COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2012/CLE/GEN/FP00377

IN THE MATTER OF the property comprised in Debenture dated 21 July 2005 from L.T. INVESTMENTS INC. to FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

AND IN THE MATTER of the Conveyancing and Law of Property Act, Chapter 123 of the Statute Laws of The Bahamas

BETWEEN
FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED
Plaintiff

AND

L.T. INVESTMENTS INC.
Defendant

BEFORE The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES:

For the plaintiff: Mrs Nicole Sutherland-King with Mrs G. Diane Stewart

For the defendant: Mr Harvey O. Tynes, Q.C. with Ms Ntshonda Tynes and Ms Rosanne Sweeting

HEARING DATES: 2014: 24 June; 11 November

JUDGMENT

GrayEvans, J.

1. This action is brought by the plaintiff, First Caribbean International Bank (Bahamas) Limited against L.T. Investments Inc for judgment for moneys due and owing to the plaintiff by the defendant and for delivery up of vacant possession of certain property owned by the defendant and charged to the plaintiff.

2. The plaintiff is and was at all material times a company incorporated under the laws of the Commonwealth of The Bahamas and engaged in the business of commercial banking from and within the said Commonwealth. The defendant is and was at all material times a company incorporated under the laws of the said Commonwealth and a customer of the plaintiff.

3. The plaintiff commenced this action on 9 November 2012 by an originating summons and by order of this Court made with the consent of the parties on 25 April 2013, these proceedings were ordered continued as if begun by writ.

4. On 15 May 2013 the plaintiff filed its statement of claim seeking the following relief:

   (i) Judgment against the defendant in the sum of $3,245,497.35representing outstanding principal and interest with interest accruing thereon at the statutory rate until payment;

   (ii) An order that the defendant do deliver up possession of the charged properties;

   (iii) Costs and such further or other relief as the Court may deem just.

5. The evidence on behalf of the plaintiff came from Mr Charles Hall who, at all material times, was the plaintiff's Senior Manager, Receivables Management and Risk Management Division. Mr Hall's witness statements, which he adopted as his evidence-in-chief, were filed on 10 September 2013 and 24 June 2014.

6. The evidence on behalf of the defendant came from Mr Hannes Babak, president and director of the defendant company, whose witness statement, which he too adopted as his evidence-in-chief, was filed on 20 June 2014.

7. In 2005 the plaintiff made advances of up to $3,200,000.00 to the defendant.The advances were secured, inter alia, by a first fixed and floating debenture, dated 21 July 2005, and recorded in the Registry of Records in volume 9464 at pages 244 to 288, from the defendant giving the plaintiffa first legal charge over Lots 1,2,3,4 and 5 Tract A, Central Area West, Freeport, Grand Bahama, and the defendant's other assets and undertakings. The plaintiff was also given an irrevocable assignment of rent from Freeport Concrete Company Limited t/a the Home Centre, a tenant of the building situated on the charged real property.

8. By clause 2 of the debenture, the defendant agreed to pay to the plaintiff on demand all moneys and liabilities owed by the defendant to the plaintiff, together with interest. It was also agreed that until so demanded, the aforesaid advance would be repayable by the defendant by 180 regular blended monthly payments of $24,644.00 each.

9. By clause (9) of the debenture, the failure by the defendant to pay any money or to discharge any obligation or liability to the plaintiff on the due date is defined as an event of

default in which all moneys under the "debenture immediately shall become due and payable on demand, the security shall become enforceable, and, if so required by the bank the company shall immediately provide cash cover on demand or a guarantee acceptable to the bank for all contingent liabilities of the company to the bank."

10. The loan payments fell into arrears in early 2010. The matter was brought to the attention of Mr Hall who after some discussion with Mr Babak wrote to the defendant on 27 April 2010, confirming that the plaintiff had agreed to "stand down" from pursuing normal recovery activity until receipt of aproposal for dealing with the arrears from the defendant by 1 July 2010, but reserved its right to resume normal recovery activity after 1 July 2010. At the date of that letter, the loan payments were five months in arrears.

11. The Home Centre closed in June 2010 and the defendant stopped making payments on the loan.

12. Except for the fact that no payments were made on account of the loan after June 2010 and up to September 2011, it is unclear what transpired between the parties. However, by email dated 4 September 2011, Mr Hall wrote to Mr Babak noting the plaintiff's concerns regarding the operation of the loan account and requested Mr Babak's further advice as to his intentions on the way forward. In that email Mr Hall also inquired, inter alia, whether it would be possible to obtain "a legal assignment" of up to US$6M in a settlement agreement of which Mr Babak was a beneficiary, "as added comfort".

13. At some point between the closure of the Home Centre and September 2011 the defendant had decided to convert a portion of the charged real property into an indoor mall in an effort to increase its tenant base and its cash flow to enable it to better service the loan. That information was shared with Mr Hall and by email dated 9 September 2011 ("the 9 September email"), Mr Hall wrote to Mr Babak summarizing Mr Babak's proposal, as he understood it, for restructuring the defendant's loan facilities with the plaintiff bank. In that email Mr Hall also indicated that, in support of the proposal he would require "an operating budget/projections inrelation to the plans for the commercial building", as well as a rental income cash flow forecast and an indication of the expected square foot charge for the kiosks inthe building.

14. The proposal as summarized by Mr Hall was as follows:

> 1) FCIB to agree to forbear with client [and] place LTI repayment on an interest only basis to 28 February 2011. (The parties agree that the year should be 2012 and not 2011).
>
> 2) HB to raise $750K in private capital to: a) convert unused section of building into a small indoor mall with kiosks, food court etc and b) to cover past due license fees with the GBPA. Fit out time frame expected to be December (90 days +or-)
>
> 3) Meantime any excess rental income after payment of the defendant's insurance premiums will be available as principal payments for loan.
>
> 4) HB to provide an irrevocable legal assignment of up to $6M from Port Settlement Agreement by way of additional security to cover FCIB loans in the event it wishes to exit all or any part of the relationship (in its sole discretion). This is intended to be a continuing security for the relationship, before and after payment by Port Group Ltd, unless an agreement to the contrary is reached, and it is not intended that the benefits will fall away if a demand is not made."

15. The 9 September email also contained a request for Mr Babak to confirm that his proposal was as had been outlined in the aforesaid email.

