

IN THE SUPREME COURT OF BELIZE A.D. 2007

Claim No. 218 of 2007

BETWEEN

The Association of Concerned Belizeans	1st Claimant
The Medical And Dental Officers Union of Belize	2nd Claimant
Godwin Hulse	3rd Claimant
National Trade Union Congress of Belize	4th Claimant

AND

The Prime Minister & Minister of Finance	1st Defendant
The Attorney General of Belize	2nd Defendant
The Belize Bank Limited	1st Interested Party
Universal Health Services Company Limited	2nd Interested Party

BEFORE: The Hon. Madam Justice Minnet Hafiz

Appearances:

- Ms. Lois Young S.C. for the Claimants**
- Ms. Pricilla Banner for the Defendants**
- Mr. Nigel Fleming Q.C. with Mr. E. Andrew Marshalleck for Belize Bank Limited (Part heard)**
- Mr. Vincent Nelson QC along with Mr. E Andrew Marshalleck for Belize Bank**

J U D G M E N T

Introduction

1. The Claimants in these proceedings claim by way of Declaration that the Defendants acted contrary to the Constitution when they entered into a Guarantee dated 9th December, 2004 with Belize Bank to guarantee the debt of a private hospital, Universal Health Services. Further, that the Defendants acted contrary to the **Finance & Audit Reform Act, No. 12 of 2005** when they borrowed money in excess of ten million dollars without first obtaining a resolution from the National Assembly.
2. The first named claimant, the Association of Concerned Belizeans (**ACB**) is a not-for-profit company limited by guarantee, whose objectives include the strengthening of good governance, economic growth, and social well being in Belize. ACB was given the approval by 1,667 persons who are residents of Belize to represent them in these proceedings.
3. The second-named Claimant is a trade union representing members from medical and dental field. There are about 68 members who practice medicine in the public health care system.
4. The third-named Claimant is a business man and a Senator in the National Assembly of Belize representing the business community.
5. The fourth named-Claimant is a confederation of trade unions in Belize.
6. The Defendants are sued in their official capacities as Ministers and representative of the Government of Belize. The personalities have

changed but this is a public law claim against the Government of Belize (the **Government**).

7. The first interested party, the Belize Bank Limited is a commercial bank and is a party to the financial agreements/arrangements which are the subject matter of this claim (the **Belize Bank**).
8. The second interested party is a private hospital and is a party to one of the financial agreements. (**UHS**)

Chronology of Events leading up to trial

9. On the 2nd day of May, 2007 the Claimants applied to the Supreme Court by a Fixed Date Claim form for certain declarations of unlawfulness in respect of a Guarantee and Postponement Agreement dated the 9th day of December 2004 and entered into by the Prime Minister and Minister of Finance with the Belize Bank in respect of debts incurred by UHS.
10. On the 3rd day of May, 2007 the Claimants applied for interim relief in the form of interim declarations and an injunction. The hearing of the Application for interim relief was heard on the 14th day of May 2007. The learned Solicitor General at the time gave an undertaking to the Court in terms that until after Judgment in this action the Defendants will not satisfy the Guarantee or any subsequent agreements emanating therefrom until the determination of the claim.
11. On the same day, the 14th day of May, 2007 the Supreme Court heard and granted an application by the Belize Bank to be joined in the action as an Interested Party. The Court also granted an application by the 1st Claimant to appear in a representative capacity for some 1,517 named persons.

12. On the 25th day of May, 2007 Mr. Philip Johnson filed a second affidavit on behalf of the Belize Bank Limited in which he deposed of the existence of :
- (1) A Settlement Agreement signed by the Defendants on the 23rd day of March 2007. **(Settlement Deed)**
 - (2) A Loan Note dated the 23rd day of March 2007 evidencing a loan from the Belize Bank to the Defendants. **(Loan Note)**
 - (3) An Additional Loan Facility dated the 29th day of March 2007. **(Additional Loan Facility)**
- (See paragraphs 32 to 34 of Mr. Philip Johnson's affidavit)
13. By Application dated the 29th day of May 2007 the Claimants applied to amend the Fixed Date Claim Form so as to seek additional Declarations of unlawfulness in respect of the Settlement Deed, Loan Note and the Additional Loan Facility. This Application was heard before Madam Justice Arana on 30th May, 2007 and at that hearing the Bank submitted that the Claimant's application should have been by way of Judicial Review. The Judge ruled that the Claimants had proceeded correctly in accordance with Part 56 of the **Supreme Court (Civil Procedure) Rules 2005** and granted the application to amend the Claim Form to include two additional prayers.
14. On the 24th day of May, 2007 UHS applied to be joined as an Interested Party. This Application was heard and granted by the Court on the said 30th day of May 2007.
15. On the 30th day of May 2007 the Court also ordered that there be disclosure to the Court and to the Claimants of the Settlement Agreement

dated the 31st day of March 2007 and the Loan Note by the 15th day of June 2007.

16. On the 15th day of June 2007 the Settlement Agreement and Loan Note were disclosed to the Claimants and the Court.
17. On 28th June 2007, the Bank filed a Notice of Appeal against the Order of the Judge on the ground that she had erred in law and misdirected herself in finding that the Claimants who sought declaratory relief in relation to public law issues did not have to proceed by way of Judicial Review.
18. This Appeal, Civil Appeal No. 18 of 2007 was heard in October of 2007 and March 2008 and dismissed. The Bank has appealed to the Privy Council.
19. The substantive matter commenced in the Supreme Court in October, 2008 after which it was adjourned as a result of illness of the attorney who represented the Bank at the time. The matter then continued in January, 2009 and February of 2009.
20. On the first day of the hearing the attorney for UHS made an application to remove himself from the record as UHS was no longer interested in making any submissions in the claim. This application was granted.
21. Ms. Pricilla Banner the attorney for the Defendants attending court on the first day informed the Court that they would not defend the claim.

Brief Factual Background

22. In 1998, the Prime Minister's Government was elected on a manifesto which promised inter alia to reform the health care system in Belize by

encouraging the growth of private health care facilities as part of a national health insurance program.

23. UHS sought to meet this need by building a 56 bed specialised hospital at a projected cost of \$28 million. The project was initially financed by a \$4 million loan from the Social Security Board, but the loan was later assigned to the Development Finance Corporation (DFC) and on 22nd December, 2000 the DFC and UHS executed a loan agreement under which DFC agreed to provide a developmental loan of \$28 million for establishing the hospital complex for which construction had already commenced.
24. DFC was unable to make disbursements in accordance with the loan agreement and therefore alternative arrangements had to be made with the Belize Bank in consideration of the DFC's guarantee of repayment, to make available overdraft facilities for short – term bridge financing by way of an overdraft facility until the DFC was in a financial position to commence payment of disbursements to UHS pursuant to the said loan agreement.
25. The balance owed on this short-term bridge financing via the overdraft facility increased to \$17 million which included interest. However, the DFC was still unable to make any disbursements to UHS as per the loan agreement. The Bank therefore offered additional financing to UHS via the overdraft facility on the condition that the DFC would provide a guarantee of payment on behalf of the UHS. The guarantee was so provided by DFC.
26. On 9th December, 2004, the Prime Minister in his capacity of Minister of Finance executed a guarantee for the debts and liabilities of UHS owing

to Belize Bank. In furtherance of this guarantee the Prime Minister executed a Settlement Deed and a Loan Note on 23rd March, 2007.

27. On 29th March, 2007 the Belize Bank made a further loan facility of 12 million dollars to the UHS. The Minister of Finance was a party to this Additional Loan Facility.
28. As a result of the Guarantee, the Settlement Deed, the Loan Note and the Additional Loan Note all of which executed by the Prime Minister, the Claimants have come to the Court seeking the declarations as stated below.

The Relief Claimed

29. The Claimants by Fixed Date Claim Form dated 2nd May, 2007, as amended by the Order dated the 20th June, 2007 seek the following relief from the court:
 - (i) A Declaration that the Guarantee and Postponement Agreement dated the 9th day of December 2004 (the Guarantee) is unlawful as being contrary to section 44 of the Belize Constitution, and sections 78, 79, 80, 81 and 119 of the Belize Constitution, taken together;
 - (ii) A Declaration that the decision of the Prime Minister and Minister of Finance to satisfy the payment of monies allegedly due under the Guarantee, is unlawful;
 - (iii) A Declaration that the provisions of section 114 of the Constitution of Belize, and section 3 of the Finance & Audit Reform Act, No. 12 of 2005, must be complied with before proceeding to satisfy the Guarantee by way of payment from the Consolidated Revenue Fund.
 - (iv) *A Declaration that the Settlement Agreement dated the 23rd March 2007 and the Loan Note under the terms of which the*

2nd Defendant was to pay the Belize Bank Limited Bz.\$33,545,820.00 are unlawful as being contrary to the Finance & Audit Reform Act, No. 12 of 2005.” (amended)

- (v) *A Declaration that the loan facility of Bz. \$12 million procured by the first and second Defendants from the Belize Bank Ltd. on the 29th day of March 2007 are unlawful as being contrary to the Finance & Audit Reform Act, No. 12 of 2005” (amended).*
- (vi) An injunction restraining the first and second Defendants from satisfying the Guarantee without the authority of the National Assembly duly given in accordance with the Constitution of Belize.

Affidavit evidence for the Claimants

- 30. All four Claimants swore to affidavits. David Vasquez, the President of ACB swore to four affidavits. Marta Habet swore to an affidavit for the Second Claimant. Godwin Hulse, the third Claimant swore to two affidavits. Dylan Reneau swore to three affidavits for the fourth Claimant.
- 31. The first affidavit of David Vasquez dated 2nd May, 2007 at paragraph 6 to 9 shows how the public became aware of the UHS debt. He deposed that on or about the 12th day of December 2006 the Prime Minister and Minister of Finance in responding publicly to a question from Channel 7 News, indicated the intention of the Government of Belize to pay off a debt owed by UHS to Belize Bank but the response from the Prime Minister did not give much information. He deposed that he did not tell the public the basis upon which the Government of Belize was required to pay off this debt nor how much money was owed to the Belize Bank but that it became common knowledge that the amount owed was \$33 million dollars. He said that the Prime Minister only referred to the

Belize Bank debt being “squared away” by a land transfer. See Exhibit “D.V. 2” for a copy of the Prime Minister’s interview on television with Channel 7 News on 12th December 2006 .

32. At paragraph 10 of his affidavit he deposed as to the public condemnation of the Prime Minister’s intention. He said that the matter of the Government of Belize paying off the debt of UHS had received wide spread public attention and condemnation. That initially, much of the condemnation was caused by the fact that UHS is a private company and had received a Government of Belize guarantee and that no control appeared to have been exercised over the management of UHS. Also, that the shareholders in UHS had put up collateral for the Belize Bank loan and this collateral remains untouched while taxpayers would have to foot the bill.
33. He further deposed at paragraph 27 that on the 24th day of April 2007 the Government of Belize announced that it would make the document public and on the 25th day of April 2007 ACB procured a copy of the document. See Exhibit “D.V. 14” for a copy of the document entitled “Guarantee and Postpayment of Claim Agreement” dated the 9th day of December 2004.
34. Mr. Vasquez also deposed that the public has an interest in the lawfulness of the decisions of the Government it has elected. Further, that the public has an interest in how public monies are spent and in how public assets are being used.
35. Marta Habet (MD) deposed that she is the Vice President of The Medical and Dental Officers Union of Belize and has been authorized by the Union to swear to the affidavit on its behalf. She deposed that the public health care system needs equipment, supplies and upgrading and that the Union considers the decision of the Prime Minister and Ministry of Finance to pay over some \$33 million dollars, or indeed any amount of money, to the Belize

Bank for the debt of a failed private hospital as denying the potential government investment into the public health care system in Belize in which they work and as such they are directly affected by the Government's intention.

