[2022] JMCC Comm 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE INSOLVENCY DIVISION

CLAIM NO. SU2022IS00005

BETWEEN	**HUBBLE LIMITED**	**CLAIMANT**
AND	**BANK OF NOVA SCOTIA JAMAICA LIMITED**	**DEFENDANT**

IN OPEN COURT

Mrs. Denise Kitson QC, and Mr. Gordon McFarlane instructed by Grant, Stewart, Phillips & CO. Attorneys-at-Law for the Claimant.

Mrs. Alexis Robinson instructed by Myers, Fletcher & Gordon Attorneys-at-Law for the Defendant.

Heard: 2nd June and 25th July 2022

Insolvency - Application for discontinuance of insolvency - accord and satisfaction - Waiver - promissory estoppel

CRESENCIA BROWN BECKFORD, J

INTRODUCTION

[1] Hubble Limited **("Hubble")** was the co-owner of property whose one half interest was mortgaged to the Bank of Nova Scotia Jamaica Limited **("BNS")** to secure the payment of the sum of Fifty-One Million Five Hundred and Fifty-Six Thousand and Four Hundred Dollars **($51,556,400.00)** at an interest rate of six percent per

annum. The Principal borrowers defaulted and BNS, in exercise of its statutory power of sale, sought to sell Hubble's interest in the property. Hubble prayed the assistance of the Court and Supervisor of Insolvency to make a proposal pursuant to **S.11 of the Insolvency Act, 2014**.

[2] By letter dated 30 March 2022, by Mrs. Maia Wilson, Director and Legal Counsel, BNS advised Hubble that it had exercised its statutory power of sale over the property for a price of Fifty-One Million Six Hundred Thousand Dollars **($51,600,000.00)**. The letter, captioned *'Closing Statement'* further advised that the net proceeds of the sale was applied in the following manner:

Principal Amount Owed:	*$51,556.400.00*
Less Net Sale Proceeds:	*$48,153,670.01*
Balance Outstanding:	***$3,402,729.99***

This sum represented in actuality is the balance on the principal only.

[3] A letter dated 14th April 2022, was delivered to BNS' Attorneys, Myers, Fletcher and Gordon Attorneys-at-Law, with a manager's cheque enclosed in the sum of Three Million Four Hundred and Two Thousand Seven Hundred and Twenty-Nine Dollars and Ninety-Nine Cents **($3,402,729.99)** in *'full and final settlement'* of the balance due. BNS having received the letter dated 14 April 2022, responded by way of letter dated 27th April 2022 to advise that they would not accept the sum *'in full and final settlement',* but they would accept the sum in partial payment of the outstanding debt. In said letter, BNS attached a statement of account which quoted the outstanding balance inclusive of interest payable.

[4] In letter dated 29th April 2022, Hubble restated its offer for the payment of the sum in *'full and final settlement'*. In response to this, BNS, in letter dated 4th May 2022, restates its *'unequivocal rejection of Hubble's offer of that sum in full and final settlement of the balance of the debt due'* and returns the manager's cheque provided by Hubble. Hubble, in letter dated 30th May 2022, acknowledged the return of the cheque and restated that it has *'tendered payment in full and final*

settlement of the balance outstanding' and again enclosed the manager's cheque previously returned by BNS. BNS again returned the cheque and to date has not accepted the cheque. For ease of reference, the above mentioned communications between the parties will be referred to as ***'the communications'***. Hubble also relied on the affidavit of Maia Wilson sworn on April 27, 2022 and filed in these proceedings in which she stated the balance owing as Three Million Four Hundred and Two Thousand Seven Hundred and Twenty-Nine Dollars and Ninety-Nine Cents **($3,402,729.99)**.

[5] Hubble then submitted to the Office of the Supervisor of Insolvency a request for a further extension of time to file a proposal, and to seek directions for the withdrawal of the insolvency proceedings, on the basis that it was no longer insolvent having tendered for payment, in full, the debt owed to BNS. By way of an Amended Fixed Date Claim Form Hubble seeks the following orders:

1) Directions that the Claimant is no longer required to file a proposal pursuant to Section 11 of the Insolvency Act since the debt owed to the sole creditor has been satisfied.
2) An order that the insolvency proceedings thereby initiated are discontinued.
3) Costs to the Claimant.
4) Such further and other relief as the Honourable Court deems fit.

