THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2007-02269

RBTT TRUST LIMITED

Claimant

And

APUA FUNDING LIMITED
THE GOVERNMENT OF ANTIGUA AND BARBUDA

Defendants

Before the Honourable Madame Justice Rajnauth-Lee

Appearances:

Mr. Alvin Fitzpatrick S.C. leading Mr. Jason Mootoo and instructed by Mr. Adrian Byrne for the Claimant.
Mr. Russell Martineau S.C. leading Mr. Kerwyn Garcia instructed by Miss Glenda Edwards for the Defendants.

Dated the 16th April, 2010

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JUDGMENT

INTRODUCTION

1. Before the Court is the Claimant's application for summary judgment filed on the 4th January, 2008 against the Defendants pursuant to Part 15 of the Civil Proceedings Rules, 1998, as amended ("the CPR").

2. By its Claim Form filed on the 29th June, 2007, the Claimant, RBTT Trust Limited ("RBTT Trust") a trust corporation incorporated as a limited liability company under the Companies Ordinance Chap. 31 No. 1 of the laws of the Republic of Trinidad and Tobago and continued under the Companies Act Chap. 81:01 and having its registered office at Royal Court Nos. 19-21 Park Street, Port of Spain, Trinidad:

   (A) As trustee for bondholders under a Trust Deed dated the 12th March, 2004 and made between the First Defendant, APUA Funding Limited ("APUA Funding"), of the one part and RBTT Trust of the other part, claims against APUA Funding, a company duly incorporated under the laws of Antigua and Barbuda and having its registered office at Parliament Drive, St. John's, Antigua as due and owing under the Trust Deed:

      (i) the sum of US$6,862,436.00; and

      (ii) interest on the sum of US$6,862,436.00 at the rate of 13.5% per annum from the 11th June, 2007 until payment (daily rate US$2,573.41)

(B) As trustee for bondholders and for its own benefit under a Deed of Guarantee and Indemnity dated the 12th March, 2004 and made between the Second Defendant, the Government of Antigua and Barbuda ("the GOAB"), of the one part and RBTT Trust of the other part, claims against the GOAB as due and owing under the Deed of Guarantee and Indemnity:**:**

(i) the sum of US$6,862,436.00;

(ii) Interest on the sum of US$6,862,436.00 at the rate of 13.5% per annum from the 11th June, 2007 and continuing until payment (daily rate = US$2,573.41)

3. The Claimant filed a Statement of Case on the said 29th June, 2007. A Defence was filed on behalf of both Defendants on the 7th November, 2007.

4. The application for summary judgment was supported by the affidavit of Aliyah Jaggassar filed on the 4th January, 2008. On the 5th March, 2008, the Defendants filed the affidavit of Foster Derrick in opposition to the application for summary judgment.

HISTORICAL BACKGROUND AND RELEVANT DOCUMENTS

5. The claim arose out of a bond transaction ("the bonds") arranged by RBTT Merchant Bank Limited ("RBTT Merchant") for the purpose of refinancing existing facilities ("the original facilities") held at or arranged by RBTT Merchant. The bonds were offered by RBTT Merchant to selected persons in accordance with the Subscription Agreement ("the Subscription Agreement")

dated the 12th March 2004 made between APUA Funding and RBTT Merchant and upon the terms set out in the Trust Deed ("the Trust Deed") of the same date and made between APUA Funding and RBTT Trust Limited.

6. The bonds were secured, inter alia, by a Security Agreement dated the 12th March 2004 ("the Security Agreement") between APUA Funding and RBTT Trust whereby APUA Funding inter alia assigned to RBTT Trust for its benefit and the benefit of the bondholders all its rights to receive monies due under certain contracts made between the Antigua Public Utilities Authority ("the Authority"), Cable and Wireless (West Indies) Limited ("Cable and Wireless") and the GOAB.

7. In order to induce the bondholders to purchase the bonds, the GOAB issued its Guarantee and Indemnity dated the 12th March 2004 ("the Guarantee and Indemnity") in favour of RBTT Trust as trustee for the bondholders and RBTT Trust whereby it undertook, irrevocably and unconditionally, to pay to RBTT Trust on demand all monies and liabilities which are or shall become due and owing to RBTT Trust and the bondholders under or in connection with the bonds and the Trust Deed. I propose to examine each of the above documents.

8. By the Subscription Agreement (referred to at paragraph 5 of this judgment) it was agreed, inter alia, that:

(a) APUA Funding would issue 11.50% bonds in the aggregate value of US$16,500,000.00;

(b) RBTT Merchant would, on behalf of APUA Funding, offer the bonds for subscription and procure the subscription and payment of the bonds on the terms and subject to the conditions set out in the Subscription Agreement;

(c) The bonds would be constituted by a trust deed to be made between APUA Funding and RBTT Trust, with RBTT Trust appointed as trustee thereunder; and

(d) The bonds would be secured, inter alia, by the Trust Deed, the bonds, the Guarantee and Indemnity granted by GOAB in favour of RBTT Trust for the benefit of itself and the registered holders of any of the bonds and the Security Agreement entered into by APUA Funding in favour of RBTT Trust.

9. In accordance with the Subscription Agreement, the Trust Deed was executed between APUA Funding and RBTT Trust, whereby RBTT Trust was appointed to act as trustee for the benefit of the bondholders and subject to the terms and conditions set out in the Trust Deed. It was an express term of the Trust Deed under clause 2.2 thereof that APUA Funding would on the 12th March, 12th June, 12th September and 12th December of each year, commencing 12th June, 2004 and ending with the 12th March, 2009 pay to or to the order of RBTT Trust the sum of US$1,096,281.58 ("the quarterly installment payment"), representing the amount owing in respect of principal and interest on the bonds or such part thereof as fell due to be repaid.

