Approval for the property to be sub-divided into strata lots is a different process and we have seen no documentation in relation to this application, except for a copy of a proposed strata plan."

34. As confirmation of the above, Mr. Lincoln Evans, the then Acting Town Clerk for the Kingston & St. Andrew Corporation in a letter dated September 7, 2004 to the respondent's attorneys-at-law stated the following:

> "An application requesting strata approval was submitted on May 21, 1998. A site investigation conducted on June 3, 2004 revealed that the site was in order. However, work in accordance with approved building plans had not been carried out. THIS MEANT THAT THE STRATA PLANS SUBMITTED WERE PREMATURE....as a result no further processing of the application has been done."

The appellants it would appear confused planning and building approval with the very distinct and specialized form of approval required for sub division and the creation of strata lots.

35. I must return to the issue of the market value reports on the mortgaged property. Prior to the July 2004 Tavares and Finson

Company valuation report, another valuation was prepared in 2003 by Allison Pitter and Company at the request of the appellants. The chartered surveyor from that company valued the premises between $10.5M and $11M.

36. In analyzing the Allison Pitter and Company and the Easton Douglas and Company valuations, the firm of Tavares and Finson Company in its report of July 2004 stated its opinion as follows:

> "In comparing the two market values/prices, we find that there is a fairly large disparity between the two of somewhere between 17% and 25% (depending on how calculated) which, although not desirable is not unusual in valuing real estate. A desirable range would be somewhere in the range of 10% to 15%. However, there are many factors that can affect an opinion of value and under stable conditions there is normally room, within certain limits, for differences of opinion, however, in times when market conditions are not stable or where market information is not readily available, more serious differences may arise. ... We are of the opinion that the estimated values in both reports fall within an (sic) passable if not totally desirable range although based on our estimated market value the market value given by Easton Douglas & Company Ltd. could be considered on the low side."

The firm then opined that on its retrospective evaluation in 1999, the mortgaged property "would have fetched a negotiated price in the region of $9,800,000.00."

37. It is to be noted that the report provides that:

"(a) Allowances must be made for disparities between assessments made by different companies.

(b) Although the valuation estimate issued by Easton Douglas & Co. was "on the low side" it was nevertheless passable.

(c) The market value estimate range given by Tavares & Finson Company itself was, at its lower end, only $300,000.00 above the $9,500,000.00 obtained by the respondent in the sale to Mr. Clement Stevens.

(d) The forced sale value ought reasonably to have been set at a minimum of $8,000,000.00 based on the company's extensive data collection and analysis."

38. Of importance is the evidence of Mr. Connel Steer who acted as the valuator for the preparation of the Allison Pitter & Company report of 2003 which assessed the market value of the property between $10.5M and $11M. Under cross-examination he conceded that the "forced sale value" of the premises should have fetched the sum of $9.9M. He further stated in his evidence as follows:

"Q. What is a distressed sale?

A. Distressed sale is where a mortgagee in particular would call in their mortgage.

Q. Who would determine 'forced sale' value

A. A valuer (sic) would include if required by an institution.

Q. This 'forced sale' value – less than market value'.

A. Usually less.

Q. I've seen term 'reserve price' is it similar to "forced sale' value.

A. Yes."

39. In this case, the respondent had in fact "called in their mortgage" by way of Statutory Notice of June 10, 1999. This combined with the dismal failure of the August 14, 1999 public auction in my view rendered the March 2000 sale to Mr. Clement Stevens a "distressed sale" for which a forced sale value would have been obtained. In light of the difficulties experienced by the respondent in the period 1998 to 2000 in procuring a purchaser for the property, I accept that the learned trial judge's finding that the March 2000 sale to Mr. Stevens was a distressed sale was faultless.

40. The first public auction on July 9, 1998 failed because no bids were received from the general public. The second auction on August 12, 1999 failed due to the fact that a bid received from one Mr. McFarlane dissipated because of his inability to pay the deposit on his $5.5M bid. In those circumstances where the outstanding debt was some ten years old and still unpaid and the respondent was encountering difficulties in disposing of the property by means of public sale, it appears quite reasonable that the March 19, 2000 sale should have been regarded as a distressed sale.