16. Mr Babak's evidence is that the email did not accurately reflect his proposal. However, although in an email dated 20 September 2011, he sent the "revenue for projections" also requested by Mr Hall in the 9 September email, there is no evidence in writing that Mr Babak notified Mr Hall of any inaccuracies with the said proposal. His evidence is that he would have responded to Mr Hall and noted the inaccuracies, although he could not recall whether he did so orally or in writing.

17. By letter dated 13 October 2011,MrAndre Feldman wrote to Mr Hall in the following terms:

> "I am writing to you at the request of Mr Hannes Babak for whom I act as attorney and counsel.
>
> I can confirm that Mr Babak has given me irrevocable written instructions as follows. Up to a level of US$6 million dollars any funds that I receive for Mr Babak that flow from the 2010 Settlement Agreement between the Hayward Interests and the St Georges following a sale of IDC (Holding Company for Grand Bahama Port Authority and Port Group Limited), or any of the underlying IDC group companies, IDC assets or any part thereof, and which would be paid to me in my capacity as the attorney for Mr Babak, these are to be paid first to CIBC First Caribbean Bank ("the Bank") to pay down the debt of Mr Babak and/or his company LT Investments Ltd.
>
> These irrevocable instructions are attached to this email. To be clear these payments to the Bank are in relation to Mr Babak and the 2010 Settlement Agreement.
>
> Neither I, nor my firm, have assumed any of Mr Babak's personal or corporate liabilities. I am simply an intermediary who has received certain instructions and at the client's request I am sharing those instructions with you and the Bank and confirm that I will act in accordance with these instructions as soon as these above referenced funds are paid to me."

18. The aforesaid irrevocable instructions were contained in a letter also dated 13 October 2011, from Mr Babak to Mr Feldman in which Mr Babak asked Mr Feldman to confirm receipt of those instructions to Mr Hall.

19. In or about November 2011, in conjunction with an annual review of the plaintiff's loan facility with the defendant, and as a part of the plaintiff's internal document known as "classified debt annual review", Mr Hall forwarded to the plaintiff's head office in Barbados an application on behalf of the defendant for the restructuring of the said loan facility and incorporating Mr Babak's said proposal therein.

20. If the restructuring were successful, the plaintiff would be holding more than $20M in securities in respect of loans in the combined sum of less than $6M, an arrangement which Mr Hall saw as "bankable" and which he recommended and expected to be approved by his superiors.

21. In the meantime, the defendant proceeded with its plans for converting the charged property to an indoor mall. Mr Hall was aware that Mr Babak and the defendant were engaged in the creation of the mall on the charged property, using private financing, the effect of which would be to increase the value of the asset which was the subject of the debenture.

22. There is nothing in writing from Mr Hall or anyone else from the plaintiff bank to Mr Babak or the defendant prior to 28 February 2012confirming whether or not Mr Babak's proposal had been accepted, notwithstanding that the said proposal requested the plaintiff's forbearance with respect to the defendant's repayment under the loan, permitting the defendant to make interest-only payments up to that date.

23. As indicated, following the closure of the Home Centre, payments under the mortgage ceased in June 2010 and the evidence is that notwithstanding the aforesaid proposal to make interest-only payments, presumably between September 2011 and 28 February 2012, the defendant did not make any further payments on the account until 10 February 2012. Thereafter five more payments in varying amounts were made on account during the period ending 8 June 2012.

24. Mr Hall's evidence is that those payments were applied to the defendant's overdraft facility with the plaintiff.

25. It was also during the month of June 2012 that: (i) the construction of the indoor mall was completed; (ii) the defendant obtained its occupancy certificate and welcomed its first tenants; and (iii) Mr Babak was informed by Mr Hall that the plaintiff "might" want its loan repaid.

26. No further payments were made by the defendantafter the 8 June 2012.

27. The defendant had a "soft opening" for the Circle Mall on 10 August 2012 and three days later, by letter dated 13 August 2012, the plaintiff (i)notified the defendant of its default under the debenture; (ii)made formal demand for payment in full of the outstanding loan within 21 days of the date of that letter; and (iii) threatened legal action in the event of the defendant's failure to comply with the demand.

28. The defendant did not meet the plaintiff's demand and the debtremains outstanding.

29. As a result, the plaintiff commenced this action in November 2012, seeking judgment for the amounts owed by the defendant and for possession of the charged property.

30. In its defence and counterclaim filed on 10 June 2013, the defendant admits that it was unable to pay the monthly payments to the plaintiff as agreed from January 2010 until October 2011.

31. In light of that admission, the plaintiff is,pursuant to the terms of the debenture, entitled to the relief it seeks.

32. However, the defendant claims that in or about the month of October 2011 the plaintiff and the defendant entered into a new agreement whereby, for consideration, the plaintiff agreed to waive or vary its rights under the debenture.

33. Although particulars of that agreement were not pleaded in its defence, in its counterclaim, which was abandoned at trial, the defendant alleged that in or about October 2011 the plaintiff and the defendant entered into an agreement whereby the defendant agreed to invest approximately $1M in the renovation of "The Home Centre" and construction of The Circle Mall on the charged real property and that its president, Mr Babak, would assign to the plaintiff $6M of sums payable to him by virtue of the aforesaid settlement agreement with the Port Group, in consideration of which the plaintiff agreed that it would not enforce its rights under the debenture. Further, that pursuant to that agreement, the defendant invested the aforesaid sum of $1M in the construction of the Circle Mall and Mr Babak assigned to the plaintiff the sum of $6M as aforesaid.

34. The defendant, relying on the equitable defence of promissory estoppel, contends that by virtue of that alleged agreement the plaintiff is estopped from enforcing itsrights under the

debenture without giving reasonable notice of its intention to do so. In that regard, the defendant contends that the plaintiff's letter dated 13 August 2012 demanding repayment of the aforesaid loan was not reasonable notice and the commencement of this action in November 2012 was, therefore, premature.

35. In support of that contention, the defendant relies on certain oral assertions made by Mr Babak in his witness statement as well as under cross-examination. The defendant also relies on the cases of Thomas Hughes v The Directors & C., of the Metropolitan Railway Company (1877) 2 App. Case 439 and W. J. Alan & Co. v El Nasr Export & Import Co. [1972] 2 All E.R. 127.