10. The Deed of Guarantee and Indemnity (referred to at paragraph 7 of this judgment) was granted in accordance with the terms of the Subscription Agreement. By the Guarantee and Indemnity, the GOAB, for the express benefit of RBTT Trust and the bondholders, inter alia, irrevocably and unconditionally, guaranteed the payment and repayment of all monies, obligations and liabilities whatsoever, whether for principal interest or otherwise in whatever currency, which may at the date thereof or at any time in the future fall due, owing or incurred under or in connection with the terms of (i) the bonds, (ii) the Trust

Deed, (iii) the Guarantee, (iv) the Security Agreement and (iv) any other document creating security for or supporting the obligations of APUA Funding in connection with the Trust Deed ("the Security Instruments").

11. By the Security Agreement also executed in accordance with the terms of the Subscription Agreement, APUA Funding in order to induce RBTT Trust and other parties to subscribe for the bonds under the Trust Deed agreed with RBTT Trust for the benefit of RBTT Trust and for the benefit of such subscribing parties to secure the payment of all obligations of APUA Funding under the Security Instruments by, inter alia, assigning to RBTT Trust the benefit of an agreement dated 22nd July 1987 and made between (1) the Authority (2) Cable and Wireless and (3) the GOAB as amended by two subsequent agreements between the same parties dated 22nd February, 1991 and the 21st May, 1993 and all monies due and to become due thereunder.

12. In accordance with the terms of the Subscription Agreement, RBTT Merchant procured the subscription and payment of the bonds on the terms and subject to the conditions set out in the Subscription Agreement. All the bonds were duly issued on the 12th March, 2004.

13. APUA Funding failed to deposit into the debt service account set up under the terms of the Security Agreement the funds necessary to meet the quarterly installment payments due on the 12th September, 2006, the 12th December, 2006, and the 12th March, 2007.

14. By letter dated 10th May, 2007 the Authority wrote to RBTT Trust advising that it considered unlawful the issue of the bonds and proposed to call all of the transactions connected therewith into question by appropriate legal proceedings. Further, since February 2006, no monies have been deposited into the debt service account.

15. On the 11th June 2007 RBTT Trust, as trustee under the Trust Deed, sent a facsimile letter transmission to APUA Funding at its principal place of business (a) giving notice to APUA Funding that an event of default had occurred under the Trust Deed and (b) declaring the entire amount payable on the outstanding bonds (as defined by the Trust Deed) in the sum of US$7,958,718.52 ("the Debt") to be immediately due and payable.

16. On the said 11th June 2007 RBTT Trust by way of facsimile letter transmission sent to telephone No +(268) 462-3225 and addressed to:

> "The Government of the State of Antigua and Barbuda
> c/o The Office of the Prime Minister
> St. John's
> Antigua
> West Indies
> For the Attention of the Chief of Staff"

(a) notified the GOAB that an event of default had occurred under the Trust Deed (b) notified the GOAB that it had by letter of even date addressed to APUA Funding declared the Debt forthwith due and payable and (c) demanded that the GOAB pay the Debt under the Guarantee and Indemnity.

17. APUA Funding and the GOAB have failed to pay any part of the Debt. It is not in dispute that APUA Funding has defaulted in the payment of these monies and that an event of default has been constituted; and that pursuant to that event, RBTT Trust has made a demand to the GOAB to pay under the terms of the Guarantee and Indemnity. The Defendants have taken no objections to these formalities.

SUMMARY JUDGMENT

18. Part 15.2 of the CPR provides inter alia, that the court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue.

19. It has been contended on the part of RBTT Trust that in this case and having regard to the claim made by RBTT Trust the test is a heightened or more stringent test and that the only defence that can properly be mounted by the Defendants is that of clear fraud to the knowledge of RBTT Trust.

20. On the other hand, it has been argued on behalf of APUA Funding and the GOAB that the proper test is the realistic prospect of success test and that in that case, they should succeed and the claim proceed to trial. The Court will return to this issue.

ISSUES

21. The Defendants have sought to disclaim liability on several grounds:

(i) Firstly, they argue that the Guarantee and Indemnity is unenforceable since it was never approved by the House of Representatives ("the House") contrary to section 26 the Finance and Audit Act CAP. 168 [Laws of Antigua and Barbuda] ("the Finance Act").

(ii) Secondly, they argue that the assignment of receivables under the Security Agreement was illegal and/or fraudulent in that the receivables belonged to the Authority and had been improperly taken away and given to APUA Funding in

breach of the Public Utilities Act CAP. 359 [Laws of Antigua and Barbuda] ("the Public Utilities Act") under the Sale of Receivables Agreement.

(iii) Thirdly, it had been argued on behalf of the Defendants that RBTT Trust knew or ought to have known of the alleged illegality and/or fraud.

(iv) Fourthly, they argue that the claim is not maintainable against the GOAB having regard to sovereign immunity.

ISSUE 1 – WHETHER BREACH OF SECTION 26 OF THE FINANCE ACT

22. At the start of his submissions, Mr. Martineau S.C., Counsel for both APUA Funding and the GOAB, made it clear that he was taking no point that the document which had been exhibited to the claim of RBTT Trust as the Guarantee and Indemnity was not signed. He submitted, however, that the Guarantee and Indemnity was not binding on the GOAB in the absence of the approval of the House. He also contended that the onus was on RBTT Trust to establish that the Guarantee and Indemnity had the approval of the House.