36. She further deposed that as medical professionals they are concerned about the amount of money committed by the Government to public health care in Belize.

37. Mr. Godwin Hulse deposed that he is a business man whose principal business is the processing of rice. He said that he is a Senator in the National Assembly of Belize representing the business community and have been a Senator since April 2003.

38. Mr. Hulse deposed that in his tenure as a Senator, at no time did the matter of the Government issuance of the Guarantee dated the 9th day of December 2004 referred to in these proceedings go before the Senate. Also, the Guarantee was not disclosed in the Government's Budgets for the years 2006, 2007 or 2008.

39. He further deposed that as a businessman and citizen of Belize, he pay several different taxes to the Government of Belize and that when the Government needs to, it increases the taxes, and/or raises other taxes. He deposed that the taxes that he pays go into the Consolidated Revenue Fund, and as a taxpayer he is directly affected when unbudgeted sums of money are taken out of the Fund. He said that as a citizen and taxpayer he is directly interested that the constitution and laws of Belize should be obeyed in all respects, and in particular where public monies are concerned and so he opposed the Defendant's intention to satisfy the Guarantee.

In his second affidavit, Mr. Hulse deposed that he has attended every Senate meeting since his appointment in April 2003 and at no time was the Senate called upon to authorize the Government to make a loan from the Belize Bank Limited of \$33,545,820. Also, at no time was the Senate called upon to grant approval for the Government to offer a guarantee or provide security of any kind for a loan of \$12,000,000 to be made by the Belize Bank to UHS.

40. Dylan Reneau, for the fourth Claimant deposed that he is the General Secretary of the National Trade Union Congress of Belize and he has been authorized to swear the affidavit on behalf of the Union. He said that the Union is a federation of trade unions and at present there are nine members, namely: Association of Public Service Senior Managers, (APSSM), Christian Workers Union (CWU), The Belize National Teachers Union (BNTU) Belize Water Services Workers Union (BWSWU) , Belize Communication Workers Union (BCWU), Public Service Union of Belize (PSU), Belize Workers Union (BWU), Belize Medical and Dental Officers Union (BMDU) and the Belize Energy Workers Union (BEWU) .
- 41 He deposed that from about January 2007, the Union along with the Belize Medical and Dental Officers Union and the Nurses Association, have on the media challenged and disagreed with the payment of an alleged guarantee securing the debt of a private hospital, namely UHS.
- 42 He further deposed that now that the guarantee has been made public the issue for the Union is the lawfulness of the document and the lawfulness of satisfying the guarantee using public monies.
- 43 There was no evidence filed on behalf of the Defendants.

Affidavit evidence for the First Interested Party - Belize Bank

44. Belize Bank filed three affidavits sworn to by Mr. Philip Johnson who is the Chairman of the Bank. In his second affidavit he deposed to the Bank's position as an interested party in the proceedings and responded to the issues which have been raised by the Claimants in the Fixed Date Claim Form dated 2 May 2007 before the amendment.
45. At paragraph 6, Mr. Johnson deposed that Government is indebted to the Bank in relation to a principal amount of BZ\$33,545,820 and related interest payments including default interest. That this was the effect of the Settlement Agreement between the Bank and the Government dated 23 March 2007 (the **March Settlement Agreement**) which included a Loan Note between the Bank and the Government dated 23 March 2007 (the **March Loan Note**). That the March Settlement Agreement was entered into in full and final settlement of the Government's liabilities under the Guarantee. Therefore, the March Settlement Agreement and the March Loan Note represent a settlement of the Bank's contractual rights arising out of the Guarantee.
46. He further deposed that pursuant to Clause 9 of the March Settlement Agreement, the Bank and the Government expressly agreed that disputes arising out of or in connection with the March Settlement Agreement and the March Loan Note are to be referred to and finally resolved by arbitration in London under the LCIA Rules and therefore, the Bank will pursue its claims for payment against the Government by commencing arbitration proceedings. He deposed that they are submitting to the jurisdiction of the Courts of Belize for the purpose of a determination of entitlement as between the Bank and the Government and the Bank will appear as an interested party before the Court in relation to the issues which have been raised in these proceedings.

47. Mr. Johnson deposed at paragraphs 13 to 37 as to the relevant agreements between the parties. He deposed that in March 2001, the Development Finance Corporation (“DFC”) agreed to loan the sum of BZ\$24,000,000 to Universal Health Services Company Limited (“UHS”) for the construction of a hospital facility and the failure of DFC to disburse funds to UHS. Consequently, the DFC requested that Belize Bank provide short term bridge financing for the construction of the hospital facility. On 25 October 2002, the Bank therefore entered into a loan facility with, inter alia, the UHS for BZ\$17 million.
48. At paragraphs 20 and 21 Mr. Johnson deposed that under a guarantee and postponement of claim agreement dated 21 February 2003, the DFC guaranteed payment to the Bank of *“all debts and liabilities, present or future, direct, absolute or contingent, matured or not, at any time owing by Universal Health Services Company Limited”* arising under the Loan Facility (the “DFC Guarantee”). See “P.J. 12” for a copy of the DFC Guarantee. Subsequently UHS required further working capital and the Loan Facility was therefore amended on 5 May 2004, when the original principal of BZ\$17 million was consolidated with UHS overdraft and the overall loan facility was increased to BZ\$19 million (the “Amended Loan Facility”). See “P.J. 13” for a copy of the Amended Loan Facility.
49. At paragraph 22 he deposed that in consideration of the grant by the Bank to UHS of additional funds pursuant to the Amended Loan Facility, the DFC on 7 May 2004 made a new guarantee in favour of the Bank securing the debts of UHS to the Bank to an aggregate sum of BZ\$19,000,000 together with any interest due pursuant to the Amended Loan Facility. See “P.J.14” for a copy of the guarantee from the DFC to the Bank.
50. He further deposed that at the end of 2004, UHS requested that the Amended Loan Facility be increased to BZ\$29,000,00 to provide additional working capital, funds for capital expenditure and funds for

interest payments but because of the deteriorating financial condition of the DFC, the Bank was only prepared to advance additional funds on receipt of a guarantee from the Government itself securing the indebtedness of UHS to the Bank. He said that he attended several meetings with representatives of the Government at a ministerial level in the month leading up to 9 December 2004 when the Guarantee was executed. See paragraph 23 of his affidavit.

51. He further deposed at paragraph 24 that the Amended Loan Facility was amended on 9th December 2004 when the amount was increased to BZ\$29 million (the "Re-Amended Loan Facility"). That the Prime Minister and Minister of Finance were also a party to the Re-Amended Loan Facility. See "P.J. 15" for a copy of the Re-Amended Loan Facility.

52. He deposed that the Guarantee was given by the Government in connection with securing further advances from the Bank to UHS in the Re-Amended Loan Facility. The Bank would not have advanced any further money to the UHS if the Government had not provided the Guarantee. Clause 3(a) of the Re-Amended Loan Facility recognised this by providing that:

"All amounts payable by the Borrower to the Bank hereunder shall be secured by a guarantee to be issued by the Government of Belize ("GOB"), in the Bank's required form, for the benefit of the Borrower, and in favour of the Bank, securing all debts and liabilities owed by the Borrower to the Bank under or pursuant to the Agreement and any subsequent amendments thereto."

53. At paragraph 28 he deposed that on 9 December 2004, the Government entered into the Guarantee, pursuant to which the Government guaranteed the payment to the Bank of all debts and liabilities at any time owing by UHS to the Bank. It was executed by the Prime Minister and the Minister of Finance and was witnessed by the Attorney-General.

54. At paragraph 32 he deposed that accordingly, various documents were entered into in March 2007 and on 23 March 2007, the Bank and the Government entered into the March Settlement Agreement where the Bank and the Government agreed to settle all claims owing to the Bank under the Guarantee. The Bank and the Government agreed that the Guarantee would be discharged and the Government released from all future debts and liabilities owed to the Bank under the Guarantee. He said the March Settlement Agreement was executed by the Honourable Prime Minister of Belize in his capacity as the Minister of Finance and the execution was witnessed by the Attorney General of Belize.
55. Mr. Johnson further deposed that in consideration for this, and pursuant to the March Settlement Deed, the Government executed the March Loan Note under the terms of which the Government was to pay to the Bank BZ\$33,545,820. The March Loan Note was also executed by the Honourable Said Musa as the Prime Minister and Minister of Finance of Belize and was witnessed by the Attorney General of Belize.
56. He further deposed at paragraph 34 that on 29 March 2007, the Bank made a further loan facility of BZ\$12 million available to the UHS (the "Additional Loan Facility"). The Prime Minister and the Minister of Finance was a party to the Additional Loan Facility. It was executed by the Prime Minister and the Minister of Finance and was witnessed by the Attorney-General. See "P.J. 16" for a copy of the Additional Loan Facility.
57. Mr. Johnson deposed that to date BZ\$4,000,000 has been disbursed to UHS pursuant to the Additional Loan Facility, to enable repayment of the DFC debt owed by UHS and to ensure the release of DFC security taken in relation to its lending to UHS. He further deposed that the Government and the UHS entered into an agreement in March 2007, pursuant to which the Government agreed to purchase the issued share capital in UHS. That, as a result of the Share Purchase Agreement, the

Government now has full control and use of the hospital and other health facilities owned by the UHS.

58. He deposed that the Bank entered into each of the Re-Amended Loan Facility, the Guarantee, the March Settlement Agreement, the March Loan Note and the Additional Loan Facility with the Government in good faith. And that each of these agreements are private commercial agreements between the Bank and the Government.
59. At paragraphs 38 to 44 Mr. Johnson deposed as to the representations made by the Government authority to enter into the March Settlement Agreement, Loan Note and the Additional Loan Facility and the Re-amended Loan Facility. He further deposed that if these representations had not been made, the Bank would not have entered into this agreement. That given that the Prime Minister was the signatory and the Attorney-General was the witness, he verily believe that the Bank had good reason to believe that the representations were true.
60. In his third affidavit, Mr. Philip Johnson deposed at paragraph 3 that he explained in his Second Affidavit dated 25 May 2007 that it is the Bank's position that the Government is indebted to the Bank in relation to a principal amount of BZ\$33,545,820 and related interest payments including default interest. He further deposed that the principal amount was advanced to the Government under a Settlement Agreement between the Bank and the Government dated 23 March which included a Loan Note between the Bank and the Government dated 23 March 2007 .

Submissions on the 2004 Guarantee by the Claimants and the Bank

61. Both the Claimants and the Bank made lengthy submissions on the 2004 Guarantee. The Claimants position is that the Settlement Agreement of March 2007 discharged the Guarantee of December, 2004. However, the Claimants were not sure of the position that would be taken by the Bank on the 2004 Guarantee in the event the Court finds the Loan Note unlawful. That is, whether there would be a revival of the 2004 Guarantee in the event the court finds the loan note unlawful. Mr. Nelson Q.C. however, made his position clear at the end of the Claimants case. He agreed that the Settlement Agreement of March, 2007 discharged the 2004 Guarantee. He also made it clear to the Court that if the Court finds the Loan Note unlawful there is no contention that the 2004 Guarantee is revived. He said that the remedies available to the Bank will be pursued in Arbitration proceedings which is the appropriate forum. Nevertheless, because submissions were made by the Claimants on the 2004 Guarantee, Mr. Nelson felt it necessary to make submissions also on the 2004 Guarantee.

62. Further, no challenge has been taken by the Claimants on the Settlement Agreement. I am in agreement with the Claimants and the Bank that the Settlement Agreement has discharged the 2004 Guarantee. The contract of Guarantee was discharged by an express agreement set out in the Settlement Deed. It was executed as Deed and is under seal. A Guarantee could be discharged by payment or it could be discharged by agreement.

