REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2006 - 02682

BETWEEN

FIRST NATIONAL CREDIT UNION CO-OPERATIVE SOCIETY LIMITED

Claimant

AND

TRINIDAD AND TOBAGO HOUSING DEVELOPMENT CORPORATION

Defendant/
Ancillary Claimant

AND

DOC'S HOMES LIMITED

Ancillary Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. S. Maharaj S.C., Mr. F. Hosein instructed by Mr. R. Thomas for the Claimant.

Mr. K. Garcia instructed by Ms. G. Edwards for the Defendant/Ancillary Claimant.

Mr. P. Deonarine instructed by Mr. V. Deonarine for the Ancillary Defendant.

JUDGMENT

1. The Claimant, the First National Credit Union ("the FNCU") seeks from the Defendant, the Trinidad and Tobago Housing Development Corporation,("the HDC") payment of the sum of $9,588,441.96 together with interest at the rate of 16.5% being monies due to it under a loan agreement made between it and Doc's Homes Ltd, ("Doc's Homes"). By the loan agreement in consideration for the provision of certain financing facilities by the FNCU, Doc's Homes agreed to assign to the FNCU all monies due to Doc's Homes from the National Housing Authority ("the NHA"), the HDC's predecessor, under a contract dated the 29th May 2003 for the construction of a number of housing units ("the construction contract").

2. By way of a letter dated the 5th August 2003 the proceeds due to Doc's Homes under the construction contract were assigned to the Claimant by Doc's Homes. The letter provided for the assignment of all contract funds to the FNCU "with immediate effect..... in accordance with the contract agreement dated 29th May 2003, when due for payment." It further provided that, in the event of the termination of any dealings with NHA, any funds which may become due to Doc's

Home under the construction contract be forwarded to FNCU. This assignment was approved and accepted by the NHA as irrevocable and unable to be cancelled unless consented to in writing by both the FNCU and Doc's Homes. No payments were made to the FNCU by the HDC or the NHA under the assignment.

3. While not denying the assignment, the HDC claims that no money has become due under the contract. In this regard the HDC (i) denies that the sum of $6,046,398.00 was advanced to Doc's Homes by the FNCU; (ii) admits that there was a contract in writing between it and Doc's Homes whereby Doc's Homes agreed to design, finance and construct a number of apartment units for the NHA; (iii) admits that it executed the assignment; but (iv) avers that it was advised by Doc's Homes that the FNCU had failed to meet its obligations under the contract between it and FNCU and that as a result in good faith it advanced to third parties and/or Doc's Homes sums amounting to $21,592,724.41.

4. In these circumstances, it claims that Doc's Homes became indebted to the NHA and under an obligation to repay and/or reimburse and/to indemnify the NHA in respect of the monies so advanced before it could become entitled to any contract funds. As a result, it says, no sums have become due to Doc's Homes

under the construction contract and consequently there is nothing to be paid over to the FNCU under the assignment or otherwise.

5. In the event it should be found liable to the FNCU, by way of an ancillary claim, the HDC seeks an indemnity against Doc's Homes on the ground that Doc's Homes has been unjustly enriched by the payments ordered to be made to the FNCU by the NHA.

6. By way of its defence to the ancillary claim Doc's Homes admits the agreement to assign the funds due to it on the construction contract and the receipt of the sum of $303,330.00 US and the sum of $21,592,724.41 from the NHA; with respect to the latter sum Doc's Homes alleges that the said sum was paid only after certificate of approval was given by the NHA. Doc's Homes further contends that the FNCU breached its agreement to provide funding to it; and that, as a result of it not being a member of the FNCU, in accordance with the Co-operatives Society Act Chap. 81:03 it was not entitled to receive a loan from the FNCU. As a result it contends that the assignment is illegal and of no effect.

7. Both the claim and ancillary claim were ordered to be heard together. With respect to the claim the issues for my determination are:

(a) was the sum of $6, 046,368.00 advanced to Doc's Homes by the FNCU? and

(b) in the events that occurred has any sum become due to FNCU under the construction contract?

8. The issues that arise on the ancillary claim should the HDC be found liable on the claim are:

(a) is the HDC entitled to an indemnity from Doc's Homes on the basis of Doc's Homes' unjust enrichment?

(b) is the loan from the FNCU to Doc's Homes illegal? and

(c) if so, what is the effect of the illegality?

9. Common to both the claim and the ancillary claim are the following facts which are not in dispute:

(i) by an agreement made on 12th August 2003 between the executive director of Doc's Homes and the FNCU, the FNCU agreed to loan the sum of $8,667,011.00 to Doc's Homes for a period of 15 months at the rate of 16.5%.

(ii) The loan was for the purpose of providing the necessary funds to design, finance and construct a number of apartments at Pleasantville Circular Road, Pleasantville.

(iii) The repayment of the loan was to be by way of three lump sum payments in months 10,12 and 15, subject to the contract with the NHA.