23. On the other hand, it was contended on behalf of RBTT Trust that the Mr. Lester Bird, Prime Minister and Acting Minister of Finance had the actual and/or apparent authority to make the representations contained in the Guarantee and Indemnity; that the bondholders had acted in reliance upon the representations in the Guarantee and Indemnity as deposed at paragraph 10 of the affidavit of Aliyah Jaggassar filed on behalf of RBTT Trust, which evidence, it was contended, was not disputed.

24. Mr. Fitzpatrick S.C. who appeared for RBTT Trust therefore argued that the Defendants were estopped from alleging that the approval of the House had not been obtained.

25. Mr. Fitzpatrick also submitted that there was no admissible evidence on the part of the Defendants that there was no approval of the House. He argued that even if the burden was on RBTT Trust to prove that the approval of the House had been obtained that burden had been discharged.

26. It was also submitted on behalf of RBTT Trust that an examination of the Guarantee and Indemnity shows that it made the GOAB the principal obligor and not merely the surety. According to Mr. Fitzpatrick, the document was both a guarantee and a contract of indemnity, and as such contract of indemnity, it did not require the approval of the House.

27. Section 26 of the Finance Act provides that no guarantee involving any financial liability shall be binding upon the GOAB unless such guarantee is given in accordance with the provisions of an Act or by resolution of the Cabinet provided that the resolution be approved by the House within six months.

Authority and Estoppel

28. Section 8 of the Finance Act provides inter alia that the Minister (of Finance) shall be responsible for the supervision, control and direction of all matters relating to the financial affairs of the GOAB. Mr. Fitzpatrick argues that Mr. Lester Bird as the Acting Finance Minister therefore had express authority and as Prime Minister the apparent authority to make the representations made in the Guarantee and Indemnity; that the bondholders relied on the representations made on behalf of the GOAB, and therefore an estoppel arose in favour of the bondholders.

29. Mr. Martineau submitted that the usual practice in such international transactions is that the Attorney General or the Minister of Legal Affairs would advise/certify that all necessary legal and statutory requirements had been satisfied [see by way of example **Marubeni Hong Kong and South China Limited v The Mongolian Government acting through the Ministry of Finance of Mongolia** [2004] EWHC 472, paragraphs 6, 112, 113, 114, 125, 126], where Mr. Justice Cresswell after a full trial came to the conclusion that a Ministry of Justice in a foreign country would be expected to have authority to issue legal opinions on behalf of a foreign government in relation to transactions to be entered into by the foreign government. He also found that the Minister of Justice and Deputy Minister of Justice had actual or apparent authority to issue such opinion letters. I will return to **Marubeni** later in this judgment.

30. The Guarantee and Indemnity contained the following clause which set out the representations and warranties given by the GOAB, the Guarantor:

> 2.1 The Guarantor hereby represents and warrants to the Trustee for the benefit of itself and the bondholders that:
>
> (a) it has full power and authority to execute, deliver and perform its obligations under this Guarantee and no limitation on its powers will be exceeded as a result of its entering into this Guarantee;
>
> (b) the execution, delivery and performance by it of this Guarantee and the performance of its obligations under this Guarantee have been duly authorized by all necessary governmental action, including but not limited to authorization from the

Cabinet of Antigua and Barbuda, and do not contravene or conflict with;

(i) any judgment, decree or permit to which it is subject; and

(iii) the terms of any agreement or other document to which it is a party or which is binding upon it or any of its assets; and

(c) this Guarantee is its legal, valid and binding obligation and is enforceable against it in accordance with its terms.

2.2 The Guarantor acknowledges that the Trustee has accepted this Guarantee in full reliance on the representations and warranties set out in this Clause 2.

31. By clause 19.6 of the Guarantee and Indemnity, it is provided that for the avoidance of doubt the Minister of Finance of the GOAB by executing this Guarantee on behalf of the GOAB certifies in accordance with the provisions of section 26 of the Finance Act that this Guarantee has been given pursuant to a resolution of the Cabinet of the GOAB which has been approved by the House. The Guarantee is then signed by the Honourable Lester Bird, Prime Minister and Acting Minister of Finance on behalf of the GOAB with due authority of the Cabinet of Antigua and Barbuda.

32. Mr. Martineau argued that in circumstances where the principal contract is defective due to the principal's incapacity such a clause may estop any person who signs the guarantee from arguing that it is invalid on that basis. However, the clause is not likely to avail the creditor where the guarantee is invalid due to

guarantor's incapacity because the clause, being part of the guarantee, will itself be of no effect [**The Modern Law of Guarantee, Phillips and O'Donovan** 2nd edn. p. 50.]

33. Mr. Martineau relied on the case of **Commercial Cable Company v Government of Newfoundland** [1916] 2 A.C. 610. In that case, rule 278 of the rules and orders for the proceedings of the House of Assembly of Newfoundland, provided that in all contracts …. entered into by the Government, there shall be inserted the condition that the contract shall not be binding until it has been approved by a resolution of the House. The Governor in Council entered into such a contract but it did not contain the provision required by rule 278. The work was done under the contract but the new Government repudiated the contract and declined to submit it for legislative sanction.

34. On appeal to Judicial Committee of the Privy Council, their Lordships held inter alia that rule 278 of the House of Assembly was binding upon the Executive as part of the Constitution of Newfoundland and that the contract accordingly was not binding upon the Government in the absence of the approval of the House of Assembly.

35. At pages 614 – 615 Viscount Haldane who delivered the judgment of their Lordships made some interesting observations. He noted that there was no doubt that the agreement in controversy was executed with all due solemnities as far as the Governor in Council was concerned; the question was whether it was binding in the absence of sanction from the Legislature. He also said that their Lordships had no concern with the policy of the new Administration in Newfoundland in repudiating the agreement. The Administration may have acted harshly or they may have been simply doing a public duty. Such a question was not for a court of law, but was a domestic issue for the Government of Newfoundland and those to whom they are responsible. Further Viscount Haldane stated that the question turned on whether the then Government had authority to make a contract, binding

apart from legislative sanction, which would have entitle the appellants to claim the sum in question under the terms of such a contract.