41. Finally on this point, I am of the view that the learned trial judge made an impeccable observation, with which I concur when she wrote at page 28 of her judgment:

> "In any event on the 14th February 2000, Dr. Manhertz' (sic) attorney informed Island Life's that Dr. Manhertz has secured a purchaser who was willing to purchase the property for $8,000,000.00. Island Life in that correspondence was warned against selling the property at an inordinately low price. Dr. Manhertz and his attorney therefore did not regard the sum of $8,000,000.00 as being low. As a matter of fact he told the Court that the property 'could have been sold to Mr. Stennett for $8,000,000.00. The property was sold for $9,500,000.00."

42. What now remains on the appellants' case in their attempt to establish the issue of collusion is conduct on Mr. Clement Stevens part which they label as suspicious and surreptitious. They pointed to Mr. Stevens' repeated revision of his price offers. I have concluded that it was reasonable for the trial Judge to have interpreted his behaviour as being wholly innocuous and "merely evidence of his tenacity." See page 35 of the judgment.

43. The residual points which the appellants allege indicate collusion may be summarized as follows:

> "(a) That the respondent was unprofessionally indulgent towards Mr. Stevens as evidenced by the respondent's eagerness in accepting only his offers while refusing to seek out other possible purchasers who might have offered higher prices for the mortgaged premises. As well as Miss

> Stephenson allowing him to pay his deposit in installments;
>
> (b) That the respondent's agent Miss Donna Stephenson, shared a close relationship with Mr. Stevens which rendered her incapable of conducting the business of the respondent with Mr. Stevens at 'arms length'; and
>
> (c) That the respondent refused to disclose the particulars of sale to the appellants, despite their repeated requests. (A fact which on the appellant's case shows secretiveness indicative of *mala fides* dealings in the form of collusion)."

44. It is my view that submissions (a) and (b) above might be answered by acknowledging on the evidence presented that Mr. Stevens was an eager purchaser who was serious about acquiring the mortgaged property and was committed to doing what was necessary in order to do so. He therefore took practical steps toward paying the $9.5M purchase price, which the respondent, after ten years of defaults by the appellants, urgently needed to settle the outstanding debt. In other words the respondent had secured a committed buyer and as such would have been willing to make such concessions (such as the payment of the deposit in instalments) as would have assisted Mr. Stevens in completing the purchase of the mortgaged property.

45. Finally, on this issue of collusion, attention should be given to the evidence of Miss Donna Stephenson under cross-examination, bearing in mind that the learned trial judge would have had the opportunity to

observe her demeanour and to weigh her answers in the context of assessing her credibility as a witness. The dialogue was as follows:

> "Q. Suggesting that your familiarity with 12 Gordon Town Road arose out of familiarity with Mr. Stevens?
>
> A. No – never knew Mr. Stevens till he offered.
>
> Q. Suggesting that it was your relationship with Mr. Stevens that he made his offers directly to you?
>
> A. He did not make all offers to me.
>
> Q. Suggesting that because of close relationship that caused him to send payment directly to you, even when you had retained an attorney?
>
> A. No close relationship between us.
>
> Q. Suggest that close association explains why no interest in making counter offer?
>
> A. Not close relationship – why I had no interest in making counter-offer is it goes through a process when offers are received – they are submitted to board meeting.
>
> Q. Suggesting that's why you did not try to make contact with other known potential purchasers?
>
> A. We did communicate with other known purchasers.
>
> A. I had told you we had 2 offers.
>
> Q. From?

A. Mr. Stennett and Mr. Stevens."

The learned trial Judge accepted Miss Stephenson's evidence. This Court will not interfere with such a finding.

46. As regards submission (c) i.e. the respondent's refusal to disclose the particulars of sale to the appellants, this complaint in my view is answered by referring to what I consider the reasonable explanation given by Miss Stephenson at page 175 of the agreed Notes of Evidence where she said:

> "Q. Why were you so secretive about the terms of Mr. Steven's offer?
>
> A. Because the company on advice thought it was the prerogative of the Mortgagee to dispose of the property by private treaty especially when debt owed for years and never felt should disclose to mortgagors with whom they were struggling for many years especially when FINSAC came into the picture."

47. On a totality of the evidence as it relates to the issue of collusion, I am of the view that the learned trial judge was correct in holding that it failed to reveal that requisite element of dishonesty or moral turpitude to establish fraud as noted by Carey, J.A. in ***Timoll-Uylett v Timoll*** S.C.C.A. No. 28 of 1976 delivered on December 5, 1980. The learned trial judge was correct to hold that there was no conspiracy designed to defeat the appellants' interest in the mortgaged

property, and that there was no collusion present in the dealings between Mr. Clement Stevens and the respondent mortgagee.