(iv) The agreement provided for the loan to be secured by an assignment of the proceeds of the contract between Doc's Homes and the NHA, the construction contract.

(v) Doc's Homes was not a member of the FNCU rather at all material times, it was the managing director of Doc's Homes, Shymdeo Gosine, ('Gosine") who was a member of FNCU.

The Claim

(a) **Was the sum of $6,046,368.00 advanced to Doc's Homes by FNCU?**

10. The evidence in this regard was of the general manager of the FNCU, Mr. Mayon Murray. According to Mr. Murray Doc's Homes approached FNCU to provide financing facilities to it. The FNCU agreed to provide a loan to it of

$8,667,001.00. The agreement included the payment of interest at 16.5% per month on the outstanding principal balance after 15 months and an assignment to FNCU of all monies due on the construction contract.

11. During the period 19th August 2003 to 28th May 2004 the witness states the FNCU made 12 payments to Doc's Homes amounting to the sum of $6,046,398.00. Copies of the cheques in support of these payments were tendered into evidence. While the HDC alleges that it was been told by Gosine that the payments had not been made, these payments have not been disputed by the HDC. I find therefore that the sum of $6,046,398.00 was advanced to Doc's Homes by FNCU under the terms of the loan agreement.

(b) **Did any sums become due for payment under the construction contract?**

12. It is not in dispute that the effect of the assignment was to assign to FNCU the benefit of the contract between the NHA and Doc's Homes and to require the NHA to make payments to the FNCU of all contract funds when "due for payment". Neither is it in dispute that payments amounting to some $21, 592,724.41 were made to Doc's Homes by the NHA. With respect to $16,492,336.31 of that sum, there were tendered into evidence by the HDC interim

certificates certifying that this sum was due under the construction contract. From the contents of these certificates and in particular the numbers assigned to each certificate it is clear that not all of the interim certificates issued under the construction contract were tendered into evidence. From the evidence it is reasonable to assume, and indeed this is in accordance with the evidence, that there were in existence interim certificates in much the same terms certifying the payment of the full sum of $21,592,724.41 to Doc's Homes under the construction contract.

13. Despite the contents of the certificates and the admission that money was paid to Doc's Homes pursuant to these certificates the HDC submits that by the construction contract no monies became due for payment to Doc's Homes until the units were sold. In this regard the HDC relies on the documents evidencing the construction contract. It submits that in accordance with the terms of the contract between it and Doc's Homes the contract funds are only payable out of the receipt of funds from prospective purchasers. As a result, in accordance with the terms of the construction contract, for money to become due under that contract; (a) the units had to be presold; (b) the purchase price of the units had to be provided by the purchaser's nominated finance company to the NHA;(c) a Taking Over

Certificate would have had to be issued by the NHA and (d) 90 days have passed from the issue by the NHA of the Taking Over Certificate.

14. I do not accept the submission. An examination of the contract documents tendered into evidence reveal that they include two agreements both dated the 29th May 2003 and both executed by the parties. The first agreement is a joint venture agreement. By this agreement, the parties agreed to enter into a joint venture for the development of the land into a housing estate. The agreement identifies the obligations of each to the other and the manner in which the proceeds of the joint-venture are to be divided. This agreement provides that from the proceeds of the sale of each unit the NHA was to retain for itself that portion of the purchase consideration representing the costs of the land, infrastructure and administrative expenses and pay to Doc's Homes the balance. This, it seems to me, therefore describes the manner in which the proceeds from the joint-venture were to be apportioned.

15. The joint-venture agreement however specifically provides for the parties to enter a separate agreement for the design, finance and construction of the various housing units. By the joint venture agreement the NHA agreed to pay Doc's Homes for the works undertaken and satisfactorily completed. The works referred

to are the design, finance and construction of the housing units. It is clear therefore that the agreement between the parties comprised both a joint-venture by which the contractor would share in the profits of the venture in the manner provided by the contract as well as a contract, by which the contractor would finance and build the units at a fixed price. In my opinion it is this second aspect that constitutes the construction contract. This construction contract is the subject of the second agreement dated the 29th of May 2003 and of the assignment.

16. From the contract documents it is clear that the FIDIC conditions of contract for EPC/turnkey projects is incorporated in to the construction contract and that these are the conditions which regulate the construction contract. Clause 14 of these conditions deals with the contract price and payment. The clause sets out the procedure for payment. This procedure includes the payment of monies due to the contractor by way of an advance payment as well as interim payments and a final payment. While the conditions provide for adjustments in later payments with respect to monies which may have been improperly paid in earlier payments, it is clear that these conditions provide for the payment to Doc's Homes of money due to it under the construction contract periodically by way of interim payments.