See: The Modern Contract of Guarantee by Dr. James O'Donovan and Dr. John Phillips, 2003 at paras 6-53, 9-08.

63. In my view, since the Claimants and the Bank agree that the Settlement Agreement has discharged the Guarantee of December, 2004, it would be unnecessary and irrelevant for the Court to consider the issue of the unlawfulness of the Guarantee. The role of the Court is to adjudicate and pronounce upon live issues. As rightly submitted by Mr. Nelson Q.C. the Courts do not respond to hypothetical questions or issues to give advisory opinions but pronounce on live issues. See paragraphs 51 and 52 of **Gilbert Smith v. Belize Telecommunications Ltd. & The Attorney General** Claim No. 116 of 2005.
64. It follows that since the parties are in agreement that the Guarantee is discharged, the unlawfulness of the Guarantee is no longer an issue for this court. Thus, the Court does not have to make a determination on Relief (i), (ii), (iii) and (vi) which concerns the unlawfulness of the Guarantee, payment under the Guarantee and an injunction to satisfy the Guarantee without the authority of the National Assembly. See paragraph 29 above for relief claimed. Relief (iv) will be considered but not in the terms prayed as there is no challenge to the Settlement Agreement by the Claimants.
65. The issues to be considered will therefore, be narrowed to the Loan Note and the Additional Loan Facility. The Interested Party has also challenged the *Locus Standi* of the Claimants.
66. Though the issue of the unlawfulness of the Guarantee is no longer live an issue, I must say that it is trite law that no money can be taken out of the Consolidated Revenue Fund without authorisation from Parliament. See the case of **Auckland Harbour Board v. R. (1924) AC 318 at 326-327** where the Privy Council stressed the constitutional principle of parliamentary control over public finance.

67. **Issues for determination:**

- (i) Whether the Loan Note dated 23rd March, 2007 is unlawful as being contrary to section 7 of the **Finance and Audit (Reform) Act No. 12 of 2005**.
- (ii) Whether the Additional Loan Facility dated 29th March, 2007 is unlawful as being contrary to section 7 of the **Finance and Audit (Reform) Act No. 12 of 2005**.
- (iii) Whether the Claimants have *locus standi* to bring this claim.

Submissions by the Claimants on issues to be determined

68. Ms. Lois Young S.C. submitted that the Settlement Deed which discharged the Guarantee of 9th December 2004. That the evidence shows that the Guarantee was given on 9th December 2004 and on 23rd March 2007 the Government of Belize made a loan from The Belize Bank and used the proceeds to pay off the Government's liability to The Belize Bank under the Guarantee. The Government then signed a Loan Note evidencing the loan and terms of repayment.

69. Learned Counsel further submitted that it matters not that the loan was from The Belize Bank and was used to pay off the Belize Bank. The transactions are separate and distinct because the Bank lends \$33 million to GOB and GOB pays the Bank \$33 million to settle the Government's debt to the Bank. The result being that GOB has satisfied the Bank's demand under the Guarantee, and GOB has become liable to Belize Bank under the terms of the Loan Note. Learned Counsel relied on the case of **Brown Shipley & Co. Ltd. v. Amalgamated Investment (Europe) B.V.** (1979) 1 Lloyd's Rep. 488 which illustrates that notwithstanding

that money is borrowed from the creditor to pay off the creditor, it nevertheless constitutes an effective discharge of liability under the guarantee. A new obligation in the form of a loan is then created.

70. Learned Counsel further submitted that the Loan Note is an instrument which effects the borrowing of \$33 million dollars contrary to **Section 7 of the Finance and Audit (Reform) Act, 2005** as it was made after the Act had come into effect on 9th April 2005. Counsel submitted that section 7 renders the Loan Note Invalid. Firstly, learned Counsel looked at the preamble to the **Finance & Audit (Reform) Act 2005** which it is submitted spells out the intention of the Legislature to clarify the law relating to public monies and the expenditure thereof. Learned Counsel thereafter submitted that section 7 of the new Act in effect, clarified Section 8 of the repealed **Finance & Audit Act, Chapter 15**. Ms. Young S.C. then submitted that this repealed law did not have the equivalent of a section 7(2) specifically addressing the validity of a loan made without the authority of a resolution of the National Assembly.

71. Learned Counsel submitted that on a plain reading of section 7 of the Finance and Audit (Reform) Act, a resolution of the National Assembly is required before the Government of Belize can validly borrow ten million or more dollars. That the words “*Any agreement, contract or instrument shall only be validly entered into pursuant to a resolution of the National Assembly,*” clearly refer to a prior qualification for validity, and they are mandatory.

72. Ms. Young S.C. further submitted that on a true construction of section 7(2), if the Government makes a loan or borrows ten million or more dollars without the prior approval of the National Assembly, then the agreement, contract or other instrument which creates the debt, is invalid.

Counsel further submitted that this interpretation is supported by section 7(3) which specifies the length of time during which a resolution is valid, which is a “...*period not exceeding twelve months.*” and that there would be no point in fixing the prospective life of a resolution if it was intended to apply retroactively to a past transaction. Further, the purpose of a resolution having effect for twelve months is to facilitate a borrowing within that twelve month period of authority which means that a resolution to borrow must first be procured and its authority utilized within that twelve month period.

73. Learned Counsel in support of her argument made a comparison with section 7(8) which provides that “*Where the Government borrows money in amounts of less than ten million dollars as provided in the second proviso to subsection (2), the Government shall, within three months of the borrowing, publish a notice in the Gazette specifying*”.

Ms. Young S.C. submitted that this shows the position in which Government borrowing not requiring a prior resolution of the National Assembly, need only be published in the Gazette within three months of the borrowing.

74. Learned Counsel further submitted that the resolution of the National Assembly required in section 7(2), to which section 7(1) is subject, is clearly what confers power on the Government to borrow ten or more million dollars and that this is clearly stated in section 7(5) which provides:

“(5) Where, by resolution in accordance with this section or in pursuance of this Act, power to borrow money or to raise loans is conferred on the Government, the power may be exercised by a fluctuating overdraft.”

75. Ms. Young SC submitted that when Section 7(2) is construed in the context of the entire section 7, it is clear that the intention of the Legislature is to

clarify that the power of the Government to borrow is to be exercised pursuant to or in accordance with a resolution of the National Assembly.

76. On the principles of interpretation, Learned Counsel submitted that where the words in an instrument are plain and unambiguous, the Court is duty bound to construe such words in their ordinary sense irrespective of the consequences and may not modify or bend their meaning to achieve or to avoid a particular result. Counsel relied on:

Halsbury Vol. 44 (4th Ed.) parags. 895-897, 899

IRC v. Hinchy [1060] 1 All E.R. 505 at 511

Buckland & Others v. Sec. of State for the Environment, Transport and the Regions [2000] 3 All E.R. 205

77. Learned Counsel further submitted that the loan for \$33 million dollars as evidenced by the Loan Note of 27th March 2007 was invalidly entered into by the Government of Belize and void.

Submissions on the issue of the Additional Loan Facility of BZ\$12,000,000.

78. Learned Counsel submitted that that the Additional Loan Facility of BZ\$12,000,000 is unlawful because it is in breach of ***The Finance & Audit (Reform) Act***, either in breach of section 7(1) or in breach of section 7(6). That, subsection 1 is the prohibition against borrowing moneys or raising loans or offering security for such securities or loans without the prior approval of the National Assembly. Subsection 6 is a prohibition against the Government offering any guarantee, or some other form of security in support of any loan made directly to a private sector entity or statutory body by any public or private bank, financial institution or capital market in or outside Belize.

79. Learned Counsel referred to paragraph 34 of Philip Johnson's second affidavit where he exhibits as P.J.16 the "Additional Loan Facility" to which he states that the Prime Minister and Minister of Finance was a party and that the document was executed by the Minister of Finance and the Attorney General. Ms. Young S.C. submitted that this exhibit shows that the Minister of Finance and the Attorney General signed for the acceptance by the Government of Belize of the terms and conditions upon which the Bank agreed in the Additional Loan Facility dated the 29th day of March 2007, to make available to 5 companies, the sum of BZ\$12,000,000.00.
80. Learned Counsel submitted that the companies who have jointly and severally borrowed BZ\$12,000,000.00 include the UHS. That in clause 5 of the Additional Loan document, all amounts payable by the borrowers to the Bank, shall be secured by several first priority mortgages. Further, that paragraph 13 of the 2nd affidavit of Dr. Victor Lizarraga deposes that on the 23rd March 2007 the principal shareholder of Universal entered into a share purchase agreement with GOB for the sale of their shares to GOB.
81. Ms. Young submitted that the Legal effect of Share Purchase Agreement is that *"Once the contract has been entered into the transferee has an equitable title to the shares and the transferor holds them, until registration, as trustee for the transferee"*
See: **Palmer's Company Law 21st Ed. At p. 332**
82. The Claimants submit that at the time when this Loan Facility was entered into, the Government of Belize, was either the owner of UHS and therefore the owners by virtue of the fact that UHS is the majority owner of the other Companies that was given the Loan. Or, either the Government of Belize used the shares, its majority shareholding in UHS, to secure the Loan that was made to UHS.

83. Ms. Young referred to the affidavit evidence by Dr. Victor Lizarraga, the Chairman of the UHS. Learned Counsel submitted that Dr. Lizarraga is saying that that Additional Loan Facility was an agreement that was made along with the Loan Note and the agreement to discharge the Guarantee. Further, that the Government of Belize agreed to purchase all of the shares from the majority shareholders of UHS. So, submitted by Ms. Young SC, as of the date of the signing of the Additional Loan Facility which was conditional on all these other things happening, the Government of Belize, according to Dr. Lizarraga, would have been the owner of the majority of the shares in UHS. Learned Counsel submitted that this is supported by Mr. Phillip Johnson's affidavit at paragraph 34 and 35.
84. Learned Counsel, Ms. Young SC further submitted that from the evidence it would appear that what the Government did was to buy over the majority shares of UHS and if they did not get legal title then at least, according to Dr. Lizarraga, who is the Chairman of UHS they entered into an agreement for sale. Learned Counsel submitted that once you have entered into an agreement for sale then the transferee, who is the Government of Belize, has an equitable title to the shares and the transferor holds them until registration as trustee for the transferee. Also, that the beneficial owner was the Government of Belize. Learned Counsel said that whether the Loan was made on day one and the actual transfer of the beneficial ownership of the shares was made on day two, does not help the unlawfulness of the Agreement. Because if the Government was the owner of those shares, at the same time, contemporaneously with that Loan Facility, then the Government made a Loan in excess of 10 million dollars without the prior approval of the National Assembly, and that is contrary to section 7(1) of *the Finance & Audit (Reform) Act*.

Locus Standi

85. Learned Counsel, Ms. Young SC submitted that each of the Claimants has *locus standi* to bring this claim. Learned Counsel relied on **Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.** [1981] 2 W.L.R. 722, 107 where Lord Wilberforce distinguishes **Gouriet case**, at page 103, and then at page 107 held that a public spirited taxpayer will have standing to seek declarations once the alleged illegality is grave enough. He said that:

“It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.”

86. Ms Young SC further relied on **R. v. Greater London Council, ex parte Blackburn** (1976) 3 All ER 184 at p. 191 where Lord Denning MR said:

“On this point, I would ask: who then can bring proceedings when a public authority is guilty of a misuse of power? Mr. Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has. I think he comes within the principle which I stated in Attorney General (on the relation of McWhirter) v. Independent Broadcasting Authority ([1973] 1 ALL ER at 696, [1973] QB at 646), 191 which I would recast today so as to read: ‘I read it as a matter of high constitutional principle that, if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty’s subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.’