36. The plaintiff denies that it agreed to forbear, suspend, waive, or otherwise delay the enforcement of its rights under the debenture and while counsel for the plaintiff accepts that in certain specified circumstances a court of equity will prevent a party to a contract from insisting on having its strict legal rights, in her submission, in light of the plaintiff's denial of the existence of the alleged agreement, this is not such a case.

37. In support of its position, the plaintiff relies on the evidence of Mr Hall as well as the cases of Low v Bouverie [1891] 3 Ch 82, Tool Metal Manufacturing Co. Ltd v Tungsten Electric Co. Ltd [1955] 1WLR 761, Woodhouse Ltd v Nigerian Produce Ltd [1972] AC 741 and David Emery et al v ECB Corporate Services Limited [2001] EWCA Civ 675.

38. The learned editors of Snell's Equity, 31st edition, at paragraph 10-08, on the doctrine of promissory estoppel, wrote:

> "Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it. C must also show that the promise was intended to be binding in the sense that (judged on an objective basis) it was intended to affect the legal relationship between the parties and E either knew or could have reasonably foreseen that C would act on it. Yet C's conduct need not derive its origin solely from E's encouragement or representation. The principal issue is whether E's representation had a sufficiently material influence on C's conduct to make it inequitable for E to depart from it."

39. While the learned editors of Halsbury's Laws of England, 4th edition, at paragraph 1071, put it this way:

> "When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."
>
> See Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] AC 741 at 768; [1972] 2 All ER 271 at 291; Hughes v Metropolitan Rly Co (1877) 2 App Cas 439 at 448; Birmingham and District Land Co v London North Western Rly Co (1888) 40 ChD 268 at 286

40. In the case of Hughes v Metropolitan Rly Co supra,relied on by the defendant:

> "A notice to repair, within six months, houses held on lease by the *Metropolitan Railway Company*, was given on the 22nd of October, 1874, to expire on the 22nd of April, 1875.

It was answered by a letter of the 28th of November, suggesting that the lessor might like to purchase the premises. The lessors' solicitors, by letter of the 1st of December, asked the price demanded, and were told, by letter on the 30th of December, that it was £3000. The lessors' solicitors on the 31st of December, 1874, wrote to say that, considering the condition of the premises, "the price is out of all reason. We must therefore request you to reconsider the question of price, having regard to the previous observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you." No further communication on this subject took place till the 19th of April, 1875, when the agent for the company wrote to say that as "the negotiations had not resulted in a sale" the company would take in hand the repairs. On the 20th of April the solicitors for the appellant wrote, declaring that "the negotiations" had been broken off in December last, and that there had been ample time since then to complete the repairs. On the 22nd of April the notice expired, and on the 28th the ejectment was served. After verdict for the plaintiff and judgment in the Court below it was held, that the company was entitled in Equity to be relieved against the forfeiture, for that the letters at the end of November and at the beginning of December had the effect of suspending the notice, and that the suspension did not come to an end till the 31st of December, till which time the operation of the notice was waived, so that no part of that time could be counted against the tenant in a six months' notice to repair."

41. In that case, Lord Cairns LC at page 448 opined as follows:-

"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 negotiations which has the effect of leading one of the parties to suppose that the strict 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."

42. Then in W.J. Alan & Co. v El Nasr Export & Import Co. [1972] 2 All E.R. 127, also relied on by the defendant, Lord Denning MR considered the nature of "promissory estoppel" as a form of "variation" of an original contract or a "waiver" of strict rights thereunder. At pages139 and 140, after referring to the cases of Panoutsos v Raymond Hadley Corpn of New York [1917] 2 KB 473; and Enrico Furst& Co v W E Fischer Ltd [1960] 2 Lloyd's Report at 348, both of which dealt with letters of credit. His Lordship continued:

"What is the true basis of those decisions? Is it a variation of the original contract or a waiver of the strict rights thereunder or a promissory estoppel precluding the seller from insisting on his strict rights or what else? In Enrico Furst, Diplock J said it was a 'classic case of waiver'. I agree with him. It is an instance of the general principle which was first enunciated by Lord Cairns LC in Hughes v Metropolitan Railway Co. and rescued from oblivion by Central London Property Trust Ltdv High Trees House Ltd. The principle is much wider than waiver itself; but waiver is a good instance of its application. The principle of waiver is simply this; if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so; (see Plasticmoda Societa Per Azioni v Davidsons (Manchester Ltd [1952] 1 Lloyd's Report 527 at 539 per Lord Denning). There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will

thereafter insist on them: (see Tool Metal Manufacturing Co Ltd. v Tungsten Electric Co. Ltd [1904] 1 Ch 395). But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by the waiver. He will not be allowed to revert to his strict rights. He can only enforce them subject to the waiver he has made." [underline added]

43. On the issue of whether the promisee must have acted to his detriment, Lord Denning, MR, opined:

> "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 Simonds in the Tool Metal case ([1955] 2 All ER at 660, [1955] 1 WLR at 764) that the other must have been led 'to alter his position', which was adopted by Lord Hodson in Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd ([1964] 3 All ER 556 at 559, [1964] 1 WLR 1326 at 1330). But that only means that he must have been led to act differently from what he otherwise would have done. And, if you study the cases in which the doctrine has been applied, you will see that all that is required is that the one should have '*acted* on the belief induced by the other party'. That is how Lord Cohen put it in the Tool Metal case ([1955] 2 All ER at 686, [1955] 1 WLR at 799), and is how I would put it myself."

44. In the case of Tool Metal Manufacturing Co. Ltd. V Tungsten Electric Co Ltd *supra*, it was held that a temporary indulgence or concession will not give rise to a promissory estoppel if it was not intended to affect the legal relationship between the parties.

45. In Low v Bouverie [1891] 3 Ch 82, relied on by the plaintiff, Bowen LJ noted at page 106: "...an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different interpretations, but it must be such that it will be reasonably understood in a particular sense by the person to whom it is addressed."