17. Clause 14.3 sets out the manner in which applications may be made for interim payments. By the procedure outlined by the conditions of contract, it would seem to me that the contractor is entitled to apply for the payment of money which he considers due to him to be made by way of interim payments. According to the clause, the employer shall, within 56 days of receipt of the statement and supporting documents, pay to the contractor the amount which is due to him with respect to the work completed under the contract.

18. The HDC submits that the making of any payments were contingent upon the sale of the housing units. I do not accept that this is the effect of the clause but even if it were the reality is that payments were certified due, funds released by the finance company and money paid to Doc's Homes by the NHA under the construction contract. In the circumstances I do not accept the HDC's submission that payment under the construction contract had not yet become due.

19. The HDC further submits that no funds have become due for payment because Doc's Homes became indebted to the NHA and under an obligation to repay and/or reimburse and/or to indemnify the NHA in respect of the monies so advanced before it could become entitled to any contract funds. This is the defence as pleaded by the HDC. According to the HDC the sum of $21,592,724.41, paid

over the period 25th July 2003 to the 7th November 2005, were advances made to Doc's Homes in order to prevent a non performance of the construction contract by it. It must be noted however that the first of these payments, $773,647.32, represented an advance payment in accordance with the terms of the contract and was made prior to the assignment.

20. The only witness to this issue was Noel Garcia, the executive director of the NHA and the HDC from the 2nd January 2003 to 30th June 2008. According to the evidence of Garcia in or around early October 2003 he was advised by Gosine that the FNCU was in breach of the terms of its agreement to provide financing and that the project was as a result in jeopardy. Subsequently Gosine wrote requesting that the NHA advance monies directly to one of the suppliers. Pursuant to the request the NHA advanced monies for the purchase of these supplies. The money so advanced was $303,330.00 US or $1,983,744.00TT.

21. According to Garcia this money was advanced by way of a "forced involuntary loan". He says that both NHA and Doc's Homes agreed that loan would be repaid from deductions made from the interim payments "which were subsequently to fall due to Doc's..... under the contract." According to him "It was agreed that the loan would be treated as a liability on Doc's part arising under

the contract which liability Doc's would discharge before any contract funds became due to Doc's under the contract." To this end, he says, the NHA caused a formal agreement to be prepared but this was never actually signed by the parties.

22. The terms of this document, albeit unexecuted, bear consideration. The document is dated November 2003. By its recitals it confirms the construction contract and in particular confirms that by that contract Doc's Homes undertook to design, finance, execute and complete the construction of 96 apartment units at Pleasantville. The document acknowledges that in accordance with the contract the NHA would make interim payments to Doc's Homes for works undertaken and satisfactorily completed. It confirms that as of the date of the document a payment of $2,757, 391.32 had been made to Doc's Homes by the NHA as per interim certificates dated July 25 2003, October 6 2003 and October 6 2003.

23. It further recites that on the 6th October 2003 the NHA had granted a loan to Doc's Homes in the sum of $1,983,744.00 TT for the purchase and shipping to Trinidad of moldings and accessories from Waffle-Crete International Inc. According to the unexecuted agreement repayment of the loan was to be by way of the deduction by the NHA of the sum of $247, 968.00 from each of the amounts certified by NHA in each of the next 8 successive interim certificates to be issued

in relation to the works to be performed by Doc's Homes under the project. No reference is made in the document to the assignment of monies due under the construction contract to FNCU. It is clear, however, that if the document represents the NHA's position, the NHA was prepared to deduct the money owed to it by way of installments from the monies due to Doc's Homes under the construction contract. Further the arrangement contemplated that the balance of the sums due to Doc's Homes by way of interim payments would be paid over to Doc's Homes.

24. It is clear therefore that, according to Garcia, this document represented the NHA's position in the matter at least up to November 2003. In particular by the document the NHA was acknowledging the existence of the construction contract and confirming that (a) Docs Homes was entitled under the construction contract to interim payments; and (b) payment in the sum of at least $2,757,391.32 had been made to Doc's Homes by the NHA between the period 25th July 2003 and 6th October 2003 under the construction contract.

25. According to Garcia thereafter more money was paid to Doc's Homes. These monies were advances made by NHA to keep the project afloat. He says that these payments were made to Doc's Homes on the understanding that it would apply the money to discharge its liabilities to its suppliers. According to him by

some undisclosed time the contract was abandoned and a new arrangement substituted. He says that the payments of $21,592,724.41 were the payments made to keep the project afloat.

26. Despite no plea in this regard Garcia gives evidence of the original contract being abandoned by the parties and a new contract substituted in its place. Despite attempts by Attorneys for FNCU to have all the evidence in respect of this new defence struck out from the witness statement some evidence in support of this allegation remained.

27. Garcia explains away the interim certificates issued in the following manner. He says in order to ensure access to the funds to finance the construction the NHA had to secure the preparation by Doc's Homes of "makeshift interim certificates" for presentation to the bank for the release of funds. According to him these certificates so drawn up by Doc's were made out in the sums required to cover the amounts that were owed from time to time to Doc's suppliers or sub-contractors and the monies paid out to Doc's Homes by way of cheques from the NHA.