Submissions by Belize Bank on issues to be determined

87. Mr. Nelson Q.C. submitted that the Loan Note is a valid and lawful agreement. He started his presentation by giving a background history as to the making of the 2004 Guarantee, the Settlement Deed and the Loan Note. Learned Counsel submitted that the analysis will show that there was no loan to the Government by the Belize Bank under the Settlement Agreement and Loan Note.
88. Learned Counsel referred to the affidavit of Dr. Victor Lizarraga who deposed that UHS shareholders were encouraged to invest \$3 million in land acquisition and design for the proposed hospital and to seek to acquire loan funding for the project when the Government of Belize publicly declared its intention to undertake the reform of the health care system of Belize by extending its national health insurance program. He submitted that the aim of Universal at that stage was to participate in the infrastructure developments of Belize and to have a hospital which could be used for the public of Belize as well as privately. He then referred to the entire affidavit evidence of Mr. Lizarraga to show how the loan was obtained from SSB and thereafter assigned to DFC and the failure of DFC to provide the funding. Thereafter the Government signed the Guarantee.
89. Mr. Nelson then referred to the **Development Finance Corporation Act, Chapter 279** at section 4 (1) which makes provisions for the purposes of the DFC.

“4 (1) The purposes of the Corporation shall be to expand and strengthen the economy of Belize by-

- (a) supplying finances ...*
- (b) purchasing developing, improving land, and engage in commercial ventures, either alone or in association with others;*

(c) *promoting and facilitating capital investment, both domestic and foreign ...*”

90. He then referred to section 5 which provides for the powers of the DFC.

“5 In carrying out its purposes, the Corporation may exercise all or any of the following powers:-

- (a) *provide finance in the form of loans, or by purchasing or subscribing for shares or other securities, or by acquiring any other interest*
- (b) *...*
- (c) *guarantee loans from other sources.*

.....

- (e) *borrow funds for the purposes of the business of the Corporation from sources either in Belize or abroad and give security for any loans obtained.”*

91. Learned Counsel thereafter submitted that that the duty of the Government is to provide security for the people, and to provide jobs and expand the economy. Further, he submitted that the **Development Finance Corporation Act** is to provide certain aspect in expanding public facilities and expanding the economy of Belize which is a public purpose function. Further, it is a function that one would find a Government undertaking in the ordinary course of events, but in this case it was the DFC doing so on behalf of the Government.

92. Learned Counsel thereafter referred to the exhibits of the second affidavit of Mr. Phillip Johnson to show the history of what transpired. Mr. Nelson referred to the letter dated 7th of March 2001 from the DFC which says that the DFC’s Board of Directors have approved a loan of Twenty Four Million Belize Dollars to UHS for the construction of a Hospital Facility. He then referred to the letter which showed DFC wrote to the manager of Belize Bank undertaking to pay BZ\$3,000,000.00 to the Bank on behalf of UHS and committing to make such payment no later than the

30th of June, 2001. He then went on to show that the Bank continued to give loans to UHS.

93. Mr. Nelson then submitted that when the Bank makes a loan, it is done by a Banking Facilities Letter which makes it clear that what is being given is a Loan. It refers to the term of the Loan, the interest of the loan and it refers to the drawdown.
94. He submitted that in regard to the Loan Note there is no Banking Facilities Letter to the Government, no drawdown, nothing of that nature. He further submitted that the internal consistency of that shows that the Settlement Agreement is a settlement of the Guarantee and the acceptance of the liability which is accrued under that, therefore it is not a Loan but a settlement of what comes through these letters.
95. Mr. Nelson then referred to the Loan Facility Letter dated October 25, 2002 at Clause 6 which is exhibited at "P.J. 11" of the second affidavit of Philip Johnson and submitted that it shows that this is not a Guarantee of a Loan but the Guarantee of a Performance of the Agreement.
96. The Banks submission is that the legal consequence of this obligation is that the failure of UHS voluntarily to perform its obligation is a failure on the part of the Government to ensure that UHS meets its obligation. That the Bank then becomes entitled to recover from the Government, as damages for breach of the guarantee, the sum that is owed to the Bank by UHS.

97. In such circumstances, it is the Bank's submission that the primary obligations of the Government under the Guarantee is substituted, by operation of law, by a secondary obligation to pay to the Bank damages. Learned Counsel relied on the case of **Moschi v Lep Air Services Ltd.** **supra** at 1183 E-H and 1184-1185A .

98. Learned Counsel further submitted that the nature of the Loan Note is that it is a 'Promissory Note' and fulfills all the definitions of a Promissory Note. He relied on of the **Bills of Exchange Act, Chapter 85.** Mr. Nelson Q.C. further relied on Lord Reid's statement in **Moschi v. Lep supra** that the label given to an arrangements by the parties cannot provide the true legal categorization.

99. Mr. Nelson Q.C. further submitted that the March Settlement Deed and Loan Note which are inextricably linked determine and make provision for the payment of the sums payable by the Government in respect of the obligation arising out of its failure to ensure the performance of UHS under the Banking Facilities Letters. Learned Counsel submitted that as a matter of construction and law the Settlement Agreement and Loan Note in the sum of BZ\$33,545,820 is a crystallization and settlement by the parties of all sums owed by the Government of Belize pursuant to the Belize Bank's vested contractual rights under the terms of the Guarantee. Mr. Nelson Q.C. submitted that this is clear from the terms of the March Settlement Deed which says that: "*The Government wishes to determine its liability and to settle all Claims owed under the Guarantee to the Bank*"

100. In response to the Claimants' submissions that the transactions are separate, Mr. Nelson Q.C. submitted that The Settlement Agreement and Loan Note represent one transaction and that the Loan Note crystallizes the sum owed. Learned Counsel submitted that in the

Brown Shipley case supra cited by the Claimants there was a separate transaction because a loan was actually granted. He submitted that there is no evidence in the case at bar which shows that there was any drawdown of a loan by the Belize Bank or of any account held by the Government at the Bank to pay off the sums arising under the December 2004 Guarantee and the issuing of a Loan Note based on those bank accounts. Learned Counsel submitted that there was no loan and no borrowing under section 7 of the **Finance and Audit (Reform) Act 2005**.

Interpretation of section 7

101. Mr. Nelson submitted that in the case of **Saint Lucia v. Martinus Francois No. 37 of 2003** the court said that the words ‘shall only be binding’, assumes that there is a contract in being at that time. Learned Counsel submitted that in terms of section 7(2) of the **Finance and Audit (Reform) Act 2005**, “*Any agreement, contract or other instrument effecting any such borrowing ...*”, there is no difference between the Saint Lucia’s position and the position in Belize. He submitted that in Belize there assumes the existence of an agreement and then goes on to speak about its validity or not. He submitted that validity without clear words, could only be referring to a position similar to ‘shall not be binding’, as in the Saint Lucia case where the contract is in being. Mr. Nelson also relied on the case of **Australian Broadcasting Corporation v Redmore Proprietary Limited (1989) 166 CLR** to support his argument.
102. He further submitted that in terms of the ordinary English meaning of binding and valid the meaning are the same.
103. As for the effect of section 7(2), Learned Counsel submitted that the court has to look at the phraseology used by the draftsman in section 7(6). He submitted that in terms of the internal consistency of ***The Finance***

Act, it shows that there is a different intention when one is dealing with section 7(2).

104. Mr. Nelson in the alternative submitted that even if there was a “borrowing” or a “loan” to the Government, the words of section 7 are directory rather than mandatory and cannot invalidate the loan note although the National Assembly retains control over whether funds can be paid from the Consolidated Revenue fund to meet the liability arising. He referred to the case of **R v Home Secretary ex p. Jeyanthan (2000) 1 WLR 354 at 359B** where Lord Woolf described the approach the Court should adopt when considering non-compliance with procedural requirements set out in statutes.
105. In written submissions the Bank stated that the key question is the third one posed by Lord Woolf, that is, what are the consequences of non-compliance. The Bank further submitted that when looking at the alleged non-compliance with section 7(2) of the Act, one should consider the context of the statute as a whole and the circumstances of the decision, whether substantial prejudice has been suffered or whether there is another opportunity of putting the failure right. The Bank submitted that the failure to obtain National Assembly’s approval before entering into the Settlement Agreement does not violate the objects and the purpose of the Act as a whole.
106. The Belize Bank further submitted that section 7(2) of the Act is a provision which ties in with the State budgetary process. They referred to section 41 of the Constitution which confers on the Minister of Finance general powers to enter into contracts on behalf of the Government and sections 114 to 116 which shows that Government expenditure is to be drawn from the Consolidated Revenue Fund.

107. Further, that while the Government has a general power to enter into contracts, funds can only be withdrawn from the Consolidated Revenue Fund to honour Government's obligations under a contract if the National Assembly has passed a law to approve such expenditure. Further, that section 7 allows the Government to raise funds for payment of any contract into which it has entered prior to the passing of an Appropriation Act.
108. Mr. Nelson in further submissions relied on the **Redmore** case supra where the Court looked at whether section 70 of the **Broadcasting Corporation Act** was 'directory' or 'mandatory'. In written submissions the Bank relying on this case submitted that properly construed section 7(2) of the **The Finance and (Reform) Act**, is not a confining power, it is merely directory and as such does not prohibit the Government from entering into a contract in excess of BZ\$10 million.
109. The Bank submitted that the legal consequence of non-compliance with section 7(2) is that the Government has entered into a contract to effect borrowing or a loan which is binding on the parties but which in any event the Government is unable to fund from the Consolidated Revenue Fund unless it is authorized to do so under the Constitution. That the rights of the public are as equally protected whether or not the Government complies with the procedural requirement set down in section 7(2). Therefore, non-compliance does not offend the object and the purpose of the Act nor will any members of the public suffer as a result.

Submissions on the Additional Loan Facility

110. The submissions by the Bank is that the Additional Loan Facility entered into on the 29th March, 2007 created new obligations between the parties unlike the Settlement Agreement and Loan Note. That section 7 of the Finance Act only relates to instruments effecting borrowing or loan to the

Government and that the borrowers in the Additional Loan Facility are defined as UHS, Universal Specialist Hospital Company Limited, Belize Medical Engineering Company Limited, Integral Health Care Limited and The Pathology Laboratory Limited. The Bank submitted that it is not a loan facility to the Government and therefore on any view falls outside section 7(2) of the **Finance and Audit (Reform) Act**.

111. The Bank further relied on the submissions made in relation to the Settlement Agreement and the Loan Note that section 7 does not disable the Government from acting without the prior approval of the National Assembly. Further, that under Clause 5 (a) of the Additional Loan Facility, the Government has agreed, together with the majority shareholders of UHS to grant by way of security a first priority legal mortgage over 98.28% of the issued share capital in UHS. The Bank therefore submits that the Government has not offended section 7 of the Finance Act.
112. Mr. Nelson Q.C. further relied on the principles set out in the case of **The State of New South Wales v Bardolph (1934) 52 CLR 455** and the case of **Tipperary Developments Pty Ltd. v. The State of Western Australia (2006) WASC 137** that contracts are enforceable if:
- (a) The contract is entered into in the ordinary or necessary course of Government administration;
 - (b) It is authorised by the responsible Minister; and
 - (c) The payments which the contractor is seeking to recover are covered by a parliamentary grant for the class of service to which the contract relates.
113. The Bank submits that because no payments are to be made by the Government and because the obligation is on UHS to do so, only the first

two elements above ((a) and (b)) are applicable to the Additional Loan Facility and they are satisfied.

114. Learned Counsel submitted that firstly, because the funding of UHS was part of Government's NHI program. Government and UHS entered into an agreement pursuant to which the Government agreed to purchase the share capital in UHS. Further, the Government now has full control and use of the hospital and other health facilities owned by the UHS. Secondly, the Additional Loan Facility was executed by the Prime Minister and Minister of Finance and witnessed by the Attorney General.