[6] In the Affidavit of Maia Wilson, in response to the Amended Fixed Date Claim Form sworn on the 31th May 2022, BNS contends that Hubble has not satisfied the debt in the amount of Twenty Million Eight Hundred and Fifty-One Thousand Five Hundred and Ninety Dollars and Ninety-Nine Cents **($20,851,590.99)** which is owed.

[7] These contentions between the parties raise the following issues for determination:

a) Whether in the communications exchanged between the parties and their corresponding actions, the principle of accord and satisfaction arises?

b) Whether BNS is estopped from recovering the outstanding interest when it omitted the agreed interest in the letter dated 30th March 2022?

c) Whether Hubble Limited **("Hubble")** remains indebted to the Bank of Nova Scotia Jamaica Limited **("BNS")** considering that Hubble paid the sum of Three Million Four Hundred and Two Thousand Seven Hundred and Twenty-Nine Dollars and Ninety-Nine Cents **($3,402,729.99)**, deemed as the *'Outstanding Balance'* per the account statement provided by BNS?

PRELIMINARY OBJECTION

[8] Counsel for BNS submitted that there were no proper proceedings before the court as the Fixed Date Claim was for a stay of execution and Hubble had failed to seek the court's permission to amend its Fixed Date Claim Form. She submitted further that what had arisen is not truly a question in the insolvency proceedings. These arguments did not find favour with the Court.

[9] No permission was required for an amendment to the statement of case where there had been no Case Management Conference. **(See Part 20.1 of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020.)** Further the Insolvency Act gives greater latitude in matters of form than the strictness required by the **CPR**. **S. 278 of the Insolvency Act, 2014** states:

> *278. No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.*

BNS has not claimed that it will suffer any injustice from the failure to seek the court's permission to amend the Fixed Date Claim Form.

[10] The question of whether the debt has been settled is in fact a question which falls within the ambit of the insolvency proceedings, as the insolvent person is entitled to seek a discharge if it has no debt. **S. 277 of the Insolvency Act, 2014** states:

> *277. Subject to this Act, the Court shall have full power to decide all questions of priorities in accordance with applicable law and all other questions whatsoever, whether of law or fact, that may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide in furtherance of the objects of this Act.*

The submission by Hubble that the court retains *'over-riding control'* and may grant the orders sought in the Amended Fixed Date Claim Form is well founded.

ACCORD AND SATISFACTION

[11] Mrs. Denise Kitson QC submited on behalf of Hubble that, in reliance of the contractual principles of Accord and Satisfaction, based on the communications between the parties, the mortgage debt to BNS has been paid in full. Having sworn unequivocally to the balance, BNS cannot now seek to resile after it was accepted by the claimant and paid through tendering a cheque for the amount. She relied on the case of **Rio Brown v Nem Insurance Company Limited ("Rio Brown")** [2012] JMSC Civ 27.

[12] Counsel Mrs. Alexis Robinson, on behalf of BNS, submitted that the statement of BNS did not constitute an offer to settle the debt for Three Million Four Hundred and Two Thousand Seven Hundred and Twenty-Nine Dollars and Ninety-Nine Cents **($3,402,729.99)**, as it only dealt with the amount owing on the principal sum. She further contended that in the circumstances where there was an agreement that spoke to interest, express terms in the mortgage deed referring to the rate of interest as six **(6)** per cent per annum, and an amortization schedule, Hubble would know that an amount for interest would remain outstanding. Further, the amount owing including the interest was set out in the default statement. The cases relied on by Hubble were in fact distinguishable from the case at bar as there was an offer which was accepted in those instances. In the instant case BNS did not accept the proffered cheque. She relied on **Stour Valley Builders v Stuart ("Stour Valley Builders")** (1992) CAT 1281, to say there was no satisfaction as BNS did not accept the proffered cheque.