28. The problem with this evidence is that the interim certificates presented are clearly not made out by Doc's Homes. Neither frankly is there anything on the

certificates to suggest that they were makeshift. The certificates not only purport to present the engineer's estimate of the works presented to date but they each purport to be signed by four senior officers of the NHA.

29. The dates on the certificates range from the 6th October 2003 to 3rd February 2005. All the certificates bear the signatures of persons purporting to be the Senior Project Manager, Chief Project Manager, Project Co-ordinator and the Financial Controller of the NHA. Apart from periodically certifying the money to be paid to Docs Homes the certificates present a picture of the progression of the works from the point of view of the value of the work done. Each certificate identifies the Engineer's estimate of work done to date; values the work done and materials on site; identifies the sums to be deducted, for example for materials provided by the NHA, and the sum to be paid to Doc's Homes for work done for the particular period.

30. In fact the only suggestion of something untoward is the fact that the documents suggest that there ought also to be a certification by the contractor and that is not there. I do not accept the evidence of Garcia that these were "makeshift" certificates prepared by Doc's Homes only for the purpose of accessing funds. To accept his evidence would, to my mind, be a serious indictment on the NHA and its

officers. These certificates confirm to me that in the mind of the NHA the construction contract was still in existence and that under the construction contract Doc's Homes was entitled to monies paid for work completed.

31. All in all if I accept the evidence of Garcia the picture painted is of an abandonment of the old contract and its replacement by a new contract in which the obligations of the parties were substantially changed and under which, despite the receipt of money by Doc's Homes, no money became due to FNCU under the assignment. Indeed the facts as presented by Garcia bring this case in line with two cases relied on by the HDC.

32. It is not disputed by the HDC that, in law, as a general rule where notice of an assignment of funds is given and despite this notice the funds are paid out to the contractor the person paying the money will nonetheless be required to satisfy the terms of the assignment. The HDC however submits that where the money is so paid to avoid a threatened breach of contract the stringency of the rule does not apply. In this regard the HDC relies on the judgment of Bramwell L.J. in **Brice v Bannister (1877-78) L.R. 3 Q.B.D. 569** and the case of **Shepherd v Livingstone 1924 Carswell Alta 78.**

33. Except on two crucial points the facts in Brice's case are, for all intents and purposes, on all fours with the facts as presented by Garcia. In Brice the defendant, after being notified of the assignment, in order to ensure the completion of the contract advanced money to the contractor. The issue for the court's determination there was whether the plaintiff, the assignee, was entitled to recover the amount so assigned from the defendant. In Brice's case however while the defendant had notice of the assignment he refused to be bound by it and the money was advanced before the due date for payment under the contract. In the instant case however the NHA had agreed to be bound by the terms of the assignment and, as I have found, the contract provided for interim payments to be made once the conditions for making these payments had been satisfied. By the interim certificates made in this case it is clear that these conditions had been satisfied.

34. In Brice's case the judges, three in number, were far from ad idem in their opinions. Insofar as there was a majority decision, it was that the general rule applied and the assignee was entitled to be paid his money by the defendant. The HDC relies on the decision of Bramwell L.J. who at the end of the day, on the particular facts, determined that the general rule applied.

35. Cotton L.J. in the lead judgment, was of the opinion that a charge for money lent after the notice of assignment, even where it was for the purpose of enabling the contract to be performed, could not be preferred to the claim pursuant to the assignment. Insofar as they may have been equities attached to the assignment Cotton L.J. was of the opinion that:

> "...these must be equities existing or arising out of circumstances existing before notice is given by the assignment; the advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity ..... existing or arising from the circumstances existing as the date of the notice to the defendant of the assignment to the plaintiff.": page 578.

36. Brett L.J. on the other hand dissented. He was of the opinion that that principle ought to be confined to cases where the debt had actually accrued or where nothing was left to be done under the contract. For his part he was not of the view that the doctrine ought to be extended:

> "...so as to prevent the parties from an unfulfilled contract from either cancelling or modifying or dealing with regard to it in the ordinary course of business. I quite agree that they ought not to be allowed to act mala fide for the purpose of defeating an equitable

assignee but if what they do is bona fide and in the ordinary course of business, I cannot think that their dealing ought to be impeded or imperiled by this doctrine....":page 579.

37. He was of the view that before the money became due it was absorbed either by an advance made bona fide by the defendant or by a modification to the contract. According to him the defendant had a right with the consent of the builder to modify the contract and he modified it to the extent that no money was ever due from the defendant to the builder and therefore the equitable assignment by the builder to the plaintiff had no legal or binding effect.