36. Viscount Haldane came to the conclusion that the agreement must be presumed to have been made on the footing that it would be submitted to the Legislature of the Colony for its approval, and that it was not to become a binding agreement in the absence of such approval. It is interesting to note that no issue of estoppel arose in this case.

37. Mr. Martineau further submitted that the procedural requirements of section 26 had to be observed, otherwise the Guarantee and Indemnity would be invalid and unenforceable [**Phillips and O'Donovan** (supra) page 99, **Chitty on Contracts** (13th edn) Volume 1 paragraph 10-005.) Mr. Martineau argued that estoppel could not prevent an act from being challenged on the ground of ultra vires and could not be used to uphold an ultra vires transaction.

38. Mr. Martineau placed much reliance on the case of **Rhyl Urban District Council v Rhyl Amusements Limited** [1959] 1 W.L.R. 465 in support of two (2) contentions. Firstly, he contended that in the absence of legislative sanction, the Guarantee and Indemnity was ultra vires, in excess of power and void. Secondly, he argued that a claimant may not use the doctrine of estoppel to make a guarantee binding where statutory procedural requirements for assuring that it is binding have not been met.

39. In **Rhyl**, no consent was obtained by the plaintiffs from either the local government board or the Minister of Health to grant of any of the leases as required by section 177 of the Public Health Act 1875. Harman J. held that the plaintiffs were not estopped from denying the validity of the 1932 lease for a plea of estoppel could not prevail as an answer to a claim that an act done by a statutory body was ultra vires. In the judgment of Harman J. [page 474], if the consent of the body was not obtained, the lease was ultra vires and void.

40. Harman J. examined the judgment of the Court of Appeal in the unreported case of *Minister of Agriculture and Fisheries v Hulkin* (1948). According to Lord Greene M.R. in the appeal court [page 475] where the Minister had no power under the regulations to grant a tenancy, it is perfectly manifest that he could not by estoppel give himself such power. The power given to an authority under a statute is limited to the four corners of the power given. Further, Lord Greene stated that it would entirely destroy the whole doctrine of ultra vires if it was possible for the donee of a statutory power to extend his power by creating an estoppel. The principles set out above were regarded by Harman J. as not only good sense but also good law.

41. Harman J. went on to cite the dicta of Lord Haldane in *Pacific Coast Coal Mines Ltd v. Arbuthnot* [1917] A.C. 607, 616 that when the act done is one which has not, by the constitution of the corporation, been put within its power except on the fulfillment of a condition, then the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled [page 482]. According to Harman J, the 1932 lease was void and not voidable since subsequent consent could not have validated that instrument.

42. The Court agrees with Mr. Fitzpatrick that **Rhyl** is not applicable to the instant case. In my judgment, *Hulkin* contemplates a wholly different situation where the public authority has no power to enter into the contract. It is obvious therefore that they could not by a mere representation in the contract extend their powers by creating an estoppel.

43. Section 26 makes clear that the act of giving a guarantee is wholly within the powers of the GOAB. I agree with Mr. Fitzpatrick that section 26 does not impugn the vires of the GOAB to enter into a contract of guarantee. Section 26 makes it clear only that the guarantee is not binding without the approval of the House, not that it is void, in excess of power and ultra vires. It is notable that the

approval of the House can be obtained up to six (6) months after the giving of the guarantee.

44. Having regard to section 8 of the Finance Act, I accept that Mr. Lester Bird acting as Minister of Finance could properly make the representations that he made in the Guarantee and Indemnity. Further, in my judgment, it would be difficult to argue that, as Prime Minister, he did not have the implied authority to make the representations on behalf of the GOAB [see Diplock L.J. in the landmark case of *Freeman & Lockyer v Buckhurst Park Properties* (1964) 2 Q.B. 480 at page 502. 503]. Mr. Martineau has correctly submitted that this is not in a case of ostensible authority which would require the holding out of the agent's authority by the principal. I agree with Mr. Fitzpatrick that it is undisputed that the bondholders relied on these representations and parted with their monies on the clear representation of the GOAB contained in the certificate given in clause 19.6 of the Guarantee and Indemnity that the provisions of section 26 had been complied with. In these circumstances, in my judgment, the GOAB is estopped from alleging that the Guarantee and Indemnity is not binding on the GOAB because it did not have the approval of the House.

45. The Court has examined the learning in the text **Spencer Bower The Law Relating to Estoppel by Representation** (1977) para. 142, and the related authorities cited and notes that the issue of the waiver of a statutory defence is not relevant to the facts of this case. As I understand this issue, it is form of estoppel which operates in favour of an innocent party who is entitled to insist on the fulfillment of the statutory condition. The Defendants could not possibly seek to rely on this doctrine. As to the case of **Actionstrength Ltd v International Glass Engineering [2005]** 1 BCLC 606, that is also inapplicable. In that case, the guarantee itself was not in writing and therefore contrary to the Statute of Frauds, section 4. In order to show inducement or encouragement the sub-contractor in that case could rely on nothing beyond the oral agreement of the

employer, which in the absence of writing, was rendered unenforceable by section 4.

Whether a contract of indemnity or a performance bond/guarantee

46. Mr. Fitzpatrick has argued with conviction that the Guarantee and Indemnity was in essence a contract of indemnity and therefore section 26 of the Finance Act did not apply to it. He also contended that the unconditional language of the Guarantee and Indemnity and the irrevocable obligations undertaken by the GOAB to ensure the performance of the obligations of APUA Funding render the document at law a performance bond or performance guarantee rather than a mere conventional guarantee. Mr. Martineau has contended the contrary.