46. Then in the case of Woodhouse Ltd. v Nigerian Produce Ltd *supra*, another case on which the plaintiff relies, acontract for the sale of coffee beans was agreed to be payable in pound sterling. The sellers mistakenly sent an invoice stating that the price was payable in Kenyan Shillings. At the time the value of pound sterling and Kenyan shillings was equal. The buyers accepted the delivery and invoice without objection. Subsequently the value of the pound fell quite dramatically in relation to the Kenyan shillings. The buyers then sought to revert to pound sterling as stated in the contract. It was held that the buyers conduct in accepting the invoice unquestionably amounted to an implied clear and unambiguous promise to accept on those terms.

47. In that case Lord Hailsham made the following observation at page 755:

> "...cases as Low v Bouverie [1891] 3 Ch. 82 and Canadian & Dominion Sugar Co. Ltd. v Canadian National (West Indies) Steamships Ltd [1974] AC 46 are authority for the proposition that, to give rise to an estoppel representation should be clear and unequivocal, and that, if a representation is not made in such a form as to comply with this requirement, it matters not that the representee should have misconstrued it and relied upon it."

48. He then commented at page 770:-

> "I am satisfied that, in the second sense of the above quotation, the meaning is to exclude far-fetched or strained, but still possible interpretations, whilst still insisting on a sufficient precision and freedom from ambiguity to ensure that the representation will (may not) be reasonably understood in the particular sense required." (emphasis added)

49. Lord Pearson at page 762 of Woodhouse Ltd. v Nigerian Produce Ltd expressed the following view:

> "In a case of this kind, the alleged "representation" or promise or assurance ought to be reasonably clear and definite both as to the terms of the contract which are being waived and as to the duration of the waiver. It may be that the "representation" or promise or assurance has to have at least as much precision as would be needed for a variation of the contract." (emphasis added)

50. Then in the case of The Astrea [1971] 2 Lloyds Rep 494, Roskill J commented at page 502:

> "So far as estoppel was concerned there was some discussion as to the modern doctrine of promissory estoppel and the fact that it is often of what is called a suspensory nature. I accept that and I accept that so long as any estoppel is operating, the party who is relying upon representation is entitled to continue to rely upon it until adequate notice is given to bring the effect of that representation to an end."
>
> See Also Odyssey Pavilion LLP (In Administration) v Marcus Ward Limited et al (2011) NICh 10.

51. Finally, in the English Court of Appeal case of David Emery et al v UCB Corporate Services Limited *supra*, the Court considered an appeal of a decision of the High Court against the mortgagors, Mr. and Mrs. Emery, in favour of their mortgagee, UCB Corporate Services Limited. Following the Emery's default on their mortgage, UCB made a demand and appointed receivers over the mortgaged property. The Emerys commenced proceedings against the bank seeking declarations that both the bank's demand and the appointment of receivers were unlawful and claiming damages. The Emery's particulars of claim included a claim of promissory estoppel in which it was pleaded that the Emerys had acted in reliance on a promise by a bank officer, that UCB would accept reduced payments on their loan until the arrears were paid off and that UCB would not demand repayment of the loan as long as those payments were made. The Emerys averred that in reliance on that promise they took no steps to raise funding by refinancing, or otherwise, to pay off the arrears or the entire indebtedness. UCB denied that it had made any such representation to the Emerys. The Court of first instance held that the bank officer concerned could have simply indicated that UCB intended to call in the loan and that as such, it was difficult to see why the Emerys were in any worse position than they would have been had the bank officer done so.

52. On appeal by the Emerys, the Court of Appeal noted that the plea of promissory estoppel had not been made out. Peter Gibson LJ commented at paragraph 36:

> "I do not doubt that Mr. and Mrs. Emery feel genuinely aggrieved at UCB's conduct in not honouring what they regard as a clear promise to them not to take action without Mr. Smith reverting to them once the accountant's report was received. But having regard to all the circumstances. I am left in no doubt that this is not a case for the operation of the doctrine of promissory estoppel. It is not inequitable for UCB to go back on Mr. Smith's representation. UCB cannot be held to be estopped from exercising its contractual right in demanding repayment. Putting it the other way round, I regard it as plainly unfair that a failure to warn Mr. and Mrs. Emery of what UCB was about to do, when such warning would not have made any actual difference to their position, should leave UCB exposed to a claim for substantial damages."

53. As indicated, the defendant contends that the plaintiff in October 2011 agreed to waive or vary its rights under the debenture in consideration of the defendant expending $1M on converting its property which had been charged to the plaintiff under the aforesaid debenture into an indoor mall and the assignment to the plaintiff by Mr Babak of $6M which he expected to receive from the aforesaid settlement agreement.

54. As I understand the position advanced by the defendant, the defendant via its principal, Mr Babak, informed Mr Hall, as the plaintiff's representative, that in an effort to improve its cash flow and thereby its ability to make the agreed payments under the debenture, the defendant planned to renovate the building on the charged real property and convert the same to an indoor mall. The cost of those renovations was originally estimated at $750,000.00, but that sum was subsequently increased to approximately $1M. It was expected that the intended renovations would increase the defendant's tenant base as well as increase the value of the charged real property.

55. However, in order to proceed with those plans, the defendant needed to obtain private funding since the plaintiff declined to advance further funds to the defendant. Proceeding with those plans would also mean that the defendant would not have been able to make the monthly mortgage payments which were admittedly seriously in arrears. Consequently, Mr Babak on behalf of the defendant required the plaintiff's assurance that it would not enforce its strict legal rights under the debenture by demanding payment in full of the loan, while the renovations were being carried out.

56. The defendant's evidence, as I understand it, is that Mr Hall gave Mr Babak the assurance which he requested so the defendant proceeded with the renovations, which Mr Babak says the defendant would not have done had the defendant not been assured by Mr Hall that the plaintiff would not call in the loan.

57. As evidence of that assurance the defendant relies on the following statements made by Mr Babak at paragraphs 16, 17, 19, 26 and 27 of his witness statement, which Mr Tynes, QC, argues have not been specifically denied by Mr Hall:

> "I told Mr Hall that my only concern is that the plaintiff be patient and not call in the loan once the defendant would have made the investment.
>
> "Mr Hall said that he fully understood."
>
> "Mr Hall acknowledged that the investment would substantially increase the value of the building."
>
> "I reiterated to Mr. Hall that I needed to know that the plaintiff would forbear and would not demand the immediate repayment of the outstanding loan.
>
> "Mr. Hall said that that was not a problem, that I shouldn't worry about that and that we should go ahead and build the Mall".