38. With regard to the principle of law Bramwell L.J. was in agreement with Brett L.J. He was of the opinion that if the contractor had broken or threatened to break his contract:

"and the defendant to remedy and to avert such breach, reasonably and bona fide, not to defeat the plaintiff but to protect himself advanced money..... before it was due. So that it never became due according to the contract, I should have hesitated long before holding that the defendant was liable in this action. But, in reading the correspondence I cannot see that this was the case. That the

> defendant acted bona fide I doubt not, but I think his advancing of the money as he did was quite voluntary and no way compulsory.": page 581.

39. In those circumstances, based on the fact that the payment was voluntary, Bramwell L.J. agreed with Cotton L.J. that the plaintiff was entitled to recover the money from the defendant.

40. In **Shepherd v Livingstone**, by a majority decision, Brice v Bannister was distinguished. In this case the contractor had assigned a sum of $2,250.00 or such part thereof as "might become payable to him on the completion of the works" to the plaintiff. The defendant undertook to pay the said sum to the plaintiff should the sum be due and payable on the completion of the contract. Under the contract the defendant was to pay to the contractor 50% of the contract price at certain stages and the balance upon completion. The contractor threatened to quit the job unless certain expenses were paid. The defendant agreed to make the payments. At the end of the day the contractor was overpaid.

41. In coming to the conclusion that the plaintiff was not entitled to recover any sums pursuant to the assignment the majority of the court was of the opinion that

the decision in Brice was distinguishable on the following grounds: (i) that the money was only payable under the assignment on the completion of the contract and on the particular facts of the case it could not be said that the contract was completed; (ii) the action of the defendant was not voluntary; and (iii) since the contract between the contractor and the defendant expressly provided for the payment of damages by the contractor should he fail in the proper performance of his contract the defendant would in any event have had a right to set off damages or any other claim arising out of the contract against the contractor.

42. Even if I accept the evidence of Garcia on the facts of our case it is clear that the instant case is distinguishable from both of these authorities. In the first place, unlike in Brice's case, the NHA had signified its intention to be bound by the assignment and indeed had signed the assignment document signifying it intention to be bound by its terms. As well by the terms of the assignment the NHA agreed that the assignment was irrevocable and unable to be cancelled unless consented to in writing by both the FNCU and Doc's Homes. In addition in this case the construction contract provided for money to become due during the currency of the contract, by way of interim payments. The terms of the assignment therefore, unlike both cases, did not postpone the payment of the money until the completion of the contract.

43. It would seem to me that in the circumstances since the NHA had: (i) confirmed their intention to be bound by the assignment; (ii) had agreed that the assignment was irrevocable and could not be cancelled without the written consent of both the FNCU and Doc's Homes; and (iii) had agreed that in the event of any termination any funds due to Doc's Homes must be forwarded to the FNCU, in advancing money to Doc's Homes without either confirming the truth of the factual position put forward by Gosine or advising the FNCU of the position the NHA could not have been acting in a bone fide manner. In my opinion the general rule applies.

44. In the circumstances I am of the opinion that on the evidence adduced in the claim and the applicable law the FNCU is entitled to the payment of the money due to it under the assignment from the HDC. In these circumstances I am now required to consider the ancillary claim.

The Ancillary Claim

45. With respect to the ancillary claim, the HDC submits that should it be required to pay any sums to the FNCU, then they are entitled to an order for the

repayment of those sums by Doc's Homes on the grounds that Doc's Homes has been unjustly enriched by virtue of the overpayment.

46. To this Doc's Homes submits:

(a) that the evidence is that the monies paid to Doc's Homes was for the purpose of paying its subcontractors and Doc's Homes was never the beneficiary of the funds. In the circumstances the concept of unjust enrichment does not arise;

(b) In any event, the loan from the FNCU was illegal and contrary to the Co-operatives Societies Act Chapter 81:03; and

(c) In the circumstances of the loan being illegal public policy demands that the loan and the consequences of the loan be not enforceable.

(a) Has Doc's Homes been unjustly enriched?

47. The concept of unjust enrichment presupposes three things: (i) the defendant must have been enriched by the receipt of a benefit; (ii) the benefit must have been gained at the claimant's expense and (iii) it would be unjust to allow the defendant to retain the benefit.

48. Lord Hoffman in **Banque Financiere de la Cite S.A. v Parc (Battersea)Ltd [1999] 1 AC 221** puts it this way:

> " I think it should be recognised that one is here concerned with the restitionary remedy and that the appropriate questions are therefore, first, whether the defendant would be enriched at the plaintiff's expense; secondly, whether such enrichment would be unjust; and thirdly, whether there are nevertheless reasons of policy for denying a remedy.": page 234.