Submission on *Locus Standi*

115. The Bank relied on their written submissions in which they argued that since the Claimants are public interest claimants, they should have proceeded by way of judicial review and complied with the safeguards set down in that procedure. They relied on the case of **O'Reilly v. Mackman (1983) 2 A.C.** They submitted that an application for judicial review may be brought by a person, group or body which has sufficient interest in the subject matter of the application. The Bank submitted that this is a broad test for standing which only applies to applications for judicial review by virtue of Rule 56.2(1) of the **Belize Supreme Court (Civil Procedure) Rules 2005.**

116. The argument by the Bank is that the **Belize Supreme Court (Civil Procedure) Rules 2005** do not say that the test of "*sufficient interest*" applies to application made pursuant to Rule 56.1 (1) (c), the rule under which the Claimants brought their claim for the Declarations sought.

117. The question which arises for consideration is what is the standing test for applications brought under Rule 56.1 (1) (c). The Bank submitted that a

declaration, unless sought by way of judicial review, is a remedy for the protection of personal rights and therefore a claimant has to show that the declaration would have an impact on his private legal rights. The Bank relied on the **Martinus Francois** case supra at paragraph 147 where Justice Hugh A Rawlins, Justice of Appeal stated as follows:

*“It will be recalled, of course, that a person who applies for a declaration must have a personal legal right or interest which the alleged illegal action or decision infringes or threatens to infringe. The rationale for this is in the private nature of declaratory relief. Lord Diplock expressed the rationale for the requirement of a personal legal right or interest in **Gouriet v Union of Post Office Workers (1978) AC 435 at 501**. He stated:*

“But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of any one else.”

118. The Bank submitted that the Claimants in this case seek declarations as public interest litigants. That they do not have a personal right which has been infringed by the entering into of the Settlement Agreement and therefore does not fall within the test for a declaration as outlined by Justice Rawlins, Justice of Appeal.

119. To be clear the issue for this Court is the standing of the Claimants and not whether they should have proceeded by way of Judicial Review. That issue was dealt with by the Court of Appeal and the Bank has appealed that decision to the Privy Council.

Determination

*Issue 1: Whether the Loan Note dated 23rd March is unlawful as being contrary to section 7 of the **Finance and Audit (Reform) Act No. 12 of 2005.***

120. To determine this issue there are several questions which must be answered in light of submissions made by the Bank with regards to section 7 of the **Finance and Audit (Reform) Act 2005** that there was no borrowing. Thereafter, if there was a borrowing the Court will construe section 7.
121. The first question to be answered is whether the loan note executed by the Government as part of the Settlement Agreement in March 2007 effected “borrowing” or a “loan” to the Government. The Claimant’s submission is that there was a borrowing. The Bank’s submission is that the Settlement Agreement and the Loan Note did not effect borrowing.
122. To answer this question, the Court must look at the 2004 Guarantee, the Settlement Agreement and the Loan Note, the three documents before the Court to see what was the agreement between the parties. For the avoidance of doubt, the nature of the Guarantee will be looked at and not whether it was entered into unlawfully.
123. I will start with the 2004 Guarantee to see what the Prime Minister and Minister of Finance was guaranteeing and the type of Guarantee. Mr. Nelson Q.C. in his submissions on the Guarantee said that the 2004 Guarantee is a performance guarantee. In so far as is relevant the Guarantee states:

'GUARANTEE AND POSTPONEMENT OF CLAIM AGREEMENT'

The Belize Bank Limited

.....

FOR VALUABLE CONSIDERATION, receipt whereof is hereby acknowledged, the GOVERNMENT OF BELIZE (hereinafter called the "Guarantor") **hereby guarantees payment to THE BELIZE BANK LIMITED** of 60 Market Square, Belize City, Belize (called the "Company") **of all debts and liabilities, present or future, direct absolute or contingent, matured or not, at any time owing by UNIVERSAL HEALTH SERVICES COMPANY LIMITED** of 5780 Goldson Avenue, Belize City, Belize (hereinafter called the "Customer") to the Company or remaining unpaid by the Customer to the Company, **pursuant to the terms of a facility letter agreement made between the Customer (as borrower) and the Company dated October 25, 2002 as amended by letters dated May 5, 2004 and December 9, 2004 executed by the Company and the Customer**

This Guarantee was signed on 9th December, 2004 by the Minister of Finance in the presence of the Attorney General.

124. I think it necessary to mention the meaning of guarantee.

" a guarantee is a binding promise of one person to be answerable for a present or future debt or obligation of another if that other defaults"..... See: The Modern Contract of Guarantee, Donovan and Phillips paragraphs 1-18.

125. It is expressly stated in the 2004 Guarantee that the Government of Belize **"guarantees payment of all debts and liabilities, present and future direct absolute or contingent, matured or not, at any time owing** by UNIVERSAL HEALTH SERVICES COMPANY LIMITED." The question to be asked is, what was the Government guaranteeing. The Government was making a promise to the Bank that it is agreeing to meet the debts and liabilities owed by UHS to the Bank, should UHS fail to meet those debts and liabilities. The said debt being that pursuant to the facility letter agreement made between UHS and the the Bank dated October 25, 2002 as amended. The Government, therefore, had a

contractual obligation to pay the debt if UHS does not pay. In my respectful view, this is not a Performance Guarantee as submitted by Learned Counsel, Mr. Nelson Q.C.

126. There is no evidence before the Court that the Government did not want to perform its obligation under the Guarantee. What is before the Court is that the Government has entered into a Settlement Agreement which the parties have agreed discharged the Guarantee. The Court is in agreement with this submission.

127. Mr. Nelson in his arguments referred to the Banking Facility Letter dated October 25, 2002 at Clause 6 which states as follows:

“ Guarantee

(a) *In consideration of the Bank entering into and acting in accordance with this Agreement each of the Associated Companies, Dr. Lizarraga, Dr. Cob, the Family Members, and the DFC (collectively the ‘Guarantors’ ...) as primary obligors and not merely as sureties, unconditionally and irrevocably **guarantee as a continuing obligation the proper and punctual performance** by the Borrower of all its obligations and liabilities under or pursuant to this Agreement.” (See P.J. “11” of the second affidavit of Philip Johnson).*

128. Mr. Nelson submitted that this shows that this is not a Guarantee of a Loan but a Guarantee of a Performance of the Agreement. I do agree with Mr. Nelson that this particular Guarantee mentioned in the Banking Facility letter is a guarantee for the proper and punctual performance by the Borrower. However, this Guarantee is separate from the 2004 Guarantee given by the Government of Belize. See Clause (9) of the 2004 Guarantee which states:

“(9) This guarantee is **in addition to and not in substitution for any other Guarantee, by whomsoever given, at any time held by the Company,**”.

129. Further, the second affidavit of Philip Johnson at paragraph 4 shows that the Amended Loan Facility to UHS was amended on 9th December 2004 when the amount was increased to BZ\$29 million and the Minister of Finance was also a party to the Re-Amended Loan Facility. It was executed by the Minister of Finance and was witnessed by the Attorney-General. See “P.J. 15” for a copy of the Re-Amended Loan Facility.

Clause 4 in the Re-Amended Loan Facility states that:

“(a) *In consideration of the Bank entering into and acting in accordance with this Agreement and increasing the Term Loan to Twenty Nine Million Belize Dollars, GOB as **primary obligor and not merely as surety**, unconditionally and irrevocably guarantees as a continuing obligation **the proper and punctual performance** by the Borrower of all its obligations and liabilities under or pursuant to the Agreement and any subsequent amendments thereto **and will execute a guarantee to that effect (the “Guarantee”)**.* (emphasis mine).

130. When the 2004 Guarantee was executed it was not done in terms of clause 4 above with GOB as primary obligor guaranteeing **the proper and punctual performance by the Borrower** (in other words guaranteeing that payments are made by the Company properly and punctually). Rather, it was guaranteeing payment to Belize Bank of all debts and liabilities owing by UHS, which is a conditional agreement and in the event of default then an obligation would arise to pay the debt. I therefore, disagree with Mr. Nelson Q.C. that the 2004 Guarantee was a Performance Guarantee. In my view, it is a Guarantee of debts in the event of default. Further, I disagree with the Bank that the primary obligation of the Government under the Guarantee is substituted, by operation of law, by a

secondary obligation to pay to the Bank damages. The **Moschi case** supra relied on by Mr. Nelson can be distinguished from the case at hand.

131. **Moschi case** supra concerns the liability of a guarantor to the creditor even where the creditor has accepted the principal debtor's wrongful repudiation of his obligations to the creditor. Further, **Moschi case** considered two types of Guarantee which are:

- (1) Where the guarantor undertook to assume the principal debtor's liability in case of that person's default. (This is a conditional agreement. If the debtors fail to pay then there would be an obligation to pay).
- (2) Where the Guarantor assures the creditor that the principal debtor will perform his liabilities.

132. In this case, Mr. Moschi had personally guaranteed the performance by the Company of its obligations to make the payments. Lord Reid in this case said that there is a general view applicable to all guarantees. Parties are free to make any agreement they like and then the Court must determine what the agreement means.

At page 1179 Lord Reid said:

With regard to making good to the creditor payments of instalments by the principle debtor there are at least two possible forms of agreement. A person might undertake no more than if the principal debtor fails to pay any instalment he will pay. That would be a conditional agreement. There would be no prestable obligation unless and until the debtor failed to pay. There would then on the debtor's failure arise an obligation to pay....

On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his

contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook he would do.

In my view, the appellant's contract is of the latter type. He "personally guaranteed the performance" by the company "of its obligation to make the payments at the rate of 6,000. per week. ... The guarantor, the appellant, then became liable to the creditor, the respondents in damages."

133. In the case at bar, the situation is different as it is not a Performance Guarantee. The Government guaranteed payment of the debt. Therefore, in my considered view, when UHS breached their contract with the Bank there was no breach of contract by the guarantor/ Government of Belize. Rather, there was an obligation by the Government to pay the amount owing pursuant to the Facilities letter as amended. This (secondary) obligation can be performed voluntarily and requires no intervention by a court of law. If there is a failure to perform this obligation then this could give rise to a claim for a debt. There is no evidence before the Court that there was a claim arising out of the 2004 Guarantee.

134. In any event, even if I am wrong that the Government is not liable to pay damages, does not really matter. In my respectful view, what transpired after the Guarantee matters. The evidence is that there was a Settlement Deed dated March 23, 2007.

135. What is the terms of this Agreement? It states:

....

WHEREAS

On 9 December, 2004 the Bank and the Government entered into a guarantee and postponement of claim agreement (the "Guarantee") (under the terms of which the Government guaranteed the payment to the Bank of all debts and liabilities at any time owing by Universal Health Services ..

The Government wishes to determine its liability and to settle all claims owed under the Guarantee to the Bank; the total amount owed to the Bank by the Government pursuant to such claims under the Guarantee as of the date of this agreement being BZ \$33,545,820. and for the Guarantee to be discharged and the Government released from all future debts and liabilities owed to the Bank under the Guarantee.

The Bank has agreed to determine the Government's liability and to settle all Claims owed by the Government under the Guarantee to the Bank and for the Guarantee to be discharged and the Government released from all future debts and liabilities

.....

2. SETTLEMENT

This agreement is in full and final settlement of all and ay Claims arising out of or in connection with the Guarantee.