47. Mr. Fitzpatrick pointed to the following clauses of the Guarantee and Indemnity which read as follows:

> 3.1 As consideration for the bondholders subscribing for the bonds to enable APUA Funding to raise the funds to refinance existing facilities held at or arranged by RBTT Merchant and for other good and valuable consideration and the payment to the GOAB of the sum of US$1.00 (the benefit and receipt of which the Guarantor acknowledges) the Guarantor irrevocably and unconditionally undertakes the obligations and liabilities set out in clause 3.2 and clause 3.3.
>
> 3.2 The Guarantor irrevocably and unconditionally guarantees:
>
> (a) to pay to the RBTT Trust on demand, and in the currency in which the same falls due for payment, all monies and liabilities which are

now or at any time hereafter shall become due, owing or incurred to or in favour of the RBTT Trust and the bondholders under or in connection with the bonds, the Trust Deed and the other Security Instruments;

(b) the due and punctual observance, performance and discharge by APUA Funding of all of its obligations and liabilities under the Revenue Sharing Agreement.

3.3 The Guarantor as principal obligor and as a separate and independent obligation and liability from its obligations and liabilities under clause 3.2, irrevocably and unconditionally agrees to indemnify RBTT Trust and the bondholders in full on demand against any reasonable losses, costs, and expenses suffered or incurred by RBTT Trust and the bondholders arising from or in connection with any of:

(a) the RBTT Trust's entering into the Trust Deed;

(b) any of the provisions of the Sale of Receivables or the Revenue Sharing Agreement being or becoming void, voidable, invalid or unenforceable; or

(c) the failure of APUA Funding fully and promptly to perform and discharge any of its obligations and liabilities under the Revenue Sharing Agreement;

3.4 The Guarantor hereby agrees to indemnify and keep indemnified the RBTT Trust and the bondholders (to the extent not indemnified under the Sale of Receivables or as otherwise indemnified under this Guarantee) on demand by the RBTT Trust against all reasonable losses, actions, claims, costs, charges, expenses and liabilities suffered or incurred by RBTT Trust and the bondholders in relation to this Guarantee (including the costs, charges and expenses incurred in the enforcement of any of the provisions of this Guarantee or occasioned by any breach by the Guarantee of any of its obligations to the RBTT Trust and the bondholders under this Guarantee).

Clause 4.3 of the Guarantee and Indemnity refers to the **Primary Obligation** of the Guarantor in the following terms:

4.3 (a) The obligations and liabilities expressed to be undertaken by the Guarantor under this Guarantee are those of primary obligor and not merely as a surety;

(b) The Trustee shall not be obliged before taking steps to enforce any of its rights and remedies under this Guarantee;

(i) to take action or obtain judgment in any court against the Principal Debtor and another person;

(ii) to make or file any claim in a bankruptcy, liquidation administration or insolvency of APUA Funding, the Licensee Cable and Wireless, and any other person; or

(iii) to make demand, enforce or seek to enforce any claim, right or remedy against APUA Funding, the Licensee and any other person.

48. Mr. Fitzpatrick contends that by the Guarantee and Indemnity, there is an obligation on the GOAB as principal obligor to pay on demand such sums as is outstanding to the bondholders and is entirely independent of the underlying contract between APUA Funding and RBTT Trust and the bondholders. According to Mr. Fitzpatrick, the Guarantee and Indemnity, being in the nature of a performance bond, is different to a conventional guarantee where the relevant default must be proved and a claim there under can be defeated by any defence open to the party whose performance is being guaranteed.

49. On the other hand, Mr. Martineau relied on **Phillips and O'Donovan The Modern Law of Guarantee** (2nd edition) at page 28 under the rubric - A guarantee containing a principal debtor clause. According to this text, a guarantee which contains clauses preserving the liability of the guarantor in certain circumstances when the principal is no longer liable, will also invariably contain a *"principal debtor"* clause, whereby the creditor is given liberty to act as though the guarantor were a principal debtor. It is clear that the effect of such a clause, even standing clear, may be to preserve the guarantor's liability in circumstances in which he would otherwise be discharged, for example, where the creditor improperly releases a security or grants the principal an extension of time to repay the debt. The clause also obviates the necessity for a demand to be made upon the guarantor before issuing proceedings.

50. Mr. Martineau argued, further, however that the dominant view is that the incorporation of a *"principal debtor"* clause does not convert what would

otherwise be interpreted as a contract of guarantee into a contract of indemnity. [**Phillips & O'Donovan** p. 28].

51. At page 225 of the same text, the authors go on to say that guarantees often contain express clauses specifically designed to preserve the liability of the guarantor in the event of the principal contract being void, voidable or unenforceable. By the *"principal debtor"* clause the guarantor is stated to be liable *"as a primary obligor and not merely as a surety*."

52. Mr. Martineau cited **Heald v O'Connor** [1971] 1 W.L.R. 497. In that case, Fisher J. considered an appeal from an order of the district registrar made under R.S.C. Order 14, that judgment be entered for the plaintiffs for the sum claimed. The claim was for money alleged to be due under a guarantee. The defence, and indeed the only defence, was that the guarantee was void by reason of section 54 of the Companies Act 1948. [page 499].

