



JUDGMENT

The Belize Bank Limited (Appellant) v The Association of Concerned Belizeans and Others (Respondents)

From the Court of Appeal of Belize

before

**Lord Phillips
Lord Walker
Lady Hale
Lord Mance
Lord Clarke**

**JUDGMENT DELIVERED BY
Lord Clarke
ON**

20 October 2011

Heard on 29 June 2011

Appellant
Nigel Fleming QC
Andrew Marshalleck SC
(Instructed by Allen &
Overy LLP)

Respondent
Dr. Lloyd Barnett
Mrs Lois Young SC
(Instructed by Charles
Russell LLP)

LORD CLARKE:

Introduction

1. The issue in this appeal is whether a “Loan Note” dated 23 March 2007 (“the Loan Note”) is invalid as being contrary to section 7(2) of the Finance and Audit (Reform) Act No 12 of 2005 (“the Act”) on the ground that the Bank of Belize (“the Bank”) made a loan to the Government of Belize which could only lawfully be made pursuant to a resolution of the National Assembly authorising the loan. It is common ground that no such resolution was passed. The issue is whether the Bank effected a “borrowing or loan to the Government” within the meaning of section 7(2). Both the Supreme Court and the Court of Appeal of Belize held that the Bank did effect such a borrowing or loan and that the Loan Note was accordingly invalid under section 7(2). The Belize Bank Limited (“the Bank”) appeals to the Privy Council on the ground that they were wrong so to hold. It says that, notwithstanding its name, the Loan Note did not effect a borrowing or loan but was simply a promissory note under which the Government promised to pay BZ\$33,545,820 to the Bank and that there was no other borrowing by or loan to the Government.

The Act

2. The Act came into force on 19 April 2005. Section 7(1) and (2) provide, so far as relevant:

- “(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: ...”

The Settlement Deed and Loan Note

3. The Loan Note was Schedule 1 to a document entitled Settlement Deed dated 23 March 2007 and expressed to be between the Bank and the Government. It contained three recitals:

- “(A) 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 Company Limited ... to the Bank.
- (B) 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 US\$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.
- (C) 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 owed to the Bank under the Guarantee, on the terms and conditions set out below.”

It is common ground that the relevant currency was Belize dollars and not US dollars and that the figure in (B) should be BZ\$33,545,820.

4. The critical parts of the Settlement Deed are these:

“2. SETTLEMENT

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

3.1 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 adequacy and sufficiency of which is hereby acknowledged and agreed to by the Government, the Government:

- (a) shall immediately upon the execution of this agreement: (i) pay to the Bank the sum of BZ\$1.00 (One Belize Dollar), and (ii) execute and deliver to the Bank a loan note in the form set out in Schedule 1 to this agreement (the 'Loan Note') under the terms of which the Government for value received hereunder shall pay to the Bank BZ\$33,545,820 (ThirtyThree Million, Five Hundred and Forty-Five Thousand, Eight Hundred and Twenty Belize Dollars) in accordance with the terms and conditions contained in the Loan Note;
- (b) represents, warrants and guarantees that: ...”

5. Clause 4 provided that the Settlement Deed and Schedule 1, which is of course the Loan Note, set out the entire agreement between the parties and that Schedule 1 formed an integral part of the agreement. Clause 9.1 provided that the Settlement Deed was governed by and should be construed in accordance with Belize law. Clause 9.2 provided for arbitration in London under the London Court of International Arbitration (“LCIA”) Rules. The Settlement Deed was signed on behalf of both the Bank and the Government. The Minister of Finance signed on behalf of the Government in the presence of the Attorney General who also signed the document.

6. The Loan Note began thus:

“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, being on the date of this Note [the Bank]. ... the principal sum of ... BZ\$33,545,820 (“the

Principal Sum”) together with interest thereon accruing daily from and including the date of issue of this Loan Note and compounded monthly at the rate of interest of ... 13% per annum (“the Interest Rate”).