49. While not disputing elements of unjust enrichment identified above, in essence Doc's Homes says that the issue of unjust enrichment does not arise because (a) the decision to take over Doc's Homes' its responsibilities under the contract was made by the HDC voluntarily. Doc's Homes simply represented the facts as they were and in those circumstances no bad faith can be imputed to it; (b) the monies advanced by the NHA were not for its benefit but rather purely for the purpose of the payment of its subcontractors; and (c) in any event even if a benefit arose to Doc's Homes the proceeds from the sale of the houses due to Doc's Homes are available to meet the liability to the FNCU.

50. There is no evidence from Gosine, the only witness for Doc's Homes, as to how the monies were in fact applied. Neither is there any evidence as to the present position with respect to the sale of the houses. Even if monies are available to Doc's Homes from the sale of the houses the sum advanced to Doc's Homes by the NHA is way in excess of the sum fixed for the works under the contract. There is no guarantee that, even if money was still due to Doc's Homes pursuant to the joint venture agreement, there will be monies available to meet the money due to the FNCU under the loan agreement.

51. Even on the assumption that the monies were in fact applied to discharge Doc's Homes liabilities in my view, this of itself represents a benefit to Doc's Homes. Similarly the fact that the money was paid by the HDC voluntarily, even if true, does not in my mind, make a difference. It would seem to me that the fact that Doc's Homes received the sum of $6,046,398.00 from the FNCU under the loan agreement and the sum of $21,592,724.41 from the HDC on the basis that they received no money from the FNCU is in my opinion suggestive of unjust enrichment. In reality Doc's Homes have received the sum of $6,046,398.00 twice for the same purpose. It would seem to me however that the real question here is whether in accordance with the statement of Lord Hoffmann referred to above there are reasons of "policy for denying a remedy."

(b) Is the loan illegal?

52. Doc's Homes submits that the loan made between itself and the FNCU is unenforceable by virtue of its illegality. It is not in dispute that the FNCU is a credit union duly registered under the **Co-operative Societies Act Chap. 81:03** ("the Act"). The Act requires credit unions to be registered and constituted and managed in accordance with bylaws, approved and certified by the Commissioner of Co-operatives, and the regulations made under the Act: **section 22 of the Act** and **Regulation 4.**

53. By **section 28(1)** of the Act a credit union may make advances by way of loans to its members in accordance with its by-laws. **Section 28 (2) and (3)** exempts a credit union from obtaining a licence under the **Banking Act,** the **Local Savings Banks Act** and the **Money Lenders Act**. Further the section provides that a credit union "shall not be deemed to be engaging any business in the nature of banking so as to be obliged to obtain a licence under either of those Acts". The Act specifically prohibits a credit union, save with the consent of the Commissioner, to lend money to anyone other than a member: **section 43 of the Act**.

54. **Regulation 40** of the regulations provides that where a loan is made the borrower if he is required to provide security for the loan shall execute an instrument of charge in the form set out in the Second Schedule to the Regulations.

55. Part VIII of the Act deals with offences under the Act. For example by **section 70** any person who obtains possession of any property of the credit union or is granted any loan by false representation, other corrupt means or wrongfully withholds or misapplies such property or loan is liable to be convicted summarily or upon indictment and in addition to a penalty may be ordered to repay any sum of money to which the proceedings relate and the cost of the proceedings. Similarly, a credit union or any officer or member or any person fails without reasonable cause or willfully neglects or refuses to comply with any requirement of the Act or the Regulations is guilty of an offence: **section 71(3)**.

56. Although by the **Financial Institutions Act Chapter 79:09** no person shall carry on the business of banking, which includes the making of loans, except with a licence from the Central Bank: **section 4(1)**, credit unions registered under the Co-operative Societies Act are exempted from the requirement of obtaining a licence.

57. In this regard therefore as far as credit unions are allowed to lend the money to members, unlike other financial institutions who undertake banking business, a credit union and other co-operative societies are not required to be licensed by the central bank. In this regard therefore the requirements and conditions for the conduct of the business of banking as provided for under the Financial Institutions Act are allowed to be circumvented with respect to credit unions insofar it is allowed to lend money.

58. While the Act allows loans to its members with respect to loans to non-members a credit union may only circumvent the provisions of the Financial Institutions Act with the consent of the Commissioner. It is clear that the intention of the Act is to foster the continued existence of co-operative societies like credit unions for the benefit of its members while ensuring that the funds and property of its members are protected. In this regard therefore the Act creates criminal offences for the purpose of protecting the property and the funds of the credit union and to ensure that the funds are used for the benefit of its members.

59. On the evidence raised in the claim it is not in dispute that Doc's Homes was not a member of the credit union. There is no evidence of the consent of the Commissioner being obtained to lend money to Doc's Homes. In this regard it is

important to note that while there is no allegation of illegality raised in the claim, at the stage of the preliminary issue raised by Doc's Homes, it is clear that insofar as there were proceedings by the FNCU before the Commissioner the FNCU was not in those proceedings alleging that the loan was made to a non-member, Doc's Homes, with the permission of the Commissioner but rather that the loan was made to Gosine as a member.