[13] In **Rio Brown**, the case had its genesis in a claim for sums from an insurance company for a property which was destroyed by fire. The claimant agreed to accept the sum of Six Million & Fifty-Six Thousand Five Hundred and Thirty-Eight Dollars **($6,056,538.00)** in full discharge and satisfaction of his claim for loss and damage to his property. Consequently, the offer was accepted by the Defendant and the claimant was paid the settlement sum. The Claimant accepted the sums paid with no reservation. Mangatal J drew heavily from the Court of appeal decision of **Alcan Jamaica Company v. Delroy Austin and Hyacinth Austin ("Alcan")** Supreme Court Civil Appeal No. 106/2002 delivered December 20, 2004 and the decision of McDonald Bishop J as she then was in **Elaine Dotting v. Carmen Clifford (Executrix of the Estate of Dr. Royston Clifford) ("Dotting")** and the **Spanish Town Funeral Home** unreported decision in Claim No 2006 HCV0338 delivered March 19, 2007 upheld in SCCA No 49 of 2007 delivered January 23, 2008. Mrs. Kitson also relied on these cases. Mangatal J adopted the principle enunciated by Smith JA in **Alcan** that:

> *In our Court of Appeal's decision in **Alcan Jamaica Company v. Delroy Austin and Hyacinth Austin** Supreme Court Civil Appeal No. 106/2002 delivered December 20, 2004, the principles of accord and satisfaction, and release and discharge, are discussed by learned Justice of Appeal Smith J.A. as follows: Any person who has a cause of action against another may agree with him to accept a substitution for his legal remedy any consideration. The agreement by which the obligation is discharged is called Accord and the consideration which makes the agreement binding is called Satisfaction-see **Clerk and Lindsell** on Torts, 17th Edition, 30-06 p.1559. Thus Accord and Satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself.*
>
> *When the satisfaction agreed upon has been performed and accepted, the original right of action is discharged and the Accord and Satisfaction constitute a complete defence to any further proceedings upon that right of action. Where the demand is disputed or the amount unliquidated, payment of any sum agreed upon by the parties is a good satisfaction….*

And in the result held that:

> *Mr. Brown is not entitled to, and is not at liberty to pursue a claim for relief … because the Form of Acceptance… represented an offer on Mr. Brown's part to NEM to accept the sum of Six Million & Fifty-Six Thousand Five Hundred & Thirty-Eight Dollars set out in the Form in full and final satisfaction of his claim under the subject Policy in respect of loss and damage to the insured property as a consequence of a fire which occurred on the 30 th September 2008. That offer was*

> *accepted by NEM and Mr. Brown has been paid the entire settlement sum. There has therefore been Accord and Satisfaction and the original cause of action under the Policy has been extinguished.*

[14] In **British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd ("British Russian Gazette")** [1993] 2 KB 616 at pp 643-644, (relied on by Mangatal J and McDonald-Bishop J) Scrutton L.J. defined Accord and Satisfaction as:

> *Accord and Satisfaction is the purchase of a release from an obligation, whether under contract or tort, by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative. It is not necessary that the consideration should be executed; the consideration on each side may be an executory promise, the two mutual promises making an agreement enforceable at law.*

[15] Gilbert Kodiliyne in **Commonwealth Caribbean Contract Law 5th Ed.** references the previous case as establishing that:

> *When there is accord and satisfaction, the promisor is discharged from his original obligation. If the promisor fails to carry out his promise, he can be sued for breach of the promise, but he cannot be sued on the original obligation, as it has been discharged.*

[16] The question then is whether the letter of constitutes an offer. In **British Russian Gazette,** Scrutton L.J. further stated:

> *The document (constituting the agreement as to an accord and satisfaction) is to be construed in accordance with the intention of the parties as expressed in it, and if there is doubt, as Parke B. says in one of the cases cited, the construction which makes it effective to carry out that intention prevails.*

[17] Let me say at the outset that **Alcan, Dotting** and **Rio Brown** on the facts are different from this case. In **Rio Brown,** there was an executed offer and acceptance and payment of the sum agreed with one party thereafter seeking to resile from the agreement. In **Dotting,** the full amount provided for in the settlement agreement executed between the Claimant and First Defendant on behalf of the second Defendant was not paid in full and it was held there was no satisfaction. In **Alcan,** there was an executed Memorandum of Agreement and a release and Discharge given on payment of the agreed sums. There was no dispute that there existed an agreement between the parties in these cases. Similarly, the facts of

Stour Valley Builders are not on all fours with the case at bar. In that case the offer moved from the debtor who claimed the cashing of the cheque by the creditor constituted satisfaction. Nonetheless, the cases provided insight and clarity with respect to the law.