7. The Note further provided that the Government “shall repay the Principal Sum” (together with interest at the Interest Rate) on demand or, unless and until such demand was made, the Principal Sum (together with all outstanding interest at the Interest Rate) no later than September 23, 2007. Interest was to be paid monthly and the Government expressly agreed not to “assert or bring any defenses, setoffs, or counterclaims in any suit or action for the collection of any sum due to the holder under this Note, save in the case of manifest error in the calculation of principal or interest payable hereunder”. There were further provisions which came into effect in the event of default and state immunity was waived. Moreover the Note expressly provided that it was negotiable. It was expressed to be governed by the law of Belize and the parties agreed to submit to the non-exclusive jurisdiction of the courts of Belize. It was signed on behalf of both parties. In the case of the Government it was signed in the presence of the Attorney General by Said Musa, who was both Prime Minister and Minister of Finance.

8. It is not necessary to set out the terms of the Loan Note in any further detail because the issue in this appeal is not whether the Government has any defence under the terms of the Loan Note but (as stated above) whether it is invalid under section 7 of the Act. Apart from its title, and its provision for the Government to “repay” the Principal Sum, there are no express terms of the Loan Note which support the argument that the Bank was making a loan to the Government or that the Government was borrowing money from the Bank.

The Bank’s case

9. It was submitted on behalf of the Bank that the Loan Note did not evidence a loan by the Bank to or a borrowing from the Bank by the Government. It put its case in four ways. (1) Properly construed, the Loan Note, and the Settlement Deed to which it was scheduled, cannot be understood as providing for a loan from the Bank to the Government. (2) The Government rendered the Loan Note in order to satisfy its existing liability under a 2004 guarantee, so that the Loan Note relates to a liability pre-dating the Act and cannot therefore be rendered unlawful by the Act. (3) The Court of Appeal held that there was a loan, even though it also found that no monies had been advanced by the Bank to the Government. There cannot however be a loan without an advance of funds, and even if there could, it would not contravene section 7(1) and (2) of the Act. (4) Even if, contrary to the Bank's primary

submission, the Settlement Deed and the Loan Note did provide in some way for a loan from it to the Government, the Loan Note is, as both the Supreme Court and the Court of Appeal held, a promissory note. As such, it is separate from any loan, and is not invalid even if the loan is invalid. The Bank no longer argues (as it did in the Court of Appeal) that there was no contravention of section 7 of the Act because the section is only directory, and not mandatory, in its effect.

The background to the Settlement Deed and the Loan Note

10. At the time of the Settlement Deed on 23 March 2007 the Bank was owed the sum of BZ\$33,545,820 by Universal Health Services Company Limited (“UHS”) under a loan facility agreement dated 9 December 2004 (“the 2004 Loan”), which was the last of a series of loan agreements by which UHS steadily increased its borrowing from the Bank. UHS borrowed the money in order to finance the construction of a hospital. That borrowing was throughout supported or guaranteed either by the Development Finance Corporation (“DFC”), which was the lending arm of the Government, or by the Government itself. The Government supported the UHS project because it was Government policy to reform the health care system in Belize by promoting the expansion of private health care facilities, the cost of which would be met by a national health insurance programme.

11. It is unnecessary to trace the history back before 9 December 2004, save to note that in November 2004 the Government announced its intention to liquidate DFC. By an agreement of 9 December 2004 (“the 2004 Agreement”) the Bank agreed to increase the then current term loan granted by the Bank to UHS pursuant to a Facility Letter Agreement dated 25 October 2002, as amended by letter dated 5 May 2004, from BZ\$19,000,000 to BZ\$29,000,000. By the same agreement, the Government, as primary obligor and not merely as surety, guaranteed the performance of the obligations of UHS under that agreement. The agreement was signed on behalf of the Government by Said Musa as Prime Minister and Minister of Finance, who also signed a Guarantee and Postponement of Claim Agreement (“the 2004 Guarantee”) of the same date and to the same effect.

12. By 2007 it was clear that UHS would not be able to repay the loans. The Bank accordingly made a claim against the Government under the 2004 Loan Agreement and Guarantee. As the recitals to the Settlement Deed made clear, it was entered into in order for the Government’s liability under the 2004 Guarantee to be determined, for all claims against it under the Guarantee to be settled, for the Guarantee to be discharged and for the Government to be

released from all future debts and liabilities owed to the Bank under the Guarantee.