53. Fisher J. considered the document in issue in the case. According to him, the instrument was given pursuant to clause 7 of the agreement which calls for a personal guarantee. The word *"guarantee"* was used in it time and again. The obligation was to pay the principal moneys to become due under the debenture if and whenever the company made default. The statement of claim referred to it as a guarantee and pleaded the company's default and the consequent liability of the guarantor. Fisher J. pointed out that the only straw for the plaintiff to clutch at was the phrase *"as a primary obligor and not merely as a surety"*, but that, in his judgment, was merely part of the common form of provision to avoid the consequences of giving time or indulgences to the principal debtor and could not convert what was in reality a guarantee into an indemnity [page 503]. **Phillips & O'Donovan** (supra) conclude that it follows that the principal debtor clause standing alone, will probably not render the guarantor liable where the principal contract is void, voidable or unenforceable. [page 225] (emphasis mine).

54. Mr. Martineau also addressed the Court at length on **Marubeni** in the Court of Appeal reported at [2005] 2 All ER (Comm) 289. The Court of Appeal considered whether the guarantee provided by the Government of Mongolia in respect of an international sales contract was in the nature of or equivalent to a demand bond. Carnwath L.J. who delivered the first judgment, examined the law relating to guarantees in contrast to indemnities or performance bonds/guarantees. He considered the case of **Edward Owen Engineering v Barclays Bank International** [1978] Q.B. 159 [which had been cited on behalf of RBTT Trust]. In that case, Lord Denning M.R. was of the view that these performance guarantees were is essence exceptionally stringent contracts of indemnity. They were normally granted by banks to pay or repay a specified sum in the event of any default in performance by the principal debtor of some other contract with a third party, the creditor. An unusual feature of several modern cases was that the bank's liability arose on mere demand by the creditor. Such guarantees were sometimes called "first demand guarantees" and were analogous to a bank's letter of credit. Carnwath L.J. went on to observe that these documents which were really "demand bonds" (however described) were developed by the banking world for its commercial customers. They have been described as part of "the lifeblood of commerce".

55. The Court of Appeal concluded that in all the cases relied upon by the claimant the documents were issued by banks and were described as, or assumed to be, performance bonds. In the Court's view, they provided no useful analogy for interpreting a document which was not issued by a bank and which contained no overt indication of an intention to create a performance bond or anything analogous to one. Having looked at the letter in **Marubeni**, the Court of Appeal found that had the claimant wanted the additional security of a demand bond, one would have expected it to have insisted on appropriate language to describe such a bond. The absence of such language, in a transaction outside the banking context, created a strong presumption against the claimant's interpretation. The

question then became whether there were sufficient indications in the wording of the instrument to displace the presumption of a guarantee.

56. In my judgment, there are sufficient indications in the wording of the Guarantee and Indemnity to displace the presumption of a guarantee. Mr. Fitzpatrick has rightly submitted in my view that the principal debtor clause in clause 4.3 of the Guarantee and Indemnity does not stand alone. The document describes itself as a Guarantee and Indemnity. In addition to clause 4.3, by clause 3.3 the GOAB as principal obligor and as a separate and independent obligation and liability from its obligations and liabilities under clause 3.2 (the guarantee obligations), irrevocably and unconditionally agrees to indemnify RBTT Trust and the bondholders in full on demand against any reasonable losses, costs and expenses suffered or incurred by RBTT Trust and the bondholders arising from or in connection with either the Trust Deed, the Sale of Receivables or the Revenue Sharing Agreement becoming unenforceable or the failure of APUA Funding to perform any of its obligations under the Revenue Sharing Agreement. Clause 3.4 contains a further indemnity to both RBTT Trust and the bondholders on demand by RBTT Trust against all reasonable losses suffered and incurred by RBTT Trust and the bondholders in relation to the Guarantee. The protection afforded to RBTT Trust at clause 4.3(b) is also to be noted. No prior demand has to be made against APUA Funding. In addition, by clause 11 any demand, notification or certificate given by RBTT Trust specifying amounts due and payable shall in the absence of manifest error, be conclusive and binding on the GOAB. Unlike **Marubeni,** there is nothing in the document to indicate that the obligations of the GOAB under the indemnity clauses only arise when the amounts payable under the Security Instruments have become due and not paid [see page 299].

57. The Court also agrees with Mr. Fitzpatrick's submissions that the Guarantee and Indemnity is in the nature of a performance bond/ performance guarantee and that accordingly the only defence to a claim there under would be

clear fraud on the part of the party making the demand. No such defence has been made out in the instant case.

58. Having regard to the circumstances of this case and the Court's findings on the law, the Court accepts the submissions advanced on behalf of RBTT Trust that the Guarantee and Indemnity is a contract of indemnity and accordingly, section 26 of the Finance Act does not apply to it.

Evidential Burden

59. Mr. Fitzpatrick has submitted that the evidence advanced by Mr. Foster Derrick on behalf of the Defendants that the Guarantee and Indemnity did not receive the approval of the House was inadmissible. Mr. Martineau countered by arguing that the burden was on RBTT Trust to prove that the Guarantee and Indemnity was made with the requisite approval of the House. Mr. Martineau further argued that the representations and certificate of Mr. Bird in the Guarantee and Indemnity had no evidential value and were self-serving.

60. I cannot agree with Mr. Martineau that the representations of Mr. Bird had no evidential value without Mr. Bird's going on oath. On the face of the document, the Guarantee and Indemnity is a valid instrument. The only admissible evidence is contained in the Guarantee and Indemnity. Mr. Lester Bird, the Acting Minister of Finance and the Prime Minister, certifies that the document has received the requisite approval. In my judgment, if the Court is to find that this is not so, the Defendants will have by admissible evidence to prove that the requisite approval of the House was not obtained. In the view of the Court, there is no such admissible evidence.