58. In addition to those assertions, the defendant also relies on the following evidence elicited from Mr Babak (A) during cross-examination by counsel for the plaintiff (Q):

(i) At p. 78 of Transcript, lines 13 to 16

Q. Who did you understand Charles Hall to be?

A. I understood Charles to be the person in charge of my account or in charge of L.T. Investments; me, myself and L.T. Investments account.

(ii) Also, at p. 79 of Transcripts, lines 3 to 5

Q. Did you believe that Mr. Hall made decisions regarding the management of that account by himself?

A. Yes

(iii) And lines 11 to 24

Q. Is it your evidence that Mr. Hall never indicated to you that he had to get further approvals in relations to your accounts?

A. Didn't say approval. He said he had to liaise with other people in the Bank. But I had never a chance to talk to any of them. My only person... that only person that I had relationship with was Charles Hall from that time.

Q. You never spoke with anyone else at the Bank regarding the L.T. Investments Account?

A. Not from the time Charles Hall took over.

Q. And do you remember when Mr. Charles Hall took over?

A. In the year of 2008.

(iv) Also at page 100 of the Transcript, lines 3 to 9

Q. And it was your understanding at the time that Mr. Hall had the authority to make such a decision; yes or no?

A. He had to represent--I was a hundred percent certain that Mr. Hall was allowed to represent any decision to me what he had to do--if I may use the words, 'behind the curtain', I was not privy to.

59. Moreover, counsel for the defendant submits that Mr Hall's evidence that he "elected to follow" the defendant's loan account during the period between 13 October 2011 and 13 August 2012, is an admission that he did in fact forbear or suspend the plaintiff's right of enforcement under the debenture for "a full 10 months".

60. Mr Hall denies having given the assurance as alleged by Mr Babak. His evidence is that he had no authority to give Mr Babak or the defendant the assurance he sought and, in that regard, he advised Mr Babak that his proposal would have had to be approved by the plaintiff's head office in Barbados.

61. It appears to me from the aforesaid exchange between counsel for the plaintiff and Mr Babak during cross-examination that Mr Babak denies that he was advised by Mr Hall that the aforesaid proposal had to be approved by the plaintiff's head office or senior management.

62. However, I note that in his evidence-in-chief, Mr Babak said that Mr Hall had told him that he would speak to his superiors at the plaintiff bank and revert to him with respect thereto. Those words suggest to me that Mr Babak was indeed aware that Mr Hall did not have the final say as regards approval of his proposal.

63. I, therefore, accept Mr Hall's evidence that he did not have the authority to approve Mr Babak's proposal. I also accept Mr Hall's evidence that he informed Mr Babak that he had to obtain approval for the said proposal from his superiors; that is, his head office in Barbados. Consequently I find that Mr Barak was aware that Mr Hall did not have the authority to accept or approve the aforesaid proposal containing a request for the plaintiff's forbearance.

64. In that regard, the evidence is that Mr Hall, in or about November 2011, in conjunction with an annual review of the plaintiff's loan facility to the defendant, forwarded an application for

restructuring of the defendant's loan facility with the plaintiff to his head office in Barbados. Mr Hall's evidence is that that application was made on the basis of the 9 September email and subsequent exchanges between him and Mr Babak, which application he saw as "bankable" and which he expected to be approved by his superiors

65. Notwithstanding his optimism that the application for restructuring would be approved by his head office, Mr Hall said he did not share those views with Mr Babak or the defendant. Instead he "followed" the account and waited for his head office's decision.

66. While waiting for his head office's decision, Mr Hall, nor anyone else from the plaintiff bank notified the defendant or Mr Babak as to the status of the plaintiff's consideration of the defendant's request for its forbearance.

67. So, between October 2011, when Mr Feldman wrote to the plaintiff indicating he had received instruction from Mr Babak to pay up to a level of $6M to the plaintiff "to pay down the debt of Mr Babak and/or his company LT Investments Ltd" until 28 February 2012, the date, according to the 9 September email, the plaintiff had been asked to agree to forbear, there is no evidence that Mr Hall or anyone else from the bank indicated to the defendant or Mr Babak whether or not the said proposal had been approved, or whether or not the plaintiff was agreeable to forbearing or waiving its rights under the debenture with regard to the monthly payments of $24,644.00 and to accept from the defendant interest-only payments until 28 February 2012.

68. In fact, the next written correspondence between the parties was the aforesaid demand letter dated 13 August 2012.

69. So, clearly there was nothing, as Mr Hall says, and the defendant accepts,"formal" or "in writing" on the "bank's letterhead" whereby the plaintiff agreed to forbear or waive its rights under the debenture by not enforcing its security, although the monthly payments of $24,644.00 due under the debenture were seriously in arrears.

70. In that regard, Mr Tynes QC for the defendant points out that the defendant does not rely on an agreement in writing as, in his submission, Mr Babak never asserted that there was such an agreement. Mr Tynes QC points out further that all of Mr Babak's assertions relate to oral exchanges between he and Mr Hall, "a very senior officer of the plaintiff bank with authority to bind the bank".

71. As I understand Mr Babak's evidence and counsel for the defendant's submissions, the defendant is relying on the alleged statements by Mr Hall to Mr Babak when Mr Babak informed him of the defendant's plans to invest a substantial sum of money in upgrading the building on the charged real property, instead of making the agreed blended monthly payments under the debenture. Those statements being that Mr Babak "shouldn't worry" about the plaintiff demanding the immediate repayment of the loan while the defendant was renovating the building on the charged real property; that the defendant "should go ahead and build the Mall" in response to Mr Babak's request for Mr Hall's assurance that the "plaintiff would forbear and would not demand the immediate repayment of the outstanding loan". Furthermore, that notwithstanding Mr Hall having told him that he "would speak to his superiors at the plaintiff bank and revert" to him, and in the absence of any confirmation from Mr Hall or anyone else on behalf of the plaintiff bank that the plaintiff would, in fact, forbear, Mr Babak took those alleged statements by Mr Hall as an assurance that the plaintiff would forbear with regard to its right to demand the immediate repayment of the loan. Further, the defendant relied on those alleged statements to borrow and invest $1M in the construction of the Circle Mall on the charged real property and Mr Babak provided the plaintiff with an assignment of the aforesaid settlement agreement as required by the plaintiff.