60. In addition the terms of the loan agreement made between the FNCU and Doc's Homes provide for the security for the loan to be the assignment of the funds due under the construction contract. In accordance with the regulations once the borrower is required to provide security an instrument of charge must be executed by him. No such instrument has been executed by Doc's Homes with regard to the security provided by the assignment.

61. It would seem therefore that insofar as the FNCU loaned money to Doc's Homes this was ultra vires its powers and illegal under the Act. As well insofar as no instrument of charge was executed by Doc's Homes with respect to the security required by the FNCU under the loan agreement this was contrary to the Act. Indeed not only was these actions made illegal by the Act but in doing so criminal offences may have been committed.

(c) What is the effect of the illegality?

62. The real question here is what is the effect of the illegality of the loan agreement? It is not in dispute that, as between the FNCU and Doc's Homes there is no suit. Neither is it in dispute that the question of the illegality of the original contract has only been raised in the ancillary claim between the HDC and Doc's Homes.

63. Doc's Homes submits that despite this fact it would be contrary to public policy to allow the FNCU to enforce the assignment. In this regard it relies on the case of **Mahmoud v Ispahani [1921] 2 KB 716** and the case of **Bedford Insurance Company v Institutio de Resseguros do Brasil [1985] Q. B. 966**. In Mahmoud's case it was determined that despite the fact that it was the defendant who was to blame for the illegality and the plaintiff who was the innocent party the contract, being illegal, was not enforceable by the plaintiff.

64. According to Scranton L.J. in Mahmoud's case at page 729:

> "the court is bound, once it knows of the contract is illegal , to take the objection and to refuse to enforce the contract, whether its knowledge comes in the statement of the party who was guilty of the

illegality or whether its knowledge comes from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract."

65. Similar sentiments were expressed by Parker J. in Bedford's case in coming to the conclusion that the contract being prohibited by statute was void ab initio. In this case at page 984 Parker J. adopted the statement of Denning L.J. made at page 38 in **Marles v Philip Trant & Sons Ltd. [1954] 1 QB 29** when he said:

" the principle is well settled that, if a plaintiff requires aid from an illegal transaction to establish his cause of action, then he shall not have any aid from the court."

66. In the case of **Snell v Unity Finance Company Limited [1964] 2 QB 203** the defendant, on appeal, sought to take advantage of the illegality of a contract in circumstances where the point had not been raised in the court below. The appellate court was of the view that once it was satisfied that all the relevant facts were before it and those facts established that the contract had an illegal object, even where the point was not taken by way of submissions or pleadings by either of the parties, the court was bound of its own motion to do so.

67. In delivering his judgment Wilmer L.J. accepted the principle with regard to unlawful contracts to be as stated since the year 1775 by Lord Mansfield in the case of **Holman v Johnson (1775) 1 Cowp. 341**.

> "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it was founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of the positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff…..": page 213.

68. In quoting from the judgment of Lindley L.J. in **Scott v Brown, Doering McNab and Company [1892] 2 Q.B. 724** Wilmer L.J. stated:

> "No court ought to enforce and the illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he is not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

69. Of course the question is not free from controversy. In the case of **Strongman (1945) LD v Sincock [1955] QB 525** the contract being sued on was found to be illegal. The illegality however was found to be caused by the defendant who sought to avoid payments under the contract. In that case, in an attempt to prevent the guilty party from avoiding the contract, **Mahamoud v Ispahani** was distinguished. In that case while it was accepted that the plaintiff could not sue on the illegal contract the issue was whether the plaintiffs could recover on a collateral promise by the defendant to pay the money.

70. The argument raised before the court, of which Lord Denning was a member, was that if damages were found to be recoverable on the collateral

promise that would be an easy way of getting around the law with respect to the non enforcement of an illegal contract. Denning L.J. would have none of that argument. According to him while it was "a settled principle that a man cannot recover for the consequences of his own unlawful act,.... This has always been confined to cases where the doer of the act knows it to be unlawful, or is himself in some way morally culpable. It does not apply when he is an entirely innocent party.": page 535.

71. In the circumstances the court held that the plaintiffs were entitled to recover on the collateral warranties since they had been led by the defendant to enter into the illegal contract.

72. Lord Denning, this time while he was the Master of the Rolls, took the same or similar position in the case of **Shelley v Paddock and other [1980] Q.B. 348**. This time the situation was that the plaintiff seeking to recover money which she had paid to the defendants, who had fraudulently represented that they had authority to sell a house. The problem was that the plaintiff had innocently made payments to the defendants in breach of the exchange control legislation. According to Lord Denning in circumstances where defendants were swindlers right from the beginning:

"..... it seems to me that the principle stated by Lord Mansfield does not apply. I know that there are some cases where a person has not been able to recover when he has been guilty of the feeding the exchange control regulations or similar regulation: see **Bossevain v Weil [1950] A.C.327** and **Shaw v Shaw [1965] 1WLR 537**. In those cases both parties were participating in the illegal act and there was nothing to choose between them. But it seems to me altogether different when the parties are not in pari delecto.":page 356.