13. Contemporaneously with the Settlement Deed and the Loan Note the Government agreed to acquire the shares held by the principal shareholders in UHS and on 29 March 2007 it made a further working capital loan of BZ\$12 million available to UHS by way of an Additional Loan Facility. The condition precedents to this loan included confirmation that all debts owed by UHS to creditors “have been satisfied or will be satisfied following the draw down of this Term Loan, and that all necessary documentation or appropriate documentation required to fully extinguish any such debts has been duly recorded or registered”; and the loan was to be secured by inter alia “a first priority legal mortgage to be granted by the Government of Belize and the majority shareholder of [UHS] over 98.28% of the Issued and outstanding shares in [UHS]”. With regard to the share acquisition, no documentation has been produced by the Government, but in a second affidavit made by Dr Lizarraga of UHS, he said the agreement for the purchase of such shares was “conditioned upon, inter alia, the settlement of all claims owed to the Belize Bank by the Government under the 2004 Guarantee , the payment and discharge by the Government of Universal’s indebtedness to the Belize Bank at that date and the execution by Universal of a new Loan Agreement in the amount of £12 million to be applied in discharge of all outstanding creditors including the DFC”. The only evidence from the Bank’s side about this share acquisition consists in statements by Mr Johnson in his second affidavit dated 25 May 2007 (para 35) that “Also I understand that the Government and UHS entered into an agreement in March 2007, pursuant to which the Government agreed to purchase the issued share capital in UHS” and that “I verily believe 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”.

The proceedings

14. Events surrounding the UHS indebtedness have given rise to a number of sets of proceedings. In addition to the instant proceedings there were LCIA arbitration proceedings between the Government and the Bank which were settled. There are also ongoing LCIA arbitration proceedings between the Bank and the Government, which have not been principally concerned with the Settlement Deed and the Loan Note but with an attempt in late 2007 and early 2008 to reach a new settlement following the Government’s failure to satisfy the Loan Note.

15. The instant proceedings were originally brought by the First to Fourth Respondents against the Prime Minister and Attorney General of Belize. There was however a change of Government in Belize in February 2008 and the new Prime Minister and Attorney General ceased to defend the claim. Thereafter the Bank was added as an Interested Party and since then the proceedings have in substance been between the Bank and the First to Fourth Respondents. In the Supreme Court the case came before the Hon Madame Justice Minnet Hafiz (“the judge”), who held on 30 April 2009 that the Loan Note was invalid as being contrary to section 7 of the Act. Her decision was upheld by the Court of Appeal, comprising Mottley P and Soss and Morrison JJA on 19 March 2010.

The reasoning in the courts below

16. The judge noted at para 137 of her judgment that it was common ground that the Settlement Deed discharged the 2004 Guarantee. Then at para 140 she asked herself whether there was a borrowing or a loan which led to the signing of the Loan Note, which she said should properly be called a Promissory Note. Her reasoning is contained in paras 141 to 144 of her judgment. At para 141 she focused on the reference to “FOR VALUE RECEIVED” at the beginning of the Loan Note and observed that neither the Loan Note nor the Settlement Deed said what was the value received. She added that the fact that there was no evidence of a drawdown or a facility letter was not conclusive evidence that no loan was made. In reaching her conclusion that there was such a loan she relied upon part of an affidavit of Mr Philip Johnson, who was the Chairman of the Bank, and upon a statement in a skeleton argument filed on behalf of the Bank.

17. The affidavit relied upon was the third affidavit of Mr Johnson sworn in these proceedings. The judge relied in para 142 upon para 3, which reads:

“As I explained in my Second Affidavit dated 25 May 2007 I verily believe, and 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. 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 (“the March Settlement Agreement and Loan Note”).”

18. The judge expressed her conclusions based on that evidence in para 143 as follows:

“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 [the Government] 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.”

The judge further referred in para 144 to a paragraph in written submissions on behalf of the Bank dated 12 May 2008 to the effect that the Government had entered into a contract to effect a borrowing or a loan which was binding on the parties.