Issue No. (ii) - The $3.6 Million Dollars Settlement (Grounds 4 & 5)

48. The $3.6M settlement came out of the failure of the respondent's first attempt to sell the mortgaged property by public auction on July 9, 1998. The appellants' outstanding balance as at May 15, 1998, when the statutory notice prior to the auction was issued for $7,953,590.64. After the failed auction, in a telephone conversation with the respondent the appellants made an offer to pay $3.6M in full settlement of the debt in lieu of the $7,953,590.64. This was followed by a letter of October 12, 1998 from the appellants asking the respondent to indicate whether it accepted the offer. The respondent by letter dated November 3, 1998 communicated its acceptance of the appellants' offer.

49. The respondent having received no payment in satisfaction of this settlement, on February 11, 1999 reverted to the *'status quo ante'*. This they did by issuing a Statutory Notice demanding payment of the outstanding sums due on the appellants' account, failing which the respondent would exercise its powers of sale within thirty days of

the date of the Statutory Notice. The respondent asserted that the debt had increased from $7,953,590.64 to $8,691,593.49.

50. The appellants objected to the respondent's reviving of the mortgage instrument, contending that 'the settlement' had the legal and practical effect of dispensing with or discharging the mortgage settlement.

51. Mrs. Taylor-Wright on behalf of the appellants argued that there were three aspects of the law which were relevant to the new agreement. These were: (a) Contractually binding variation; (b) Variation which takes effect as a waiver at common law and; (c) Promissory estoppel.

(a) Contractually Binding Variation

52. The appellants submitted that the $3.6M settlement operated to vary or alter the terms of the Mortgage Instrument and that these variations are binding in law as they are supported by consideration. The thrust of the appellant's submission was that the new alternative arrangement was an agreed variation to the original contract consisting of all the elements of a valid contract (viz offer, acceptance, intention to create legal relations and consideration). At common law, a promise to accept part payment in full settlement of a debt does not usually bind a promisor. However, where the promisor substitutes a different mode of performance of the contract, this provides a new

element sufficient to provide consideration. This is the rule in ***Pinnel's*** case [1602] S. Co. Ref. 1179. The appellants complained that the learned trial judge did not apply this rule in its entirety as she failed to consider the two new elements in the instant case; (i) the new method of payment (lump sum) (ii) different time of payment (within a reasonable time since no precise time was expressed). These new elements the appellants argued had the effect of discharging the original debt and imposing a new and different binding contract.

53. Mr. Ransford Braham for the respondent submitted that in circumstances where a debtor owes money to a creditor, a debtor's agreement to pay a lesser sum in satisfaction of the entire debt is not an agreement recognized by law. He contended that the arrangement to pay the lesser sum is not supported by consideration and is therefore incapable of enforcement. He relied on ***Foakes v Beer*** (1884) A.C. 605 and ***D.C. Builders v Rees*** [1966] 2 Q.B. 216 in which it was stated:

> "... ***Foakes v Beer*** (1884) ... settled definitely the rule of law that payment of a lesser sum than the amount of the debt due cannot be a satisfaction of the debt, unless there is some benefit to the creditor added so that there is an accord and satisfaction."

54. The learned trial judge concluded that Island Life's acceptance of the $3.6M did not amount to accord and satisfaction as they received

no additional benefit by way of consideration. This conclusion was in my view faultless as the altered mode of performance was executory up to the date of trial therefore the proviso to the rule in ***Pinnel's*** case (supra) would not avail the appellants.

(b) Waiver at Common Law

55. The appellants submitted that the respondent had abandoned its right to insist on payment as required by the Mortgage Instrument as well as the right to enforce performance thereof. They argued that the respondent waived their right to recover the payment of the mortgage debt as stipulated in the Mortgage Instrument by its acceptance of the $3.6M settlement. They cited the case of ***Banning v Wright*** [1972] 1 W.L.R. 980 as the basis for this submission where Lord Hailsham of Marylebone L.C. stated:

> "In my view the meaning of the word "waiver" in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead abandonment by way of confession and avoidance if the right is thereafter asserted."

56. On the other hand, the respondents submitted that the party granting the waiver can generally retract it, provided he gives reasonable notice of his intention to do so to the party for whose benefit it is granted. They contended that waiver may not be permanent in its effect. The person waiving the right may do so for a fixed period or they may be able to revive the original right by giving

notice, which they contend was done in this case by the statutory notice of February 11, 1999. The appellants' failure to pay the settlement sum, they argue, necessitated this course of action.