3. CONSIDERATION

In consideration of the Bank agreeing: (i) not to pursue its Claims arising out of or in connection with the Guarantee and to determine the Government's liability under the Guarantee, and (ii) to discharge the Guarantee and to release the Government from all future debts and liabilities owed to the Bank under the Guarantee ... the Government

(a) shall immediately upon the execution of this agreement: (i) pay to the Bank BZ \$1.00 ... and execute and deliver to the Bank a loan noteunder the terms of which the Government for value received hereunder shall pay to the Bank BZ 33,545,820 under the terms and conditions contained in the loan note.

.....

7. BREACH

Each of the parties acknowledges, having regard to the nature of this settlement, that damages would not be an adequate remedy for any breach of this agreement and that the remedies of injunction, specific performance and other equitable relief for any threatened or actual breach of this agreement should lie to enforce any of the obligations herein. ...”

136. The terms of this Settlement show that the Government agreed to determine its liability and to settle all claims owed under the 2004 Guarantee and for the Guarantee to be discharged. In consideration for the Bank agreeing to these terms, the Government agreed to pay \$1.00 and execute a loan note for value received and pay to the Bank BZ\$ 33,545,820.

137. As mentioned above, it is agreed by the parties that the Settlement Deed discharged the Guarantee. The Loan Note which in my view, is a separate transaction was in fact executed. This document which is dated March 23, 2007 is headed “Loan Note”. It states:

LOAN NOTE

March 23, 2007

FOR VALUE RECEIVED THE GOVERNMENT OF BELIZE, (“Maker”), by this Loan Note hereby unconditionally promises to pay to the holder of this Note for the time being on the date of this Note, THE BELIZE BANK LIMITED, The principal sum of :

...BZ \$33,545,820(the “Principal Sum”), .. together with interest ...

The Maker shall repay the Principal Sum ... no later than September 23, 2007.

138. I agree with the Bank’s argument that while this document is entitled “Loan Note”, it should be properly characterized as a promissory note.

The **Bills of Exchange Act, Chapter 245 at section 85(1)** provides that:

“A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or on the order of, a specified person or to bearer.”

139. The Loan Note shows that there was an unconditional promise to pay the principal sum of BZ\$33,545,820 and it was signed only by the maker who is the Minister of Finance in the presence of the Attorney General. It satisfies the definition of a promissory note.
140. I now come to the question as to whether there was a borrowing or a loan to the Government which led to the signing of the Loan Note which should be properly called ‘Promissory Note’. For the purposes of this judgment I will continue to use the term ‘Loan Note’ to avoid any confusion.
141. The term of the Settlement Deed was that *“the Government **for value received hereunder** shall pay to the Bank BZ 33,545,820.”* The Loan Note states at the very beginning, **‘FOR VALUE RECEIVED’**. The Loan Note itself nor the Settlement Deed does not say what is the ‘value received’. There is no evidence as in the **Brown Shipley** case of a drawdown. Further, as submitted by Mr. Nelson there is no Banking Facilities Letter showing that a loan was in fact given. But, in my respectful view the absence of a drawdown and a Banking Facility Letter are not conclusive evidence that no loan was given.
142. There is evidence before the Court that a Loan was in fact given. Also, the Bank in their written submissions have acknowledged that in fact the

Minister of Finance borrowed money from the Bank. Mr. Philip Johnson who is the Chairman of Belize Bank, in his third affidavit deposed at paragraph 3 that he explained in his Second Affidavit dated 25 May 2007 that it is the Bank's position that the Government is **indebted** to the Bank in relation to a principal amount of BZ\$33,545,820 and related interest payments including default interest. He further deposed that **the principal amount was advanced to the Government under a Settlement Agreement between the Bank and the Government dated 23 March 2007** which included a Loan Note between the Bank and the Government dated 23 March 2007.

143. On the evidence from Mr. Johnson which I find credible as to what transpired, the Government has clearly borrowed by way of advance BZ\$33,545,820 from the Bank resulting in the Loan Note. Mr. Johnson said the principal amount was advanced to the Government. The principal amount is \$33,545,820. The court will not speculate as to the method of advance or the accounting method used in this transaction, or whether there was any facility letter or whether there was any recording at all of this transaction. The evidence before the Court is that the 2004 Guarantee was discharged under the Settlement Agreement. The sum of \$33,545,820. was advanced to GOB and the Minister of Finance executed the 'Loan Note'. I therefore, respectfully disagree with the Bank's submission that the Settlement Agreement and Loan Note did not effect borrowing or a loan. I am satisfied that the Minister of Finance borrowed the sum of \$33,545,820 by way of advance from the Bank.

144. See also the Bank's written submissions dated 12th May, 2008 at paragraph 3.8 where submission was made that the Government had entered into a contract to effect a borrowing or loan which is binding on the parties. Mr. Nelson Q.C. in oral submissions, however has submitted contrary to that written submission that there was no borrowing.

145. Having so found that there was in fact a loan given to the Government, I must now construe **section 7 (1) and (2) of the Finance and Audit (Reform) Act** to see whether the Loan to the Government which is evidenced by the Loan Note was validly entered into by the Minister of Finance. It is necessary that I consider sections 7(1) and 7(2) as subsection (1) is subject to subsection (2).

146. **Section 7 of the Act provides:**

*“(1) The National Assembly may, subject to subsection (2), from time to time **by resolution authorize the Government to borrow** monies or to raise loans and to offer security for such monies or loans, from any public or private bank or financial institution or capital market in or outside Belize, upon such terms and conditions and in an amount not exceeding in the aggregate the sum specified in that behalf in the resolution, to meet current or capital requirements.*

*(2) Any agreement, contract or other instrument effecting any such borrowing or loan to the Government of or above the equivalent of ten million dollars **shall only be validly entered into** pursuant to a resolution of the National Assembly authorizing the Government to raise the loan or to borrow the money:*

Provided that the Government shall not use any money borrowed under this section to meet its “recurrent expenditure” (as defined in the financial regulations made under section 23(4) except

(a) to refinance existing public debt; and

(b) to amortize and service principal payments to existing public debt

Provided further that, subject to the foregoing the Government may raise loans, borrow monies and secure financing to meet its capital requirements in amounts of less than ten million dollars at any one time without the authority of a resolution as aforementioned on the condition that the total aggregate amount so raised or borrowed in any one fiscal year does not exceed ten million dollars.”

147. I agree with Learned Counsel, Ms. Young SC that the words in this section are plain and unambiguous and where the words in an instrument are plain and unambiguous, the Court is duty bound to construe such words in their ordinary sense irrespective of the consequences and may not modify or bend their meaning to achieve or to avoid a particular result. (See paragraph 76 above).
148. I am in further agreement with Learned Counsel that on a plain reading of section 7 of the **Finance and Audit (Reform) Act**, a resolution of the National Assembly is required before the Government of Belize can validly borrow ten million or more dollars. The words *“Any agreement, contract or instrument shall only be validly entered into pursuant to a resolution of the National Assembly,”* clearly refer to a prior qualification for validity, and they are mandatory.
149. When Section 7(2) is construed in context with the statute as a whole, it is clear that the intention of the Legislature is to clarify that the power of the Government to borrow is to be exercised pursuant to a resolution of the National Assembly. I disagree with the Bank’s written submissions that ‘Pursuant’ is to be construed not as ‘prior to’ but as ‘if in accordance with’. Firstly, I see no difference between ‘pursuant to’ and ‘in accordance with’. Secondly, ‘pursuant to’ in this section, in my view, means prior approval must be given before the loan is contracted.
150. The Bank in their written submissions said that if the Draftsman had intended that section 7(2) should require a resolution prior to the Government entering into a transaction of the nature contemplated he would have used the word ‘Before’ as in section 7(6) which provides that, *‘Before ... any guaranteein support of any loan made directly*

to a private sector entity by any public or private bank ... the Government shall seek the approval of National Assembly ...'

151. I respectfully disagree with this submission. There are various ways of expressing a provision in a statute without changing the substance of what is being expressed. The section must be read as a whole and not bent to achieve a particular result. In my view, the word 'before' does not have to be used by the draftsman to provide for prior approval of a contract to borrow the prescribed amount.
152. Section 7 (1) which is subject to section 7(2) confers power on the Government to borrow only if the National Assembly by resolution authorize such borrowing. This section states that, "*The National Assembly may, subject to subsection (2), from time to time by resolution authorize the Government to borrow monies or to raise loans...*" The word "may" in this section is discretionary as the National Assembly may or may not authorize the borrowing.
153. The words '*subject to subsection (2)*' shows that the two sub sections must be read together. Subsection 2 shows that the authorization from National Assembly is required only when the amount is "*of or above the equivalent of ten million dollars*". Further, any contract by the Government to borrow the said amount shall only be validly entered if there is a resolution in hand authorizing the Government to borrow the money. Therefore, at the time of entering into the contract, there must be a resolution, if not, the contract will be invalid. It follows that section 7(2) is not capable of giving retrospective approval or refusal to a loan agreement.
154. This interpretation is supported by section 7(3) which specifies the length of time during which a resolution is valid. I agree with Learned Counsel

Ms. Young SC that the purpose of a resolution having effect for twelve months is to facilitate a borrowing within that twelve month period of authority which means that a resolution to borrow must first be procured and its authority utilized within that twelve month period.

155. The interpretation that a resolution of the National Assembly is required at the time of borrowing and confers power on the Government to borrow of or above ten million dollars is further supported by section 7(5) which provides that :

“(5) Where, by resolution in accordance with this section or in pursuance of this Act, power to borrow money or to raise loans is conferred on the Government, the power may be exercised by a fluctuating overdraft.”

This section shows how the power is exercised when the power is conferred by resolution to borrow money.

156. The **Redmore case** supra relied on by Belize Bank can be distinguished from the case at bar. In that case section 70(1) of the Australian Broadcasting Corporation Act which was construed was not about the existence of power to contract. It was about the exercise of that power to contract. In the case at bar, it is my considered view that section 7(1) which is subject to section 7(2) confers power on the Government to borrow.

157. Further, section 7 of the **Finance & Audit (Reform) Act** is materially different from section 70(1) of the Australian Broadcasting Corporation Act. The question for the Court of Appeal in **Redmore case** supra was whether section 70(1) was merely directory in character or whether it operates to confine the actual powers of the A.B.C.

Section 70 (1) of the Act provides:

“The Corporation shall not, without the approval of the Minister (a) enter into a contract under which the Corporation is to pay or receive an amount exceeding \$500,000 ...

158. The Court found that in strict terms, the words used are directory because they speak of the exercise of power rather than the existence of power. It was pointed out by McHugh J.A. that the express grant of power to enter into contracts for the performance of its functions is provided for by s. 25(1) (a). Further, the direction is to the A.B.C. and not to an innocent outsider having contractual dealings with the A.B.C. who would be likely to act on the basis that the A.B.C. would have complied with any statutory duty to obtain the approval of the responsible Minister.
159. In the case at hand, section 7 (1) which is subject to section 7(2) grants power to enter into contracts to borrow of or above ten million dollars when a resolution is given by the National Assembly. It speaks about power and not the exercise of that power.
160. The **Martinus case** supra referred to by Mr. Neslon can also be distinguished from the case at hand. I disagree with Mr. Nelson that there is no difference between the Saint Lucia’s position and the position in Belize. In the **Martinus case** the Court looked at the **Finance (Administration) Act No. 3 of 1997**. The relevant sections are:

Section 38(1) provides:

“The Minister may, by resolution of Parliament, borrow money from a Bank or other financial institution by means of advances to an amount not exceeding on aggregate the sum specified for the purpose in the resolution, to meet current requirements, and such resolution shall not have effect for any period exceeding six months.

- (2) *Where, by resolution in accordance with this section or pursuant to any enactment, power to borrow money by means of advances*

from a bank is conferred on the Minister that may be exercised by means of a fluctuating draft.