19. It is a striking feature of the judge's judgment that, save for her doubts as to what was meant by the expression “for value received” in the Loan Note, she did not analyse the language of the Settlement Deed or the Loan Note. Moreover, her reasoning in paragraph 143 is not entirely clear. It begins, consistently with the question (posed in para 140) whether there was a borrowing or a loan which led to the signing of the Loan Note, with the statement that the advance resulted in the Loan Note. On the other hand, at the end of para 143, the suggestion seems to be that it was the Settlement Deed and Loan Note that effected the loan or borrowing.

20. Although it upheld the decision of the judge, the Court of Appeal analysed the position somewhat differently. Morrison JA, with whom the other members of the court agreed, asked the question whether the Loan Note effected a borrowing by the Government from the Bank and concluded that it did. He made these findings at paras 65 to 75. The Government's liability under the 2004 Guarantee was a secondary liability (paras 65 to 67). In 2007

the Government wished to cap its liability to the Bank (para 66). In the Settlement Deed, the Bank having agreed to determine the Government's liability under the 2004 Guarantee, the Government agreed, in consideration for the Bank agreeing those terms, to pay the Bank the sum of BZ\$1.00 and to execute the Loan Note and pay the Government BZ\$33,545,820 in accordance with its terms (para 67).

21. The Settlement Deed and the Loan Note were a watershed in the relations between the Government and the Bank. The effect of the Settlement Deed was to release the Government from the 2004 Guarantee and the secondary liability which that relationship entailed and to reconstitute the relationship as one in which, although the Bank remained a constant as the creditor, the Government stepped into the shoes of UHS as primary obligor. Put another way, the Government's status changed from one in which its liability was conditional upon a default by UHS to one in which it had now undertaken primary liability for the agreed debt of BZ\$33,545,820. The Loan Note should be examined against this background (para 68).

22. As the judge held, the Loan Note satisfied the definition of a Promissory Note in section 85(1) of the Bills of Exchange Act, Chapter 245, Revised Edition showing the law as at 31 December 2000 (para 69). Morrison JA rejected the submission that the Loan Note could not (and did not) itself effect a borrowing and that it was independently enforceable as a Promissory Note (para 70). He said that such a highly technical argument bore "no relation to the realities of what both [the Bank] and [the Government] obviously set out to achieve in the transaction". He reiterated his point that the net result of the March 2007 transaction was that the Government converted ("as [the Bank] would have it, by some unknown process") its secondary obligation under the 2004 Guarantee as guarantor with a primary obligation in respect of a liability which, by executing both the Settlement Note and the Loan Note, it explicitly acknowledged (para 70).

23. At para 71, Morrison JA summarised the position in this way. He said that the judge was entitled to take the view that there was no need for the court to "speculate as to the method of advance or the accounting method used in this transaction, or whether there was any recording at all of this transaction." She opted to have regard to the fact that the 2004 Guarantee was discharged under the Settlement Deed and that the Government executed the Loan Note and to conclude in the light of both those facts that the sum of BD\$33,545,820 was advanced to the Government by the Bank. He added that it was not particularly significant that no "new moneys" were advanced by the Bank.

24. Morrison JA further relied at paras 72 to 75 both upon the evidence of Mr Johnson (quoted above) upon which the judge had relied and upon certain statements made by the Bank's solicitors which were said to be relevant to the question whether, as a matter of fact, funds were in effect advanced by the Bank to the Government to enable both parties to discharge their obligations under the Settlement Deed.

25. The solicitors' statements were contained in a letter from Allen & Overy dated 17 May 2007 in which they sought to put the Government on notice that the Bank was confident that it had strong claims under the Settlement Deed and the Loan Note. The letter asserted that the claims included a claim for restitution on the basis that the Bank "acting under a mistake as to law has paid out over BZ\$33 million" as well as a claim that the Bank was entitled to rescind the Settlement Deed and the Loan Note on the ground of the Government's negligent or fraudulent misrepresentation as to its authority to enter into the transaction, the effect of which "would be to revest in the Bank the principal amount advanced to the Government and give rise to a claim in damages ...". Morrison JA concluded at para 75 that those remarks were consistent only with the judge's view that, in keeping with the Government's obligations under the Settlement Deed and the Loan Note, there was in fact a borrowing from the Bank by the Government and that the judge was correct to take them into account in determining that question. He added that he could not imagine that, as chairman of the Bank, Mr Johnson would allow himself the luxury of throwaway remarks in a sworn affidavit or that Allen & Overy would do other than take a considered position, based on instructions, in a letter written just two weeks after proceedings were issued. Morrison JA concluded at para 76 that, for all those reasons, together with those given by the judge, he would hold that the Loan Note effected a borrowing by the Government from the Bank.