[18] This question of whether the letter constitutes an offer was considered in similar circumstances in **Brian George Foulser v Revenue & Customs ("BG Foulser")** 2014] UKFTT 483 (TC) (23 May 2014). In this case the Claimant received a letter 4th October 2010 titled *'Self-Assessment Tax Outstanding £1,202,494.44'*. The contents of the letter read:

> *I have been instructed to request you to make payment in full settlement as the liability remains correctly due and payable despite the outcome of the tribunal.*
>
> *Your payment must be made with (sic) the next 28 days to avoid insolvency action.*

The Defendant sent a letter, dated 12th November 2010, with a cheque enclosed for the outstanding amount in full and final payment of the sum owed. On 19th November 2010, the Defendant issued the Claimant with a receipt and a statement of account showing a nil balance. The Claimant contends that the letter dated 4th October 2010 was an offer to settle, to which he accepted. Berner J held that the letter dated 4 October was not *'worded as an offer of any sort'*. He further stated:

> *It is a request for payment, and a request for payment of a liability which (albeit wrongly) had already been expressed as due and payable by virtue of the notice of determination. That is what Mrs. Williams must be taken as referring to when she speaks of the liability being one that remains correctly due. Mrs. Williams was concerned only with the tax that was due and payable because it had not been postponed; there is nothing in the letter that can be taken as an indication that the payment requested was the only amount that could fall due.*
>
> *The letter employs the words "in full settlement", but it does not refer to settlement of Mr Foulser's tax liability generally for the tax year in question**. In the context, and having regard to the background, there is in my judgment no basis on which the letter could be construed as an offer of settlement.*** *The use of that phrase refers only to settlement in full of the amount that was considered to be due and payable, as not being postponed… It follows that I find that the letter of 4 October 2010 did not amount to an offer on the part of HMRC to settle the dispute as to the tax to be assessed on Mr Foulser for tax year 1997/98. (Emphasis mine)*

[19] **BG Foulser** references **Foskett, The Law and Practice of Compromise 7th Ed**., which summarizes crucial points that must be considered in determining whether there has been an accord and satisfaction. They are listed as follows:

> *1) The evidence must show that a definite offer has been made to settle on a "full and final" basis. Without this, no question of an equivalent acceptance on that basis can arise.*
>
> *2) An objective construction must be placed on the material events. The presentation for payment of a cheque tendered "in full and final settlement" of a dispute, without demur or qualification, will be taken as an objective manifestation of an intention to accept the offer of settlement thus made.*
>
> *3) The manifestation of an intention not to accept the proceeds other than as part payment may negate the inference of acceptance, but a significant delay between the receipt of and/or the payment in of the cheque and the subsequent manifestation of such an intention will give rise to the inference of acceptance.*
>
> *4) As noted above, from Stour Valley Builders, it would be artificial to draw a hard and fast line between cases where the payment is accompanied by immediate rejection of the offer and cases where objection comes within a day or a few days.*

[20] In my judgment, the letter dated March 30th 2022 cannot be construed as BNS evincing an intention to make an offer for settlement having regard to the surrounding circumstances listed as follows:

(i) The bank is engaged in the business of lending, its earnings coming from interest on the sums loaned.

(ii) There was no discussion between the parties for a forbearance of the interest charges.

(iii) There was no request for payment of the sum of **$3,402,729.99**.

(iv) The notice of default indicates the sum of **$20,851,590.99** as due and owing.