- 39(1) *The Minister may by resolution of Parliament, borrow from any Bank or other financial institution for any of the following purposes:*
a. *The capital or recurrent expenditure of Government;*

.....

S 41 *No guarantee involving any financial liability shall be binding upon the Government unless that guarantee is given in accordance with an enactment or unless approved by resolution of Parliament.* (emphasis mine)

S 42(1) *There shall be charged upon and paid out of the Consolidated Fund all debt charges for which Government is liable.*

Redhead J.A. in interpreting section 41 said at paragraph 56:

“S41 in my considered opinion is in very clear and unambiguous terms. “ No guarantee involving any financial liability shall be binding upon the Government.” It is instrumental that Parliament uses the word “binding”. It did not say that the guarantee shall be void. To say shall be binding presupposes that there is an agreement in existence but it shall not be binding and so far as is material for the purpose of this case, “unless approved by a resolution of Parliament.”

161. I have great difficulty in accepting Mr. Nelson’s QC position that ‘validly’ in section 7(2) of the **Belize Finance (Reform) Act 2005** could only be referring to a position similar to ‘shall not be binding’, as in the **Martinus** case supra where the Court found that section 41 does not prevent the making of a contract but it forbids the paying out of money on the contract.

162. Section 41 in the St. Lucia Act makes provision for a resolution to be given for a guarantee to be binding while section 7 (1) in Belize confers power to borrow subject to 7(2) which says that the agreement to borrow shall only be validly entered pursuant to a resolution. In my view, section 41 in the St. Lucia Act is entirely different from section 7 in **Belize Finance and (Audit) Reform Act.**

163. This view is fortified when a comparison is made with the Belize laws (the repealed law and the present position) and the St. Lucia laws.

Belize laws

164. The preamble to the **Finance & Audit (Reform) Act 2005** shows the intention of the Legislature is to clarify the law relating to public monies and the expenditure thereof.

The preamble states:

“An Act to make new and better provisions regulating public revenue, expenditure and contracts; to repeal the Finance and Audit Act, Chapter 15 of the Substantive Laws of Belize, Revised Edition 2000-2003; to clarify the legal status of the Financial Orders, and to provide for matters connected therewith or incidental thereto.”

165. Section 7 of the new Act (see paragraph 146 for provision) in effect, clarified section 8 of the **repealed Finance & Audit Act, Chapter 15** which provides:

“8. (1) The House of Representatives may from time to time by resolution authorize the Minister to borrow, by means of advances from a bank (or from the Crown Agents) or from any public institution, money to an amount not exceeding in the aggregate the sum specified in that behalf in the resolution, to meet current requirements: Provided that the resolution shall not have effect for any period exceeding twelve months.

(2) The principal and interest of all the advances shall be charged on the Consolidated Revenue Fund.

(3) Where, by resolution in accordance with this section or in pursuance of any Act, power to borrow money by means of advances or from the Crown Agents or from any public institution is conferred on the Minister the power may be exercised by means of a fluctuating overdraft.” (Repealed)

166. Section 7(2) as rightly submitted by Ms. Lois Young SC is entirely consistent with the Constitution which requires through sections 77 to 80 that the raising or guarantee of any loan or repayment thereof must be by

way of a money Bill, requiring the approval or recommendation of the Cabinet, and passage through the National Assembly.

167. It can be seen that section 8 (1) of the repealed Act conferred power on the Minister to borrow by way of Resolution and 8(2) shows that the power may be exercised by means of fluctuating draft.

168. Section 8(1) which is Belize repealed law is similar to section 38(1) of the St. Lucia Act. Section 38(2) of the St. Lucia Act is identical to section 8(3) of the Belize Act now repealed.

169. In Belize section 8 was repealed and replaced by section 7. The power to borrow is now conferred by section 7(1). But Parliament has sought to control this power to enter into contracts to borrow by section 7(2). The repealed law did not have the equivalent of a S. 7(2) specifically addressing the validity of a loan made without the authority of a resolution of the National Assembly which is worth repeating:

*7 (2) Any agreement, contract or other instrument effecting any such borrowing or loan to the Government of or above the equivalent of ten million dollars **shall only be validly entered into** pursuant to a resolution of the National Assembly authorizing the Government to raise the loan or to borrow the money. (emphasis mine).*

170. The St. Lucia Act does not have a similar or identical provision as section 7(2). Therefore, in my respectful view the interpretation by the Courts in the **Martinus case** supra is not applicable to the Belize provisions which are entirely different. Section 41 interpreted by the St. Lucia Court dealt with guaranteeing of loans. I agree with Learned Counsel, Ms. Young SC that section 7(2) of the **Belize Finance and Audit (Reform) Act**, effecting borrowing and section 7(6) regarding guarantees, is entirely different from the Saint Lucian sections.

171. The interpretation of the words “**shall be binding**” in Martinus case cannot be applied to the words ‘**shall only be validly entered into**’ in the **Belize Finance and Audit (Reform) Act**, because of the difference between the St. Lucia position and the Belize position. The words cannot be read in isolation. Also, the ordinary English meaning of ‘valid’ and ‘binding’ cannot be applied in isolation without looking at the entire provision. It must be read in context with the entire provision. Thus, in my considered view, the words ‘shall only be validly entered into’ does not presuppose that there is an agreement in existence to borrow ten million dollars or more. Further, the general power by a Government to enter into a contract cannot be relied on in a case where there is statutory provisions which must be complied with before entering into an agreement.

172. I disagree with the further alternative submission by the Bank that even if there is a borrowing section 7 (2) is directory and not mandatory and so it does not disable the Government from acting without prior approval of the National Assembly. The Court was invited to look at the consequences of non-compliance and referred to the case of **R v Home Secretary ex p. Jeyanthan (2000) 1 WLR 354** at 359B where Lord Woolf described the approach the Court should adopt when considering non-compliance with procedural requirements set out in statutes:

“Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorized as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the

*issue arises. In such a situation that tribunal's task will be to seek to do **what is just in all the circumstances.***

At page 362C Lord Woolf sets out questions which may arise in construing a statutory requirement:

"... I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows.

- 1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been strict compliance? ...*
- 2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? ... I treat the grant of an extension of time for compliance as a waiver.*
- 3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? ...*

Which questions arise will depend upon the facts of the case and the nature of the particular requirement."

173. My considered view of section 7(2) as said above is that it is a mandatory statutory requirement. In its ordinary language it is mandatory. However, despite that view, for completeness, I will consider the questions raised by Lord Wolf MR as he then was.

174. The first question raised is the substantial compliance question. In the case at hand, there is no compliance at all as no resolution has been obtained in respect of the Loan. I disagree with the Bank that substantial compliance is evidenced by the fact that authorization will be required before payment can be made out of the Consolidated Revenue Fund. Substantial compliance in my respectful view is

obtaining a resolution prior to entering into a contract to borrow of or above the equivalent of ten million dollars or more.

175. As for the second question, it is my view that the non-compliance in obtaining the resolution is not capable of being waived because of the mandatory requirement.

176. Since it is not capable of being waived, the next question is the consequence of the non-compliance. I disagree with the Bank's submission that the non-compliance with section 7(2), that is, the failure to obtain the National Assembly's approval before entering into the Settlement Agreement does not violate the object and purpose of the Act as a whole. Firstly, it is not the settlement agreement which is in issue. It is the borrowing of over ten million dollars. I find Lord Woolf's speech at 360C of some assistance.

..In order to decide whether a presumption that a provision is mandatory is in fact rebutted, the whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act."..

177. What is the object of section 7(2)? This section was not in the repealed Act. It is a new section and the preamble to the Act as mentioned above is to "*make new and better provisions regulating public revenue, expenditure and contracts*". If there is no compliance with this section then there will be no control of public spending of over ten million dollars. This is certainly not the intention of Parliament. Non-compliance will violate the object and purpose of the Act as a whole. Section 7 read a whole makes better provision for regulating public revenue. If a contract is entered into to borrow over ten million dollars and there is no resolution, then in accordance with section 7(2) that

contract is not valid. Further, when section 7 (1) and 7(2) are read together, an agreement to borrow will only be valid if there is a resolution authorizing such borrowing. Therefore, I find that the loan for \$33 million dollars as evidenced by the Loan Note of 27th March 2007 entered into by the Minister of Finance is unlawful as being contrary to section 7 of the **Finance and Audit (Reform) Act 2005** and therefore void.

178. There is no opportunity by the Minister of Finance to rectify the situation or putting right the failure to observe the requirement as submitted by the Bank. The Prime Minister and the Attorney General had made representations to the Bank in the Guarantee, Settlement Deed, the Loan Note and the Additional Loan Note that they have complied with all statutory requirements. This issue however, is not for this Court and so the Court will refrain from making any determination regarding same. The Bank will have to pursue its remedies in Arbitration proceedings as stated in the Affidavit of Mr. Philip Johnson.

Issue 2: Whether the Additional Loan Facility dated 29th March, 2007 is unlawful as being contrary to the Finance and Audit (Reform) Act 2005.

179. The submission by Ms. Lois Young SC is that the Additional Loan Facility of \$12 million dollars is unlawful because it is in breach of either section 7(1) or section 7 (6) the Finance and Audit Reform Act.
180. Mr. Johnson in his second affidavit at paragraph 34 states that the Minister of Finance and the Attorney General was a party to the

Agreement for the Additional Loan. See **Exhibit P.J. 16** for a copy of the Banking Facilities Letter dated March 29, 2007.

181. The nature of the agreement can only be determined by looking at the Banking Facilities letter itself. Clause 1 states:

...

Re: Banking Facilities

The Belize Bank Limited (“the “Bank”) is pleased to confirm that the Bank will make available to Universal Health Services Company Limited; Universal Specialist Hospital Company Limited; Belize Medical Engineering Company Limited; Integral Health Care Limited; and the The Pathology Laboratory Limited (the “Borrowers”; each a “Borrower”), a term loan facility upon the terms and conditions contained herein (the “Agreement”).

.....

5. Security

All amounts payable by the Borrowers to the Bank hereunder shall be secured by:

- (a) ***a first priority legal mortgage to be granted by the Government of Belize (the “Government”) and the majority shareholder of Universal Health Services Company Limited (“Universal Health”) for the benefit of the Borrowers and in favour of the Bank, over 98.28% of the issued and outstanding shares in the share capital of Universal Health, comprising of 12,557 ordinary shares of BZ\$ 1.00 each and a duly executed instrument of transfer (in the Bank’s required form) in relation to such shares.***

182. Clause 5 (b) to (d) shows the loan was to be secured also by other mortgages by UHS of issued shares in three of the companies listed in Clause 1. There are also 7 mortgages of land granted by UHS.

183. I agree with Mr. Nelson QC that the Government of Belize is not a Borrower. The Borrowers are clearly stated as the five companies listed

above. I further agree with the Bank that since the Government is not the Borrower section 7 (2) is inapplicable as there was no borrowing from the Bank by the Government.

184. Further, section 7(1) is also inapplicable as it states '*The National Assembly may, by resolution authorize the Government to borrow monies or to raise loans and to offer security for such monies or loans*'. This section is only applicable when the Government is the Borrower and in such a case the Government can offer security for such loan.

Is section 7(6) applicable? This section states:

"7(6) Before the Government offers any guarantee or some other form of security in support of any loan made directly to a private sector entity or statutory body by any public or private bank the Government shall seek the approval of the National Assembly, signified in a resolution made in that behalf, specifying

(a) the terms and conditions under which the Government shall make the guarantee;

(b) that the National Assembly is satisfied that the loan will lead to the growth of the economy of Belize.

Provided that the National Assembly shall only issue a resolution under this subsection if the National Assembly is satisfied that

(a) the lending institution requires as part of its overall lending policies or in respect of the specific loan, a sovereign guarantee by the Government of Belize; and

(b) the private sector entity or the statutory body which will be the recipient of the loan has the financial ability to make payments in respect of the loan, including assets of a value equivalent to the extent of the Government guarantee.