Discussion

26. The Board has reached the clear conclusion that the reasoning of both the judge and the Court of Appeal is flawed and that this appeal should be allowed. It is appropriate to consider first the true construction of the Settlement Deed and, in particular, the Loan Note. Since the Loan Note is scheduled to the Settlement Deed, they must of course be considered and construed together. They must both be construed in context and having regard to the surrounding circumstances.

27. As stated above, apart from the use of the expression "Loan Note" and its provision for the Government to "repay" the Principal Sum, there is nothing in the Settlement Deed or the Loan Note to suggest that by either document the

Bank was lending monies to the Government. Both the courts below correctly stated that the Loan Note was a Promissory Note. It is a negotiable instrument under which the Government promised to pay to the holder the Principal Sum of BZ\$33,545,820 together with interest in accordance with its terms. The Bank was of course the holder when the Loan Note was issued and, so far as the Board is aware, is still the holder.

28. In the judgment of the Board, the terms of the Settlement Deed and the Loan Note are clear. The purpose of both was clearly set out in the recitals. It was to settle the position as between the Bank and the Government under the 2004 Guarantee, not under any later arrangement between the parties. The amount due under the Guarantee was agreed to be BZ\$33,545,820 and the purpose of the Settlement Deed was to discharge that liability and to release the Government from all future liabilities under it. In short the liability under the 2004 Guarantee was replaced by a new obligation, namely to pay that amount as the Principal Sum due under the Loan Note, together with interest calculated as stated in the Loan Note. There is no support for the suggestion that that amount, or any other sum, was lent to the Government. Indeed, such a loan would make no sense, since there was already a liability under the 2004 Guarantee.

29. Moreover, quite apart from the fact that the Settlement Deed was effected by deed, there was ample consideration for the agreement, including that contained in the Loan Note. That consideration is expressed in clause 3.1 quoted above. It lay both in the mutual promises made by the parties and by the Government's promise to pay the Bank BZ\$1.00 and to execute the Loan Note. The judge mentioned the reference to "FOR VALUE RECEIVED" but observed that neither the Loan Note nor the Settlement Deed said what was the value received. The Board is unable to accept that that is so for two reasons. The first is that, as the quotation in para 4 above shows, clause 3.1(a) expressly provided that the Government "shall execute and deliver to the Bank ... the Loan Note under the terms of which the Government *for value received* shall pay to the Bank BZ\$33,545,820 ... in accordance with the terms and conditions contained in the Loan Note" (Emphasis supplied). The second reason is that, as just stated, the consideration, that is the value received by the Government, was the promise by the Bank to treat the Guarantee as discharged and to release it from all future liabilities under it.

30. Both the judge and, in particular, the Court of Appeal placed considerable reliance upon their conclusion that the effect of the Settlement Deed and the Loan Note was replace the Government's secondary liability under the 2004 Guarantee with its primary liability under the Loan Note. The Board is unable to accept this reasoning, for two alternative reasons. The first is that, as noted at para 11 above, the obligation of the Government under the

2004 Agreement and the 2004 Guarantee was expressly stated to be as primary obligor and not merely as surety. The second is that, however that may be, the effect of the Settlement Agreement and Loan Note was to replace the Government's liability under the 2004 Guarantee by its liability under the Loan Note, which simply contained an obligation to pay the Principal Sum and interest in accordance with its terms. Whether that was to replace a primary or secondary obligation is legally irrelevant. In either case the obligation was due and in either case there was no commercial or other reason to introduce a further loan as between the Bank and the Government. Unsurprisingly, there is nothing in the language of the Settlement Deed or the Loan Note which has that effect.

31. What then of the surrounding circumstances which might be said to evidence a collateral agreement or assist in the construction of the Settlement Deed and the Loan Note? There is nothing in any of the material seen by the Board which passed between the parties and which supports any different conclusion from that just stated. It is not suggested on behalf of the respondents that there is evidence of any relevant material passing between the parties. Three aspects of the evidence were relied upon by the courts below.