ISSUE 2 – ILLEGALITY OR FRAUD IN SALE OF RECEIVABLES

61. At paragraph 12 of the affidavit of Foster Derrick, he referred to a Revenue Sharing Agreement dated the 22nd July, 1987 (amended by an Agreement dated the 22nd February, 1991 and further amended by an Agreement dated the 21st May, 1993) and made between the Authority, the GOAB and Cable and Wireless and referred to in this judgment as "the Revenue Sharing Agreement" [referred to earlier at paragraph 11 of this judgment].

62. By the Revenue Sharing Agreement, the Authority had entered into a transaction with Cable and Wireless in which it was agreed, inter alia, that Cable and Wireless would make available to the Authority a United States Dollar loan facility to be used to repay the balance of a loan outstanding by the Authority to Northern Telecom International Finance Corporation BV and for the purchase of telephone equipment to facilitate the development of the National Telephone Service in Antigua and Barbuda. At the time of the making of the Revenue Sharing Agreement, the monthly revenue to the Authority generated from the Revenue Sharing Agreement was approximately $2,000,000.00 EC [paragraphs 12 – 13].

63. According to Mr. Derrick, on the 11th August, 1998, APUA Funding was incorporated in Antigua and Barbuda. The main type of business carried on by APUA Funding was project financing according to its Annual Returns. In the month following its incorporation, APUA Funding entered into a Sale of Receivables Agreement with the Authority and the GOAB by which agreement APUA Funding purported to purchase from the Authority all of its revenues then and thereafter due from Cable and Wireless under the Revenue Sharing Agreement. Mr. Derrick deposed that for the sale of its receivables under the Revenue Sharing Agreement, the Authority was given no consideration and was made to give away its assets to APUA Funding [paragraphs 14 – 15].

64. According to paragraph 16 of the Derrick affidavit, APUA Funding was incorporated for the specific and illegal purpose of receiving and siphoning off the Authority's revenues under the Revenue Sharing Agreement and making them available to the then GOAB to enable them to purportedly construct a market complex in St. John's, Antigua.

65. Mr. Derrick who is a director of APUA Funding deposed at paragraphs 20 and 21 of the affidavit that APUA Funding is a sham corporation with no bank account, no assets and no audited or financial statements. As such, it had no means whatever of purchasing the Authority's revenue due under the Revenue Sharing Agreement. According to Mr. Derrick, a scheme was therefore devised to raise the funds by which APUA Funding would be enabled to purchase the Authority's receivables and that involved having APUA Funding raise the finance for the purported purchase of the Authority's receivables through the issue of bonds with the bond issue arranged by RBTT Merchant which was to act as trustee for the bondholders. The scheme and the several agreements entered into between the GOAB, APUA Funding and RBTT Merchant in the year 1998 are referred to in the Derrick affidavit [paragraphs 22 and 23].

66. According to Mr. Derrick, the Authority's receivables under the Revenue Sharing Agreement were used as the security to secure the repayment of the bonds and were in fact applied towards redemption of the bonds. In the result, not only was the Authority illegally deprived of its revenues and its revenues applied to illegal purposes in breach of the Public Utilities Act, but the Authority has never received any compensation or consideration for the loss of its revenues under the Revenue Sharing Agreement [paragraph 27].

67. According to Mr. Derrick, he has been advised by Counsel and verily believes that, in the circumstances set out in his affidavit, the Trust Deed was executed to carry into effect an illegal object, namely as part of an ongoing plan to

defraud the Authority of its revenues and to commit a fraud upon the Public Utilities Act, by the use of APUA Funding as the instrumentality/puppet through which to siphon off and give away the telephone revenues of the Authority, and for the application of such revenues for purposes other than those set out or authorized by the Act [paragraph 29].

68. Mr. Martineau submitted that the Sale of Receivables Agreement was made in breach of section 13 of the Public Utilities Act. Hence, the use of the revenue of the Authority for purposes other than those set out in section 13 amounted to an illegality and was a fraud on the Authority under the Act. According to Mr. Martineau, the revenue belonging to the Authority under the Revenue Sharing Agreement was illegally siphoned off under the Sale of Receivables Agreement. Mr. Martineau argued that that revenue was at the heart of the transaction between the GOAB, RBTT Trust and APUA Funding. Accordingly, the entire transaction was tainted with illegality, void and of no effect.

69. Section 13 of the Public Utilities Act provides:

> 13. (1) The revenue of the Authority for any financial year shall be applied in defraying the following charges -
>
> (a) the remuneration, fees and allowances of the members of the Authority or of any committee thereof.
>
> (b) the salaries, fees, remuneration and gratuities, including payments for maintenance of the Provident Fund or Pension Fund authorised by this Act, of the officers, or agents and employees, and technical and other advisers, of the Authority.

(c) working expenses, and expenditures on, or provision for, the maintenance of the property and of any of the works of the authority, and the insurance of the same and the discharge of the functions of the Authority properly chargeable to revenue account.

(d) interest on any debenture and debenture stock or other security issued, and on any loan raised by the Authority.

(e) sums required to be transferred to a sinking fund or otherwise set aside for the purpose of making provision for the redemption of debentures or debenture stock or other security or the repayment of other borrowed money.

(f) such sums as it may be deemed appropriate to set aside in respect of depreciation on the property of the Authority having regard to the amount set aside out of the revenue under *paragraph (e);*

(g) any other expenditure authorised by the Authority and properly chargeable to revenue account.

(2) The balance of the revenue of the Authority shall be applied to the creation of reserve funds to finance future modernisation and expansion.

70. On the other hand, Mr. Fitzpatrick argued that the receivables were in effect a chose in action and the sale of same was authorised, legal and valid under section 4(2) (b) of the Public Utilities Act. That section reads as follows:

(2) Notwithstanding any of the provisions of this Act, except with the prior written permission -

(b) of the Cabinet, the Authority shall not dispose of by sale, bailment, or otherwise, or turn to account, any personal property or interest therein vested in the Authority.