73. It is clear therefore that while not denying the principle stated by Lord Mansfield since 1775 the Courts have strived as far as possible to reduce the harshness of this principle as it may affect an innocent party. In the case of **Joseph Evans & Co. Ltd v Heathcote and others [1918] 1 KB 418,** the court was of the view that a plaintiff could rely on an agreement even though the terms of that agreement were unenforceable as being in restraint of trade. In that case however the court made a distinction between an illegal contract and an unenforceable contract. It held that the contract being in restraint of trade was unenforceable not illegal. In any event, it found that the association was a trade union within the meaning of the Trade Union Acts and in those circumstances the contract was not void but merely could not be directly enforced.

74. The House of Lords in **North-Western Salt Company Limited v Electrolytic Alkali Company Limited [1914] A.C. 461** was of the opinion that where the issue of illegality is not raised on the pleadings a distinction must be made between a contract which is ex facie illegal and one in which the illegality depends on the surrounding circumstances. Where the contract was not ex facie illegal and its illegality depended on the surrounding circumstances the Court ought not to entertain the question unless it is satisfied that all the surrounding circumstances have been brought to its attention. Viscount Haldane LC stated:

> "..... is no doubt true that were there on the plaintiff's case it appears to the Court that claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this was only when either the agreement sued on is on the face of it illegal, or where, if the facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point is not been raised on the pleadings so as to warn the plaintiff to produce evidence that he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which might make easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which, on the face of it ought not to be enforced,

then, I have already said the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raised the question of illegality.":page 469.

75. In the instant case while the question of the illegality of the contract was not raised in the claim on the cases there can be no doubt that once the question of the illegality of the contract has come to my attention I am bound to consider this fact and its effect on the merits of the claim. On the evidence before me as presented the contract between the FNCU and Doc's Homes is that a loan was made to Doc's Homes by the FNCU. The evidence is that Doc's Homes was not a member of the credit union. In accordance with the Act the only defence that could possibly be raised by the FNCU is that the loan was granted to a non-member with the consent of the Commissioner.

76. In dealing with the preliminary point raised by Docs Homes it was accepted between all three parties that the FNCU had brought proceedings before the Commissioner against Gosine for the repayment of the loan. Given the position taken by the FNCU in its proceedings before the Commissioner, that is that the loan was granted to a member, it is clear that the position of the FNCU is not that permission was granted it by the Commissioner to loan money to a non- member.

77. In these circumstances despite the fact that the illegality of the loan was not pleaded in the claim I am of the opinion that it is open to me to consider its illegality. I am satisfied that all the facts with respect to the illegality of the contract have been presented. This contract was in my opinion ex facie illegal and void ab initio. Further this is not a case where the party seeking to enforce the contract is the innocent party. Yes, on the evidence, FNCU has advanced money on a loan which has not been repaid but this money was advanced by it in circumstances in which it knew or ought to have known were unlawful. Indeed it seems to me that the position taken by it before the Commissioner confirms that it knew that the loan to Doc's Homes was prohibited by the Act. While Doc's Homes hands are by no means clean the FNCU was itself not an innocent party in this transaction. It is clear to me that in this regard by engaging in a transaction which it knew to be illegal it is the FNCU who has perpetuated the illegality.

78. On the evidence it seems to me that since the agreement to lend the credit union funds to Doc's Homes as evidenced by the loan agreement dated the 12th August 2003 is illegal the FNCU cannot rely on it as the basis for the enforcement of the assignment on which it sues. The FNCU is not entitled to rely on the illegal transaction to establish its cause of action and the Court will not lend its aid to such

an action. To do so would in my opinion offend against intention of the Act and public policy.

79. In my opinion, despite the fact that the illegality of the said loan agreement has not been pleaded in the claim and the fact that technically speaking the FNCU has not sued upon the loan agreement the effect of the claim is to enforce the illegal contract made between the FNCU and Doc's Homes and in my opinion this is a contract which ought not to be enforced. If the Court were to do so, in my opinion it would be allowing itself to be made "the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal". This a Court must not do.

80. It is with the greatest of reluctance that I come to the view that the contract between the FNCU and Doc's Homes is so tainted by illegality that it cannot stand and with it must fall the assignment. Unfortunately at the end of the day the only loser is the membership of the credit union, the very persons whom the Act seeks to protect. I can only hope, though not very optimistically, that at the very least the offences created by the Act may allow the membership to recover its funds from someone.

81. The claim is therefore dismissed. In these circumstances there is no need to make any order on the ancillary claim save insofar as costs may be an issue.

Dated this 16th day of December, 2010.

Judith Jones
Judge