32. The first was paragraph 3 of the third affidavit of the then chairman of the Bank, Mr Johnson, which is quoted in para 17 above. The Board is of the view that a fair reading of that paragraph does not support the conclusion that there was a loan to the Government entered into in 2007. The first sentence of the paragraph referred back to Mr Johnson's second affidavit and simply reiterated the Bank's position that, as stated in his second affidavit, it was the Bank's position that the Government was "indebted to the Bank in relation to a principal amount of BZ\$33,545,820 and related interest payments including default interest". Further reference to the second affidavit shows that Mr Johnson described the position exactly as the Bank has submitted it to be in this appeal. For example he said in para 37 that the monies due and owing under the Settlement deed and the Loan Note "were in effect due under the [2004] Guarantee". As the Board sees it, that was indeed the position under the Loan Note and has been the Bank's position throughout. The first sentence of Mr Johnson's third affidavit thus gives no support to the view that the Bank lent money to the government in 2007.

33. It will be recalled that the second sentence reads:

"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 (“the March Settlement Agreement and Loan Note”).

In the opinion of the Board it is plain that, although Mr Johnson used the word “advanced”, he was merely recording the legal effect of the Settlement Deed and the Loan Note. He was not suggesting some collateral loan agreement made before the Loan Note was entered into. He relied solely on the Settlement Deed and the Loan Note. Thus all depends upon the true construction of those documents. Yet his opinion is not relevant to the true construction of the documents. For the reasons already stated, it is the clear view of the Board that, on their true construction, neither the Settlement Deed nor the Loan Note effected a loan to or a borrowing by the Government. They merely effected the settlement of the previous liabilities of the Government to the Bank.

34. The second aspect of the evidence relied upon was the submissions relied upon by the judge. They do not provide evidence of a collateral agreement and, in the opinion of the Board, a sentence or paragraph in submissions is of no assistance in construing the documents. In any event, it is not entirely clear to which submissions the judge was referring. She referred to para 3.8 of written submissions on behalf of the Bank dated 12 May 2008. Those submissions were stated to be supplementary to outline submissions dated 26 July and 28 November 2007. They contained no para 3.8. They did however include para 38, which was in these terms:

“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 authorised to do so under the provisions of the Constitution.”

It thus appears that the judge may have had this paragraph in mind. The Board is however of the opinion that it does not assist the Respondents because it is in Part C of the submissions which was dealing with the proper interpretation of the Act, not with the facts of this case. It is possible that it was intended to refer to para 21 of the same submissions, which does state that the Prime Minister/Minister of Finance had authority to bind the Government “in respect of its agreement with the Bank to borrow BZ\$33 million”. However, here again, para 21 was in Part C of the submissions.

35. The Bank had made its submissions on the true legal position in its outline submissions dated 26 July 2007. It there stated unequivocally in para 4.4 that it was the Bank's submission that the Settlement Deed and the Loan Note did not "*effect borrowing*", original emphasis. It added:

“Rather it represented the quantification and manner of a vested contractual right arising pursuant to the Guarantee which was entered into in December 2004 ...”

That is the case which the Bank had advanced throughout.

36. The Board turns to the third aspect of the evidence relied upon, namely the contents of Allen & Overy's letter dated 17 May 2007 referred to in para 25 above. The Court of Appeal referred, in para 74, to extracts from the following passage:

“Regardless of the outcome of the ACB's challenge to the financial arrangements between the Government and the Bank (which our client expressly rejects), the Bank is confident that it has very strong claims against the Government for the full amounts due and owing under the Settlement Deed and under the Loan Note.

Such claims include, without restriction:

1. the Government informed the Bank and the Bank reasonably believed that the Government was properly authorised to enter into the Settlement Deed and the Loan Note. Thus the Bank acting under a mistake as to law has paid out over BZ\$33 million. The Government is unjustly enriched, as by this arrangement it has sought to avoid liability under the Guarantee and escape liability under the Settlement Deed and Loan Note ...
2. that the Settlement Deed and the Loan Note were procured by negligent or fraudulent mis-representations or misstatements made on behalf of the Government as to their authority to enter into the arrangements. As a result, the Settlement Deed and the Loan Note are voidable. The Bank is entitled to elect to rescind the Settlement Deed and Loan Note, the effect of which would be to revest in the Bank the principal amount advanced to the Government and give rise to a claim in damages which would allow the Bank, inter alia, to recover its interest payments ...