72. As regards that latter assertion, I accept the submission of counsel for the plaintiff and I find that neither the aforesaid letter by Mr Babak to Mr Feldman nor the letter from Mr Feldman to Mr Hall is evidence of an assignment of up to $6M of Mr Babak's interest in the aforesaid settlement agreement. At best the letter was, as described by Mr Hall, "a good faith gesture" by Mr Babak pursuant to the discussions between he and Mr Hall.

73. Further, notwithstanding Mr Tynes QC's submission that Mr Babak's assertions about the oral communications between he and Mr Hall have not been specifically denied, Mr Hall's statements in his witness statement are,in my view, a denial of the aforesaid statements attributed to him by Mr Babak, by which the defendant alleges it was assured that the plaintiff would forbear.

74. In that regard, I note the following statements by Mr Hall at paragraphs 8 through 12 of his witness statement filed 10 September 2013:

> (8) The defendant has alleged that it entered into an agreement with the bank whereby the bank agreed not to enforce its strict legal rights under the debenture, specifically that the bank agreed to waive or vary its rights under the debenture by not enforcing its security notwithstanding the fact that the defendant was in breach of the loan Agreement.
>
> (9) All discussions negotiations or otherwise relative to the defendant and its facility with the bank were had with me as I was the person with primary responsibility for the defendant's account with the bank. I unequivocally deny that any agreement was concluded between the defendant and the bank whereby the bank agreed to delay or forbear in the enforcement of its security. I was however engaged in discussions with Mr Hannes Babak, the President of the defendant, regarding, among other things, the unsatisfactory servicing of the defendant's facility with the bank. During the course of the discussions between Mr Hannes Babak and I, proposals were advanced by Mr Hannes Babak relative to regularizing the servicing of the defendant's account with the bank. The proposal tendered by Mr Hannes Babak included the possibility of an assignment by Mr Hannes Babak to the bank of a certain settlement agreement as additional security and comfort for his debts and the debts of the defendant. However, no agreement arrangement or otherwise was formally concluded between Mr Hannes Babak, the defendant and the bank as the proposal was never advanced beyond the discussion stage.
>
> (10) As a follow up to the discussions had between me and Mr Hannes Babak, I forwarded an electronic mail to him on the 9th September 2011. The electronic mail sets out a summary of the proposal advanced by him during the course of our several discussions on his and the defendant's indebtedness to the bank. No formal agreement arrangement or otherwise was concluded between the defendant and the bank relative to any forbearance by the bank in enforcing or attempting to enforce its securities. My September 9th 2011 electronic mail was a follow up to our several discussions and was written further to my earlier electronic mail dated 4th September, 2011 regarding the unsatisfactory servicing of the defendant's facilities and the bank's concerns in connection therewith.
>
> (11) Subsequently, I was provided with a copy of a letter dated 13th October 2011 purporting to be an assignment authored and signed by Andre Feldman, the purported attorney for Mr Hannes Babak. At no time did I or the bank accept this document as a valid assignment, nor did I have any discussions with Mr Hannes Babak or Mr Andre Feldman in connection with the purpose purport or effect of the letter. Rather the letter was viewed as a good faith gesture on the part of Hannes Babak pursuant to exploratory discussions in principle to reach a go forward plan that may have been acceptable in all the circumstances to Senior Management. Further, at no time did I or any other representative of the bank or

the bank's internal or external counsel have sight of the purported settlement agreement to which the purported assignment relates.

(12) I did not at any time or in any manner or form say or otherwise suggest to Mr Hannes Babak that the defendant should not worry about the bank demanding repayment of its loan. I did not, nor to the best of my knowledge did any other representative of the bank, have any discussion or conclude any agreement with the Mr Hannes Babak regarding his use or intended use and/or alternative use of the $1,000,000.00 referred to in the defendant's counterclaim.

75. However, assuming, without deciding that the statements attributed to Mr Hall by Mr Babak were in fact made by Mr Hall as alleged by Mr Babak, the question is whether or not they are capable of enabling the defendant to rely on the equitable defence of promissory estoppel as it now seeks to do?

76. As I understand the authorities, in order to rely on the equitable defence of promissory estoppel, the representation, promise or assurance on which the defendant seeks to rely may be made by words or conduct and need not be in writing. However, the representation, promise or assurance must be clear and unequivocal and must have been intended to affect the legal relations between the parties, or reasonably understood by the other party, in this case, the defendant, to have that effect. See Low v Bouverie and Woodhouse Ltd v Nigerian Produce Ltd supra.

77. Further, although there is no need for consideration to be given by the promisee or for the defendant to show that he has suffered a detriment, in order to rely on promissory estoppel as a defence, the defendant must prove that it altered its position in reliance on the promise. See Low v Bouverie supra; Tool Manufacturing Co. Ltd v Tungsten Electric Co Ltd supra.

78. Finally, the doctrine of estoppel is suspensory in nature. Therefore, the promisor may revert to his strict legal rights by giving reasonable notice to the promisee of his intention to do so. See W. J. Alan & Co. v El Nasr Export & Import Co

79. As I understand the chronology of dealings between Messrs Hall and Babak", Mr Babak had a "lengthy discussion" with Mr Hall "in the summer of 2011", prior to the emails in which Mr Hall requested his advice on the way forward (4 September 2011) and summarized his understanding of Mr Babak's aforesaid proposal (9 September 2011).

80. Now, although Mr Babak's evidence is that the summary of his proposal as outlined by Mr Hall in the 9 September 2011 email was inaccurate, he did not recall how he would have communicated his views thereon to Mr Hall and, it is, in my view, unclear as to how Mr Hall's summary was inaccurate.

81. In that regard, counsel for the plaintiff pointed out that during the course of cross-examination, when pressed for the particulars of the defendant's proposal with regard to forbearance, Mr Babak conceded that the proposal was only for the Bank to forebear until February 2012. The following exchange between counsel for the plaintiff (Q) and Mr Babak (A) is instructive:

"Q. We are trying to clarify what was your proposal. Your proposal was that the Bank would forebear with respect to LTI's obligation to it in respect to its loan until the end of February of the following year; is that correct?