57. Waiver at common law also described as forebearance, arises where one party voluntarily withholds on their right to demand the performance of the contract in accordance with its original terms. The party is therefore said to have waived his right or the term in the contract which contains that right. See ***Banning v Wright*** (supra). However, if the dependent party has delayed or postponed the performance of its obligations, the forebearing party is permitted to revoke its waiver/forebearance and revert to the '*status quo ante*'. This revocation must be preceded by issuance of a reasonable amount of notice. The learned trial judge made such a finding which in my judgment was unassailable.

(c) Promissory Estoppel

58. The appellants submitted that once a party by his conduct evinces an intention to effect legal relations between himself and another he is bound by that promise and cannot afterwards go back on it. They relied on the case of ***Hughes v Metropolitan Railway Co.*** [1877] A.C. 439. In that case Lord Cairns stated that:

> "... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results ... afterwards by

> their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict legal rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties ..."

They also submitted that even though they had acted to their detriment by entering into a legally binding contract of sale which exposed them to the possibility of legal action, it was not necessary for them to show that they had suffered detriment. Detriment they argued was not a necessary element of promissory estoppel as the law had long moved away such a requirement – see ***W.J. Alan & Co. v El Nasr Export & Import*** [1972] 2 All E.R. 127 where it was held that:

> "... it was not necessary for a party relying on the doctrine of waiver or promissory estoppel to show that he acted on the party's representation to his detriment."

They complained that the learned trial judge was wrong to have considered the appellants case solely on the narrow issue of whether the agreement amounted to a waiver in equity which caused them to act to their detriment and ignored the other aspects of their case at common law. Accordingly, they argued that she fell into error when she treated detriment as the all important factor.

59. The respondent replied that in order to establish promissory estoppel, detriment must be established as it was a fundamental consideration of the doctrine. This position they argued was recognized by the English Court of Appeal in the case of ***David Emery and another v UCB Corporate Services Ltd. (formerly UCB Bank***) 2001 EWCA (Civil) 675 in which Lord Justice Peter Gibson stated:

> "A promissory estoppel, in my judgment arises where
>
> (i) there is a clear and unequivocal promise that strict legal rights will not be insisted upon;
>
> (ii) the promisee has acted in reliance on the promise; and
>
> (iii) it would be inequitable for the promisor to go back on his promise."

They submitted further on this issue of detriment that the appellants cannot establish that they suffered any detriment or disadvantage caused by the alleged change of position in the instant case.

60. An examination of the appellants' Amended Statement of Claim in Claim #C.L. 2001/M225 paragraph 5 states as follows:

> "In reliance on the said waiver and/or representation and/or promise the plaintiffs have altered their position and acted to their detriment."
> [Emphasis mine]

and in their further Amended Defence to suit C.L. 2000/I 072 paragraph 3 states:

> "Further in denial of paragraph 5 the defendants will say that by letter dated November 3, 1998 the plaintiff waived the terms of payment under the mortgage agreement and agreed to accept the sum of THREE MILLION SIX HUNDRED THOUSAND DOLLARS in full settlement of the mortgage debt in reliance of which waiver the defendants have altered their position and acted to their detriment."
> [Emphasis mine]

On the basis of the pleadings and the manner in which the case was conducted, I concluded that the learned trial judge was correct in considering detriment having regard to the applicable law. Her finding on this issue was unassailable, therefore the Mortgage Instrument endured so as to govern the relations between the parties.

Issue No. (iii) - Compound Interest and Quantum

(Grounds 6-14)

61. These grounds deal with the issues of compound interest and quantum and may conveniently be considered together. Clause 3(b) of the Mortgage Instrument imparts to the respondent a right to charge interest on arrears of payment. The appellants contend that this clause is void for vagueness or uncertainty. Alternatively, they argued, that in the absence of specific language providing for the levying of compound interest, the learned judge should have construed clause 3(b) as bestowing a right to charge simple interest and not compound interest. Clause 3(b) provides:

> "If any interest or any interest payable on arrears of interest capitalized under this present clause shall remain unpaid after the day on which the same ought to be paid then and in every such case the interest so in arrear (sic) shall be capitalized and considered as from the day on which the same ought to be paid as an addition to the principal money hereby secured and shall henceforth bear interest at the rate specified in Item 8 of the Schedule hereto and on the days aforesaid and all the covenants and provisions herein contained and all powers remedies conferred by law or by this Mortgage in relation to the principal money and the interest thereon shall equally apply to such capitalized arrears of interest and to interest on such arrears and all such capitalized arrears of interest and interest on such arrears shall be charged on the mortgaged hereditaments and shall to all intents and purposes be within the scope and operation of this security and shall be payable by the Mortgagor upon the same being demanded by the Mortgagee PROVIDED ALWAYS that the provisions of this clause shall in no way prejudice or affect the right of the Mortgagee to enforce payment of any interest in arrear (sic) under any of the covenants or provisions herein contained."