[21] To my mind, there was a clear indication that the purpose of the letter was merely to state the balance of the principal sum owed, after the proceeds of the sale of the property had been applied to the debt. At the very highest, it could be no more than inadvertence on the part of BNS not to include the interest. As established by **British Russian Gazette**, the document must be construed in a way which makes

it effective to carry out the intention of the party. Accordingly, it must be considered that the bank is a business, with a core objective to earn income from lending. Therefore, a reasonable person, having knowledge of the commercial nature of this document, would not have thought that BNS intended to forego the interest owning. The words of a contract *'must be made to yield to business common sense'* **(Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios [1984] 3 All ER 229)**. For these reasons I find that BNS' letter dated 30th March 2022 is not to be construed as an offer, therefore no equivalent acceptance was possible. There was no accord in which case there can be no satisfaction.

[22] It was not argued, and rightly so, that Hubble's letter dated 14th April 2022 was an offer which BNS accepted by not immediately returning the cheque. This argument would not be successful. As in the case of **BG Foulser**, the communications exchanged between the parties are a clear indication that BNS reserved its right to the interest owed by constantly restating its rejection of the offer, and by returning the cheque to Hubble. In accordance with **Stour Valley Builders**, though there was not an immediate rejection of the cheque on part of BNS, the time which elapsed between Hubble's letter and BNS' rejection of the proffered cheque, could not be considered a significant delay. It was evident there was no meeting of the minds between Hubble and BNS **(Day v Mclea (1889) 22 QBD 610)**.

[23] There is another legal principle at play that undermines Hubble's position even if the court were to accept that the letter from BNS constituted an offer. It is the Rule in **Foakes v Beer** [1884] UKHL 1 which has been applied in this jurisdiction. It was explained by Smith JA in **Manhertz and Manhertz v Island Life Insurance Company Ltd ("Manhertz")** Supreme Court Civil Appeal No 24 of 2006 where he stated:

> *By virtue of the rule in **Foakes v Beer**, at common law, a creditor is not bound by a promise to accept part payment in full settlement of a debt. An accrued debt can be discharged by the creditors promise only if the promise gives rise to an effective accord and satisfaction. According to the rule in **Foakes v Beer**, the payment of a lesser sum than the amount due cannot be a satisfaction of the debt unless there is some 'added' benefit to the creditor so that there is an accord and satisfaction.*

In the case at bar, there is clearly no *'added benefit'* to BNS forgoing the interest payment.

Waiver and Estoppel

[24] In the alternative, Hubble relied on the equitable principles of waiver and estoppel to the effect that BNS had led them to believe that it would not be enforcing its strict legal rights under the mortgage, hence, BNS was estopped from demanding any sum in excess of the amount on the cheque that was tendered. On the question of estoppel Hubble relied on the cases of **Birmingham and District Land Co. v London and NW Rail Co ("Birmingham")** (1886) 40 ChD 268 and **Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commercial Bank Ltd ("Amalgamated Investment") [1982]** Q.B. 84.

[25] BNS has maintained that the letter dated 30th March 2022 was only in respect of the *'outstanding balance'* on the principal sum, and not the general *'outstanding balance'* due and payable to BNS, and that the letter never represented otherwise. Counsel further submitted there could be no basis for estoppel as the bank never accepted the cheque, there was no prejudice to Hubble having regard to the response within 7 days and Hubble had not acted in any way to its detriment.

[26] In Birmingham Bowen LJ espoused that equity will aid a promisee. He stated:

> *The truth is that the proposition is wider than cases of forfeiture. It seems to me to amount to this, that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.*

The usual starting point for a discussion on promissory estoppel in modern times is **Central London Property Trust Ltd v High Trees House Ltd (Central London Property")** [1947] KB 130 where it was held:

> *…where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a*

> *promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of less value ;*

[27] The dicta of Denning J explained the development of the law. He said:

> *There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. The cases to which I particularly desire to refer are: Fenner v. Blake [1900] 1 Q. B. 426, In re Wickham (1917) 34 T. L. R. 158, Re William Porter & Co., Ld. [1937] 2 All E. R. 361 and Buttery v. Pickard [1946] W. N. 25. As I have said they are not cases of estoppel in the strict sense. They are really promises - promises intended to be binding, intended to be acted on, and in fact acted on. Jorden v. Money (1854) 5 H. L. C. 185 can be distinguished, because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of Hughes v. Metropolitan Ry. Co. (1877) 2 App. Cas. 439 , 448, Birmingham and District Land Co. v. London & North Western Ry. Co. (1888) 40 Ch. D. 268 , 286 and Salisbury (Marquess) v. Gilmore [1942] 2 K. B. 38 , 51, afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better.*