Regardless of the outcome of Claim No 218 of 2007, on any view the Government is indebted to the Bank in relation to the [BZ]\$33,545,820 and related interest payments including default interest which was in effect advanced to the Government under the Settlement Deed and Loan Note.”

37. The Board accepts the submission made on behalf of the Bank that it is hard to see how the Court of Appeal could have relied upon these statements as relevant to the true construction of the Settlement Deed or the Loan Note. They must in any event be put in their context. They were made at the end of a letter which contained this substantive para at the outset:

“Pursuant to the Settlement Deed, the Bank and the Government agreed to settle all claims owing to the Bank under a guarantee and postponement of claim agreement dated 9 December 2004 (the "Guarantee"). The Guarantee was of course given by the Government in connection with securing advances to UHS. 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. In consideration therefore, and pursuant to the Settlement Deed, on 23 March 2007 the Government executed a loan note under the terms of which the Government was to pay to the Bank BZ\$33,545,820 (the "Loan Note).”

That was the case that was made in the outline submissions dated 26 July 2007 quoted above and is the case made in this appeal. A fair reading of the various submissions, correspondence and evidence shows that, although there may have been some sloppy thinking on the part of the Bank’s advisers at times, its essential case has been the same throughout.

38. The Board further accepts the submission made on behalf of the Bank that it would have been inconsistent with the terms of the Settlement Deed and the Loan Note for a loan to have been made by the Bank to the Government. Neither the judge nor the Court of Appeal explained the role that the alleged loan was to play in the transaction documented in the Settlement Deed and the Loan Note. There are only very few possible purposes which can be suggested. One would have been to enable the Government to satisfy the 2004 Guarantee, with the loan being repayable, on this theory, by way of the Loan Note. However, as explained above, the Settlement Deed does not state that the 2004 Guarantee was discharged by payment or that the funds for payment were

derived from a loan. On the contrary, it provides that the consideration for the discharge of the Government's liability under the 2004 Guarantee was the payment of BZ\$1.00 and the execution and delivery of the Loan Note, which was a Promissory Note and enforceable as such. Thus, as submitted on behalf of the Bank, not only did the Settlement Deed and Loan note make no mention of a loan, but the terms of the Settlement Deed are inconsistent with there having been a loan.

39. There was no commercial need for a loan to form part of the transaction documented in the Settlement Deed and the Loan Note. The government was unable to satisfy its guarantee of the UHS debt. The settlement which it reached with the Bank was that it would promise to pay the sum owing within six months, while also taking control of UHS from its former shareholders. There was no need for the Government to be loaned money by its creditor, the Bank, for this settlement to be put into effect.

40. The other possible purposes of a loan which can be suggested are to enable the Government to onlend the money borrowed to UHS, so enabling UHS in turn to repay its indebtedness or, simply, to replace UHS's indebtedness and the Government's guarantee of that indebtedness by a new loan under which the Government would be the sole debtor. Relying in this connection upon the limited secondary information which exists about the share acquisition agreement made between the principal shareholders of UHS and the Government in March 2007 (para 13 above), the Respondents, in their written case and in the oral submissions made on their behalf by Miss Lois Young SC and Dr Lloyd Barnett, urged the Board to accept an analysis, and an explanation of the use of the terms "Loan Note" and "repay", along one of these lines.