I am of the view that contrary to the appellants' contention that Clause 3(b) does not expressly confer a right upon the respondent to compound interest under the Agreement, the said clause does in fact, in very specific terms, on an ordinary reading of its stipulations, so authorize the respondent. The Clause expressly employs the term 'capitalized'. It refers to "interest capitalized under this present Clause", "capitalized arrears of interest", and "arrears shall be

capitalized." ***In National Bank of Greece SA v Pinios Shipping Co. No. 1 and Another The Maira*** [1990] 1 All E.R. 78 it was clearly stated that the term "capitalized interest" is synonymous with "compound interest". Clause 3(b) expressly and repeatedly employed the use of the term "capitalized" as it related to arrears on payment of the appellant's mortgage account. Consequently, it seems reasonable to conclude that Clause 3(b) does expressly confer upon the respondent a right to compound interest under the mortgage agreement. The clause could not in my view be attacked on the premise that it was vague as regards the issue of whether the interest referred to there-under was intended to be simple interest or compound interest. The appellants relied upon ***Financial Institutions Services Ltd v Negril Holdings Ltd. and Negril Investment Co. Ltd.***, Privy Council Appeal No. 37 of 2003 delivered 22nd July, 2004. They argued that the learned judge failed to correctly apply the principles enunciated in the ***Negril Holdings Ltd.*** case (supra) to the instant case. In my view the facts in that case and those in the present case may be distinguished. In ***Negril Holdings Ltd***. (supra) the overdraft which was the subject of the court's deliberations, was vague and unspecific as to the issue of interest, making no specific employment of the words "compound" or "capitalized". A proper reading of the Clause in the instant case reveals that it specifically

conveys an expressed right upon the respondent to compound interest under the agreement.

62. The appellants sought to raise the question as to whether the interest rate charged under Clause 3(b) constituted a penalty. The respondent resisted this assertion on the ground that the appellants having not specifically raised this point as an issue on the pleadings in the court below, should be barred for reasons of fairness from asserting it for the first time before this court. It is my view, that the respondent having not been afforded an opportunity to put forward evidence on the subject in the court below the appellants should not be permitted to raise this matter on appeal. See the House of Lords decision in ***Esso Petroleum Corporation Co. Ltd. v Southport Corporation*** (1956) A.C. 218 which stated inter alia that:

> "The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them."

63. Finally, I must consider the question of whether the respondent's records reflected an inaccurate debt sum. The learned trial judge accepted the evidence of Ms. Vinnate Hall and from her own observations and discretion as a tribunal of fact, found her to be "a reliable witness" whose calculations she accepted "as accurate." In the Privy Council decision of ***Industrial Chemical Co. (Ja.) Ltd. v Owen Ellis*** 23 J.L.R. 35 at page 39 Lord Oliver stated:

> "The principles governing the approach of an appellate court to the review of the decision of the judge of trial on disputed issues of fact are familiar but it is worth stressing yet again what has been said both by the House of Lords and by this Board.
>
> The matter is summed up in the well known passage from the speech of Lord Thankerton in ***Watt or Thomas v Thomas*** [1947] A.C. 484 at pages 487 and 488:
>
> (i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (ii) the appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (iii) the appellate court, either because the reason given by the trial judge are not satisfactory, or because, it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

In the instant case, the learned judge had the benefit of seeing, hearing and assessing the evidence of the various witnesses. In my view, she made a fair, reasonable and sound assessment of the

evidence when she came to the conclusion that Ms. Vinnate Hall's calculations and methodology were accurate and reflected what the appellants actually owed on their mortgage account.

Conclusion

It is my view, and I so conclude, that there is no ground upon which this court ought to reject the findings of fact and the conclusions of the learned trial judge. Accordingly, I would dismiss the appeal and affirm the judgment in the court below with costs to the respondents to be agreed or taxed.

SMITH, J.A.

ORDER:

The appeal is dismissed and the judgment of the court below is affirmed with costs to the respondents to be agreed or taxed.