[28] In **Manhertz**, Smith JA also considered the principle of promissory estoppel which he said had come to encompass the doctrine of equitable waiver, where a person who promises not to enforce certain of his rights under a contract, may be prevented from afterwards seeking to enforce those rights in accordance with the letter of the contract. He stated:

> *The principle of promissory estoppel usually arises where one party to a contract grants to the other party a concession, not supported by consideration, that he will not enforce his rights or a particular right under the contract.*

[29] For promissory estoppel to arise three conditions must be satisfied. Firstly, there must be a clear and unequivocal promise that the promise will not insist on his strict legal rights. Secondly, the promisee must have acted in reliance on that promise. Thirdly, it would be inequitable for the promisor to resile from his promise. While there has been much debate as to whether it was necessary for the promisee to act to his detriment, Smith JA decided that it was not necessary to prove that the promisee acted to his detriment to prove inequality. However, if the promisee had acted to his detriment, it would show that it would be unconscionable to allow the promisor to resile from his promise.

[30] In the instant case, BNS very early indicated its position that the total sum owing was Twenty Million Eight Hundred and Fifty-One Thousand Five Hundred and Ninety Dollars and Ninety-Nine Cents **($20,851,590.99)**. There is no evidence from which it could be gleaned that Hubble acted to its detriment. The Affidavits of Dennis Morgan, Director of Hubble and Dalma James, the Trustee of Hubble Limited, confine themselves to the transactions and communications between the parties. No evidence is given, nor can there be any inference from the evidence, of any detriment suffered by Hubble. Unconscionable has been defined as '*not right or reasonable' 'shockingly unfair or unjust'*. As stated before, this contract is in the course of BNS banking enterprise. Payment of interest is the normal price of a loan. Hubble must be taken to have understood this obligation. The present state of affairs is as a result of its default. This was not a promise made after a course of negotiation between the parties so Hubble could not reasonably believe that the bank intended to waive the interest payment. In fact, it could be said that Hubble is trying to snatch an opportunity created by less than careful wording on the part of BNS. Lord Denning MR stated in **Amalgamated**:

> *"Now assuming that this belief was mistaken, and the judge thought it was but I do not, a question arises about the law of estoppel. The mistake by the bank was self-induced; they had overlooked the wording of the guarantee. So, therefore the mistake is contrary to the wording in this case of the contract. They thought it applied to monies owing to Portsoken as well as money owing to the bank. This was the bank's own mistake. It was not induced by the plaintiff, nor did the plaintiff do anything to contribute to it or to reinforce it. Except this, that they did not contradict it. They did not tell the bank that it was mistaken. But then it is said, how*

> *could the Plaintiff be expected to contradict it when they were under the same mistake. So runs the argument on behalf of the Plaintiff. The bank made a mistake of its own - everything it did followed from its own mistake. So it should put up with the consequences.*
>
> *… [S]uppose that the plaintiffs knew that the bank were under a mistake – and did not tell the bank - but took advantage of it for their own benefit. Could the plaintiffs then take advantage of it? Clearly not.*

As said by Smith JA in **Manhertz,** the promisor will not be allowed to go back on his promise where it would be inequitable taking into account the course of dealings between the parties **(See paragraph 38).** The circumstances and the course of dealings between BNS and Hubble are not such that it could be said to be unconscionable for BNS to resile from its promise.

[31] Hubble has failed to satisfy the Court that it is no longer indebted to BNS in the amount of Twenty Million Eight Hundred and Fifty-One Thousand Five Hundred and Ninety Dollars and Ninety-Nine Cents **($20,851,590.99)**. It is not therefore entitled to the orders sought that it is no longer required to file a proposal pursuant to **S.11 of the Insolvency Act** and that the Insolvency proceedings be discontinued. The orders sought in the Amended Fixed Date Claim Form are accordingly refused.

ORDER

Judgment for the Defendant with costs to be taxed if not sooner agreed.