A. Yes. To put it on an only interest rate or payments are shorter.

Q. So your proposal was – let me just clarify. The Bank was to put LTI on an interest-only payment schedule until the end of February of the following year or to accept partial payment until the end of February the following year; is that correct?

A. Correct."

82. Consequently, counsel for the plaintiff submits, and I accept, that even if the aforesaid statements attributed to Mr Hall could be considered sufficient to enable the defendant to rely on the equitable defence of promissory estoppel, the assurance would only have been for the period ending 28 February 2012.

83. Moreover, it appears to me that the request for forbearance for the six months period between September 2011 and 28 February 2012, was made on the basis that: (i) the proposed renovations would have been completed by the end of December 2011; and (ii) Mr Babak would execute a legal assignment of up to $6M of the aforesaid settlement agreement to the plaintiff.

84. So, again, assuming without deciding that the aforesaid assertions made by Mr Babak are true, since the alleged conversations with Mr Hall would have taken place prior to the 9 September email, it seems to me that the alleged assurances by Mr Hall would have been given in the light of the proposal as summarized or articulated by himin that email and, therefore, with the expectation that (i) the proposed renovations would have been completed by the end of December 2011; (ii) Mr Babak would execute a legal assignment of up to $6M in the aforesaid settlement agreement to the plaintiff; and (iii) the requested forbearance would be for a period of approximately 6 months.

85. However, as counsel for the plaintiff points out, the renovations and construction of the indoor mall were not completed by the end of December 2011 and as I have already found, Mr Babak did not execute a legal assignment of the sum of $6M as proposed.

86. Furthermore, it seems to me that even if Mr Hall on behalf of the plaintiff had given the assurances as alleged by Mr Babak, those assurances would have been on the condition that, at the very least, the defendant would make and continue making interest-only payments during the period of forbearance as I understand the request for forbearance was that the plaintiff in forbearing with the defendant would agree to accept interest-only payments until 28 February 2012.

87. In that regard, the evidence is that the defendant made no payments on account of the loan between September 2011 and early February 2012, when the defendant made its first payment since the June 2010 payment.

88. Now, although the defendant made payments of varying amounts to the plaintiff between 6 February 2012 and 8 June 2012, those payments were, according to Mr Hall's evidence, applied against the defendant's overdraft facility with the plaintiff.

89. Mr Babak's evidence is that sometime in late June 2012 Mr Hall told him that the plaintiff "might" want to have its loan repaid. By that date, it would have been two years since the plaintiff would have received any payment on account of the debt under the debenture.

90. Notwithstanding that alert, the defendant made no payments during the remainder of June or July and the payments under the debenture remained seriously in arrears.

91. As a result, the plaintiff had the aforesaid demand letter served on the defendant on 13 August 2012, some six months after the period of forbearance requested by the defendant would have expired.

92. Notwithstanding that demand, no further sums were paid in respect of the loan and to date the loan remains in a state of default.

93. Furthermore, as counsel for the plaintiff points out, even after the bank had indicated its intention to enforce its security under the loan in late June 2012, at no time did Mr Babak or the

defendant write to the plaintiff "memorializing" its concern or "shock" that the bank, by calling in the loan, was in breach of its agreement to forebear.

94. I note, however, Mr Babak's evidence that he spoke to Mr Hall about the matter at a meeting between he and Mr Hall; that he reminded Mr Hall about their agreement made over the phone when Mr Hall told him to "go ahead" with the proposed renovations. He said that he was "shell shocked". As for why he did not write to Mr Hall or the plaintiff noting his concern that the defendant was in breach of its agreement, Mr Babak said:

> "For me, an agreement is an agreement. If I struck an agreement with you and I make a handshake, that is for me as good as a 20 page document. And I did it all my life like that. I think that'show it should be."

95. So, even assumingthat the aforesaid assertions by Mr Babak are true, they are not sufficient, in my judgment, to enable the defendant to raise the defence of promissory estoppel.

96. If I am incorrect in that finding, I would hold that if the assertions are sufficient to enable the defendant to rely on them to set up an estoppel, the assurances would have been given on the conditions set out in the 9 September email, that is, inter alia: that the defendant make interest-only payments during the period of forbearance, which the defendant failed to do.

97. In the circumstances, I find that the defendant has not established an entitlement to rely on the defence of promissory estoppel.

98. Having found that the defendant has not made out a case for promissory estoppel, that should be the end of the matter.

99. However, in the event I am wrong in that finding, I go on now to consider, if the dealings between Messrs Hall and Babak were capable of setting up a promissory estoppel in favour of the defendant, whether the demand for repayment served on the defendant on or about 13 August 2012 was sufficient notice of the plaintiff's intention to insist on the enforcement of its strict legal rights.

100. It is common ground that even if the defendant is entitled to rely on the defence of promissory estoppel, the plaintiff may revert to its strict legal rights by giving reasonable notice to the defendant.

101. As for what would have been reasonable notice in this case, the defendant contends, as I understand it, that the plaintiff ought to have forborne with the defendant for a period of approximately four years, that is up until 1 September 2015.

102. In support of that contention, the defendant relies on the following testimony of Mr Babak (A) during cross examination by counsel for the plaintiff (Q):

> Q:So, you were telling us the terms of the second agreement. What was the term of the second proposal that you made?
>
> A: The second one was the following: that I will try to raise the money under the conditions the bank will forbear for a reasonable amount of time to build the mall and after that to make the mall viable so that new rent can flow as income to LT Investments and then further, LT to repayment of the loan.
>
> Q: And did you indicate to Mr Hall what was that reasonable amount of time?
>
> A: We had lengthy discussions because he said he knows very well the amount involved in Nassau.
>
> Q: Can I stop you, one second. You said you had lengthy discussions. Do you remember when you had that discussion? The date?
>
> A: I said to you it was prior to the summer of 2011, prior to the email.

Q: Go ahead.

A: The Mall at Marathon. He said – I don't know if you know but his office is very close to the Mall of Marathon and he referred to the Mall of Marathon. He said to me: "This Mall never worked straight from the beginning. The Mall of Marathon took over two years to start building a good tenant base...after two years it might still not be sufficient to pay all the funds. Because it might just take you two years and then beyond that." I made it clear to him, I need the time to make the mall work, plus the time to build the tenant base. That I will not invest a serious amount of money on top if the bank is not willing to forbear.