41. The difficulty faced by such submissions is that there is no evidence of any agreement between the Government and the Bank in 2007 other than the Settlement Deed and the Loan Note, and no need for the elaborate interpretation of events involved in either of these ways of putting the Respondents' case. As far as the Bank was concerned, once the Government had by the Loan Note discharged its indebtedness under its guarantee, the past UHS indebtedness was no doubt treated as effectively discharged. It is true that the Government would as a matter of law ordinarily have retained the right to be subrogated to the Bank's rights against UHS. But, it was always open to the Government and UHS to agree between themselves that any such rights of subrogation would not be exercised (and that may well have been the effect of any conditions of any share acquisition agreement such as those to which Dr Lizarraga attested: para 13 above). Further, even if the Bank could have been shown to be party to any agreement whereby UHS was in law discharged from its past indebtedness upon the Government issuing the Loan Note, there is

absolutely no reason for such agreement to be analysed as involving a loan by the Bank to the Government. Agreement for the discharge by the Government of its guarantee liabilities could have been combined with agreement (to which UHS might also have been party) that upon such discharge the Bank would also cease to have any claim against UHS, even a subrogated claim made by the Government in its name. But none of that would have required any loan by the Bank to the Government.

42. In summary, both the Settlement Deed and the Loan Note were carefully drawn as regards the consideration for which the Loan Note was to be given and the Board is confident that if there had been a loan to or borrowing by the Government, it would have been set out in a written document. The Board notes that the Bank did advance a loan at the time of the Settlement Deed and the Loan Note, but to UHS not the Government. That loan was comprehensively documented in the term loan facility dated 29 March 2007, which was signed on behalf of the parties on 30 March 2007.

43. In addition to the evidence relied upon by the courts below, some reliance was also placed by the Respondents in the course of the argument upon the way in which the sum of BZ\$33,545,820 was dealt with in the Bank's accounts. The Board was referred to the First Partial Award in the second arbitration between the Bank and the Government. As the Board sees it, the decision of the arbitrators is not relevant to the issues in this appeal. However, especially in paras 191 and 209, the award gave some information as to the way the Bank operated its accounts. In particular it noted that the accounts show that on 23 March 2007 UHS' original loan account was in debit in the sum of BZ\$32,320,698.05. On the same day BZ\$33,545,820 was posted as the opening balance in the Government's new loan account and the various UHS entries were made in various UHS accounts which left a nil balance in the original UHS loan account. As the arbitrators put it, the end result was that the Government's loan account was in debt to the tune of BZ\$33,545,820, which subsequently accrued interest which, as at 30 January 2008, amounted to BZ\$3,993,851.27. That interest was presumably the interest accruing under the Loan Note.

44. The position was explained by Mr Johnson in his fourth affidavit sworn on 18 February 2009. In paras 7 and 8 he reiterated the point that no funds were loaned to the Government in March 2007 and that the position under the Loan Note depended upon the true construction of the Loan Note. He recognised that in the Bank's books the amount due to the Bank was recorded in an account in the name of the Government and was booked against the Bank's demand loan portfolio. However that designation flowed from the title of "Loan Note" and was not the result of any analysis of the transaction

documents. He added that he had been advised that the accounting entries cannot be determinative of the nature of the transaction. The Board agrees.

45. The Board has already expressed the view that, on its true construction, the Loan Note is a Promissory Note and that none of the documents evidences a loan to or borrowing by the Bank. Moreover there is no evidence of any collateral loan agreement or loan arrangement. It follows that the Board accepts points (1) and (2) in the summary of the Bank's case in para 9 above. It further accepts point (3), namely that there can be no loan without an advance of funds. There is also force in point (4), namely that, as a Promissory Note, the Loan Note is enforceable quite apart from validity of the underlying transaction. Although the Board does not wish to throw any doubt upon the autonomy of a promissory note as a general principle, it does not found its judgment on the proposition that, even if there was a loan which was invalid under the Act, the Loan Note would in any event be enforceable as a Promissory note - the illegality under its governing law of consideration given for a promissory note (here in fact also subject to the same law) precludes enforcement of the promissory note: Chalmers and Guest on Bills of Exchange and Cheques (17th ed.) (2009) para. 12-018 and Byles on Bills of Exchange and Cheques (28th ed.) (2007) para 19-023.

46. . The Board finds its judgment therefore upon its conclusion that there is no evidence of any loan to or borrowing by the Government. The documents are inconsistent with such a loan or borrowing and there is no other evidence to support it.

CONCLUSION

47. For these reasons the Board concludes that, contrary to the decisions by the judge and the Court of Appeal, the Loan Note was not invalid by reason of section 7 of the Act. It will therefore humbly advise Her Majesty that the appeal be allowed and that the parties make written submissions on costs within 28 days.