185. Clause 5 (a) of the Facilities letter above shows what was agreed between the Bank and the Government. That is, the amounts payable

by the Borrowers to the Bank shall be secured by a first priority legal mortgage by the Government over 12,557 ordinary shares in UHS and a duly executed instrument of transfer in relation to the shares. However, there is no evidence before the Court that these conditions were ever satisfied by the Government. That is, there is no evidence that the first priority mortgage was ever granted by the Government of Belize. Also, there is no evidence before the Court that there was an executed instrument of transfer in relation to the 12,557 ordinary shares. It would be speculative for the Court to say that the Government is in breach of section 7(6) of the **Finance and Audit (Reform) Act** without the evidence that the conditions were satisfied.

186. Learned Counsel, Ms. Young SC also in her argument referred to a Share Purchase Agreement between the principal shareholder of UHS for the sale of their shares to the Government. See the second affidavit of Dr. Victor Lizarraga and paragraph 35 of the second affidavit of Mr. Philip Johnson.
187. I accept Ms. Young's argument on the legal effect of the Share Purchase Agreement, that is once the contract has been entered into the transferee has an equitable title to the shares and the transferor holds them, until registration, as trustee for the transferee. But, having not seen the Share Purchase Agreement, I find myself unable to accept learned Counsel's submission that either the Government was the owner of UHS or the Government used its shares in UHS to secure the loan. According to Dr. Lizarraga's evidence there were several conditions to be satisfied before Government could have purchased the shares. There is no evidence before the Court that these conditions were satisfied. The Court will not speculate as to whether the Government is the owner of the Shares or the owner of UHS.

188. I therefore find myself unable to grant the declaration sought on the Additional Loan Facility of twelve million dollars.
189. However, before leaving this issue, for sake of completeness, I would like to comment on the principle in the **Bardolph** case supra and the **Tipperary** case supra relied on by Mr. Nelson QC in his submissions that contracts are enforceable if the contract is entered into in the ordinary or necessary course of Government administration. See paragraph 112 above. This principle is a common law principle. The **Finance and Audit (Reform) Act** is a statutory requirement. In the case of **CO Williams Construction Limited. v. Blackman (1994) 4 LRC 216** a case cited by Ms. Young SC, Lord Bridge at page 222 said:

It is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under which the same function might previously been exercised is superseded and so long as the statute remains in force the function can only be exercised in accordance with its provisions.

It can be seen therefore, from this case that the statutory requirement is capable of curtailing the common law power.

Locus Standi of Claimants

190. The Claim was brought pursuant to the **Supreme Court (Civil Procedure) Rules 2005, Part 56.1 (c)**. Part 56 provides for Constitutional and Administrative Law Matters. **Part 56.1 (1)** makes provision for four categories of cases which states:

56.1 (1) This Part deals with applications –

- (a) *for judicial review;*
- (b) *for relief under the Constitution;*
- (c) *for a **declaration** in which a party is the Crown, a court, a tribunal or any other public body; and*
- (d) *where the Court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, or any decision of a Minister of Government or Government Department or any action on the part of a Minister or Government Department.*

(2) *In this Part such applications are referred to generally as “applications for an administrative order”.*

191. The application made by the Claimants is therefore for an administrative order against a public body, the Government of Belize. As can be seen from the factual and legal context of the application, the declarations sought to be determined are questions of public law.

192. The question for the Court is what is the standing test for applications brought under **Rule 56.1 (1) (c)**. Part 56 of the rules specifically address the test for application made under **Rule 56. 1(1) (a)** for judicial review.

193. **Rule 56.2 (1)** makes provision for whom may apply for judicial review. It states:

*An application for **judicial review** may be made by any person, group or body which has **sufficient interest** in the subject matter of the application.*

Rule **56.2 (2)** gives some examples of sufficient interest in the subject matter but these are not exhaustive.

194. The test is not specifically laid out for the other three categories of administrative orders as in the case of an application for judicial review. However, some assistance can be sought from Rule **56.13** which provides for hearing of an application for an administrative order. As can be seen above administrative order covers four categories. Rule **56.13(1)** provides:

*56.13 (1) At the hearing of the application, the Judge may allow any person or body which appears to have a **sufficient interest in the subject matter of the claim** to make submissions whether or not served with the claim form.*

195. In any of the applications a person or body with sufficient interest may make submissions. In my considered view, the test of 'sufficient interest' in the judicial review applications can therefore be applied in all of the other applications for an administrative order.

196. It is now for this court to decide whether the Claimants have sufficient interest in the subject matter. The subject matter in this claim broadly speaking is about compliance with the laws by Government officials when spending Government's money. This issue will be dealt with based on the legal and factual context of the whole case. See the case of **IRC v National Federation of Self-Employed and Small Businesses Ltd (1981) 2 All ER 93 at 96,110 and 113**, where it was made clear that standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case.

197. The first named claimant, the Association of Concerned Belizeans is a not-for-profit company limited by guarantee, whose objectives include the strengthening of good governance, economic growth, and social well being in Belize. ACB was given the approval by 1,667 persons who are residents of Belize to represent them in these proceedings. ACB has shown by the evidence of David Vasquez who is the President of ACB that this matter which concerns the spending of Government funds is of public interest as it had received wide spread public attention and condemnation. In my view, ACB has sufficient interest in the subject matter of this application.
198. The second-named Claimant is a trade union representing members from medical and dental field. There are about 68 members who practice medicine in the public health care system. Marta Habet, the Vice-President of the Union in her evidence stated that they are concerned about the public health care system which they say need equipment, supplies and upgrading. Further, that the decision by the Prime Minister to pay the \$33 million dollar to Belize Bank for a private hospital is denying the potential Government Investment into the public health care system in which they work. In my view, the condition of the public healthcare system is a matter of public interest and the second claimant has sufficient interest to bring this claim as the Government has committed itself to pay debts for a private health care system when the public health care system in which they work needs upgrading.
199. The evidence from the third-named Claimant is that he is a business man and a taxpayer. He is also Senator in the National Assembly of Belize representing the business community. He said that the taxes he pays goes into the Consolidated Revenue Fund and when unbudgeted sums of money are taken out of the fund he is directly affected. He also said in

his evidence that as a citizen and taxpayer he is directly interested that the constitution and the laws should be obeyed in all respects, and in particular where public monies are concerned and so he opposed the intention to satisfy the guarantee. In my view, the complaint made by Mr. Hulse is grave enough which is that as a citizen and a taxpayer and a Senator he has a sincere concern that the laws be obeyed, in particular where public monies are concerned. See the case of **R v HM Treasury, ex p Smedley (1985) 1 All ER 589 at 594, 595**, where standing was accorded to a single tax payer. See also the cases of **Inland Revenue Commissioners** supra and **Blackburn case** supra relied on by Ms. Young SC. In my view, Mr. Hulse has sufficient interest to bring this application.

200. The fourth named-Claimant is a confederation of trade unions in Belize made up of nine members. The evidence of Mr. Dylan Reneau is that they are concerned about the guarantee securing the debt of a private hospital and the lawfulness of satisfying the guarantee using public monies. They oppose the payment of the guarantee out of the Consolidated Revenue Fund. They consist of nine different unions in Belize thereby showing the matter is of national importance in the public interest. I find that they have sufficient interest also to bring this claim as they are also concerned about the compliance of the laws by Government officials when spending money from the Consolidated Revenue Fund.

201. I respectfully disagree with the Bank's submissions that a declaration under Rule **56.1 (1) (c)** is a remedy for the protection of personal rights and therefore, a claimant has to show that the declaration would have an impact on his private legal rights. The Rules are clear and unambiguous. There is no provision in Part 56 which prohibits the granting of a

declaration challenging public law actions by a private citizen even though there is no infringement of his private rights.

202. I am not, with respect, persuaded about the applicability of the **Martinus Francois case** supra relied on by Belize Bank. In that case Justice Rawlins relied on the **Gouriet case** supra. The principle in the latter case is the common law position which is that a private person who applies for a declaration must have a personal legal right or interest which the alleged illegal action or decision infringes. It is clear from the evidence that there is no breach of the Claimants private legal rights. However, it is also clear from the evidence that the Claimants are not meddlesome busy-bodies. As Dr. Albert Fiadjoe said in his book '**Caribbean Public Law**' at page 120, there is a flaw in this approach because "it seeks to apply the principle of the common law to the situation of the written constitution which contains both fundamental rights and non-fundamental rights provisions, the latter providing a legitimate basis for individuals to seek declarations from the courts as long as they are not busy-bodies."

203. The learned Dr. Fiadjoe said that the approach in the Queen's Bench Division in the U.K. to the question of standing in the case of **R. v. Secretary of State for Foreign Affairs, ex. P. World Development Movement Ltd. (1995) 1 All ER 611 (Pergau Dam case)** is much to be commended. I share this view also. In this case a consortium of British construction companies sought from the British Government aid and trade provision for the construction of a dam and hydro- electric power station in Malaysia. The Pergau dam was estimated at 316 million pounds and was to be paid out of an overseas aid fund disbursable under section 1 of the Overseas Development and Co-operation Act 1980. Following appraisals of the scheme, officials of the Overseas Development Administration concluded that the Dam was

uneconomical and should not be implemented because there was much cheaper way of producing electricity in Malaysia. The Foreign Secretary went against that advice and approved aid and trade provision for the project. The applicants, a non-partisan pressure group which campaigned to increase the amount and quality of British aid to developing countries, applied for judicial review of the Foreign Secretary's decision to conclude the agreement with the Malaysia government. The Foreign Secretary contended inter alia that the applicant had no *locus standi* to make the application. It was held inter alia that, having regard to the merits of the challenge, the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty against which relief was sought and the prominent role of the applicants in promoting and protecting aid to developing nations, it was clear that the applicants had *locus standi* to make the application.

204. The principles in the **Pergau dam** case supra when applied to the case at bar clearly shows that the applicants have *locus standi* to bring this application. The Applicants in this case have an interest in how public monies are being spent and whether there is compliance with the laws governing public spending. The evidence of the Claimants show the merits in this claim. It is important for the Claimants who are seeking only declarations to know whether there has been compliance with the laws by the Minister of Finance. This in my view is an issue of national importance which is being challenged by concerned citizens and includes members from Unions in Belize and members from the Medical Field. It is unlikely there will be other responsible challengers. I therefore find that the Claimants have *locus standi* to bring this claim.

Costs

205. The Claimants brought these proceedings to Court to show that the Government of the day has violated the powers conferred on it by the Constitution and by section 7 of the **Finance and Audit (Reform) Act No. 12 of 2005**. The Defendants chose not to defend this action but left it entirely in the hands of the Interested Party, Belize Bank. Nevertheless, the Defendants should pay the Claimant's costs in this action.

206. Accordingly, the following is ordered:

Order

- (1) A Declaration is granted that the Loan Note dated 23rd March, 2007 under the terms of which the second Defendant was to pay the Belize Bank Limited BZ \$33,545,820.00 is unlawful as being contrary to section 7 (1) and (2) of the **Finance and Audit (Reform) Act No. 12 of 2005**.
- (2) The Declaration that the Loan Facility of BZ \$12 million procured by the first and second Defendants from the Belize Bank Limited on the 29th March, 2007 is unlawful as being contrary to the **Finance and Audit (Reform) Act No. 12 of 2005** is refused.
- (3) The Claimants have *locus standi* to bring this application.
- (4) The Defendants to pay the Claimants cost in this application to be agreed or taxed.

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MINNET HAFIZ

SUPREME COURT JUDGE

Dated this 30th day of April, 2009