In the discussion I can also tell you that Mr Hall said he will get back to me on that. And it is clear that any more investment in the building will only be good for the bank because it will only increase the security.

Q: Is your evidence that after you had that lengthy conversation, Mr Hall said he would get back to you?

A: Yes.

Q: At any point after that, did you agree or did the bank agree that it would forbear for a fixed period for a date certain with you?

A: No.

Q: Based on those discussions you determined that you would borrow a sum more than $750,000.00 to proceed with the renovations. Is that correct?

A: Yes.

Q: And you also indicated that even after these discussions you did not have a fixed date at which you were clear in your mind, the bank would not drop the hammer?

A: We had a well understood timeframe. We didn't have a date. Because for me the date would be 1st September 2015. Mr Hall actually made it clear to me that the Mall of Marathon took about two years and then it took another year or two to get where it was working. He would be surprised if it would work faster in Freeport because it was not in the best economic shape. So I was only willing to find the funds and invest the moneys that I had personally to borrow. If I had known for that time as I mentioned, it would have been that will be forbear of the bank."

103. Counsel for the defendant submitsthat that evidence by Mr. Babak has not been refuted.

104. However, I do not attach the same weight to that evidence as Mr Tynes QC and the defendant would have me do. Perhaps if it were a part of Mr Babak's evidence-in-chief I may have been more inclined to attach some weight to it.

105. In that regard, I note here that nowhere in his witness statement does Mr Babak refer to any conversation with Mr Hall about the Mall at Marathon or how that conversation led him to believe that the plaintiff would forbear with respect to its monthly payments under the debenture for four years. To my mind if that were the reason he was of the view that the bank would forbear for some four years, then, surely that should have been part of his evidence-in-chief.

106. If, as Mr Babak says, that alleged conversation did take place in the summer of 2011, prior to the 9 September email, it is difficult to rationalize his admission that his proposal called for the plaintiff to forbear until 28 February 2012 and his contention that he expected the plaintiff to forbear or, as counsel for the plaintiff says, drop the hammer until 1 September 2015.

107. In his evidence-in-chief, Mr Babak admits that Mr Hall forwarded a summary of his proposal and their discussions by electronic mail. However, as noted previously, nowhere in his

evidence-in-chief is there any indication that the summary of his proposal and their discussion, as understood by Mr Hall, was incorrect in any way.

108. It seems to me that had the alleged conversation about the Mall at Marathon taken place, it had no bearings on the proposal submitted by Mr Babak, which was that the plaintiff should forbear with the defendant by placing its repayment on an interest only basis to 28 February 2012; and it was anticipated that the mall renovations would be completed by December 2011.

109. In the circumstances, I am unable, on the evidence which I accept, to agree with MrTynes QC's submission that Mr. Hall having shared his knowledge and experience with Mr Babak, it was reasonable for Mr Babak to think that the bank would continue to forbear in exercising its strict legal rights under the debenture until 1 September, 2015.

110. It seems to me that even if the bank had agreed to forbear beyond the 28 February 2012 and based on the alleged conversation between Mr Hall and Mr Babak, the defendant was entitled to expect that the plaintiff would not insist on its strict legal rights until September 2015, surely that would have been on the condition that the defendant honour its part of the bargain and continue making monthly payments of interest-only during the forbearance period. As indicated, the evidence is that the defendant made no payments on account of the loan between June 2010 and February 2012 when it made six payments during the period February 2012 to June 2012, and even then those payments were not on account of the loan, but on account ofthe defendant's overdraft. So, with the defendant not making even the interest-only payments, I do not see how the defendant ought to be able to hold the plaintiff to an agreement to forbear, if there was such an agreement.

111. Furthermore, as counsel for the plaintiff pointed out, Mr Babak was aware as early as June 2012 that the plaintiff "might" want its loans repaid. No doubt, Mr Hall, by then would have had a sense of the position of the plaintiff's top management and gave Mr Babak a "heads-up". Neither Mr Babak nor the defendant, it appears from the evidence, made any attempt to persuade the plaintiff not to call in the loan or to remind the plaintiff of its "agreement" to forbear until September 2015. The letter of demand was not served until August 2012, and then, notwithstanding the defendant was given 21 days within which to comply, it was not until approximately three months later, in November 2012, that the plaintiff commenced this action seeking to enforce its strict legal remedies under the debenture. By that time, some nine months had passed since the date the plaintiff was asked, although not agreed, to forbear, in circumstances where, as pointed out by counsel for the plaintiff, under the strict terms of the contract between the parties, the plaintiff was at liberty to proceed to enforce its contractual rights within two months of the defendant's default.

112. In the case of Emmanuel Ayodeji Ajayi (trading under the name and style of The Colony Carrier Co) v R T Briscoe (Nigeria) Ltd supra, the Privy Councilors opined that a promisor can resile from his promise on giving reasonable notice, not necessarily a formal notice, giving the promisee a reasonable opportunity of resuming his position.

113. On Mr Babak's evidence, the defendant was given notice as early as June 2012 that the bank intended to enforce its strict legal rights under the debenture.

114. In the circumstances, I find that if the defendant were entitled to rely on the equitable defence of promissory estoppel, the June 2012 alert as well as the August 2012 demand letter, in circumstances where the plaintiff had waited approximately ten months before making a demand and the defendant had not been making any payments, blended or interest-only, on account of the loan, was reasonable notice of the plaintiff's intention to revert to its strict legal rights under the debenture.

115. In the result, it is the order of this Court that unless the defendant pays to the plaintiff the moneys due and owing under the aforesaid debenture within thirty days of the date hereof:

1) The plaintiff be and is at liberty to enter judgment for the sum of $3,245,497.35 representing outstanding principal and interest with interest accruing thereon at the statutory rate until payment;

2) The defendant do deliver up possession of the charged real property, that is, Lots 1,2,3,4 and 5 Tract A, Central Area West, Freeport, Grand Bahama, to the plaintiff on or before 30 June 2015; and

3) The defendant do pay the plaintiff's costs of this action, such costs to be taxed if not agreed.

DELIVERED this 29th day of May A.D. 2015

Estelle G. Gray Evans

Justice