71. According to Mr. Fitzpatrick, the term "personal property" used in section 4(2)(b) includes a chose in action. A "chose in action" is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking personal possession (per Channell J. in **Torkington v Magee** [1902] 2 K.B. 427, 430) [see also the Supreme Court of Judicature Act Chap. 4:01, section 23(7)]. Mr. Fitzpatrick argued that since the GOAB was a party to the Sale of Receivables Agreement, the presumption was that the approval of the Cabinet had been obtained. Further, he submitted that there was no allegation on the part of the Defendants whether in their Defence or in the Derrick affidavit, that the prior written permission of the Cabinet had not been obtained. As such, he argued that the Defendants' contention that the sale of receivables was illegal and part of a device to misappropriate the Authority's funds and/or involved RBTT Trust in accessory liability for dishonest assistance and/or knowing receipt must necessarily fail. The Court accepts these submissions without reservation.

72. The Sale of Receivables Agreement itself sets out the consideration of the sum of US$11,392,500.00 paid by APUA Funding to the Authority for the transfer and assigning to APUA Funding of all the Authority's rights, titles, benefits and interests arising out of the Revenue Sharing Agreement.

73. Mr. Fitzpatrick has in the Court's view correctly submitted that an examination of the relevant documents between the parties shows that the primary purpose of the transaction was the raising of finance by the issue of bonds the repayment of which with interest was secured by the Guarantee and Indemnity and the Security Agreement. Indeed, clause 5 of the Trust Deed provides that by way of security for the repayment of the bonds and all amounts due there under

APUA Funding has entered into the Security Agreement and the GOAB has issued the Guarantee and Indemnity in favour of RBTT Trust for the benefit of the bondholders.

74. Further, Mr. Fitzpatrick has correctly submitted that what was assigned to RBTT Trust as a security interest was not the Authority's interest in the Revenue Sharing Agreement, but the right, title and interest of APUA Funding under the Sale of Receivables Agreement [section 1.01. page 2 of the Security Agreement]. According to the written submissions of RBTT Trust, the Defendants accept (as they must), that at the time of the Security Agreement, the Authority's Receivables had already been transferred to APUA Funding by the Sale of Receivables Agreement. The Court agrees with the submissions advanced on behalf of RBTT Trust that the Security Agreement was not intended to divert the Authority's revenue but was meant to secure the obligations of APUA Funding in favour of RBTT Trust and the bondholders.

75. It is further submitted on behalf of RBTT Trust, that assuming but not admitting the illegality contended by the Defendants, the courts will only deny their assistance to a claimant seeking to enforce a cause of action on the grounds of public policy if the claimant was implicated in the illegality and founds his action upon an immoral or illegal act. An action will not be founded upon an immoral or illegal act if it can be pleaded and proved without reliance upon such an act [paragraphs 3 – 9 of the judgment of Aldous L.J. in the case of **Standard Chartered Bank v Pakistan National Shipping Corporation and others (No. 2)** [2000] 1 Lloyd's Rep. 218].

76. Aldous L.J. had cited the case of **Tinsley v Milligan** [1993] 3 All E.R. 65. In the case of **Tinsley**, T and M, who were lovers, jointly purchased a house which was registered in the name of T as the sole legal owner. The house was used as a lodging house which was run as a joint business venture and provided most of the parties' income. Both parties accepted that the house was owned

jointly but, as M accepted, it was registered in the sole name of T to enable M, with the knowledge and assent of T, to make false claims to the Department of Social Security for benefits. Subsequently, T and M quarreled and T moved out, M remaining in occupation. T brought an action claiming possession of the house and asserting ownership of it. M counterclaimed for an order for sale and a declaration that the house was held by T on trust for the parties in equal shares. T contended in regard to the counterclaim (i) that applying the common law maxim *ex turpi causa non oritur actio*, M was barred from denying T's ownership of the house because the purpose of the arrangement whereby the house had been registered in the sole name to T had been to facilitate the fraud on the Department of Social Security and therefore her claim to joint ownership was tainted by illegality and (ii) that applying the equitable principle that he who came to equity had to come with cleans hands, the court ought to leave the estate to lie where it fell since the property had been conveyed into the name of one party for a fraudulent purpose which had then been carried out and in those circumstances the court ought not to enforce a trust in favour of the other party. The judge dismissed T's claim and gave judgment for M on her counterclaim. T appealed to the Court of Appeal, which dismissed the appeal.

77. On appeal to the House of Lords, their Lordships held that (Lord Keith and Lord Goff dissenting) that where property interests were acquired as a result of an illegal transaction a party to the illegality could recover by virtue of a legal or equitable property interest if, but only if, he could establish his title without relying on his own illegality even if it emerged that the title on which he relied was acquired in the course of carrying through an illegal transaction. Since M did not have to rely on the underlying illegality to prove her case, she was therefore entitled to succeed on her counterclaim. Accordingly the appeal was dismissed.

78. Mr. Fitzpatrick relied on the three (3) propositions set out by Lord Jauncey at page 82 of his judgment. The first proposition was that the court will not give its assistance to the enforcement of executory provisions of an unlawful contract

whether the illegality is apparent ex facie the document or whether the illegality of purpose of what would otherwise be a lawful contract emerges during the course of the trial. Mr. Fitzpatrick has correctly submitted that this first proposition does not apply to the instant case.

79. The second proposition was that a party is not entitled to rely on his own fraud or illegality in order to assist a claim or rebut a presumption. Thus when money or property has been transferred by a man to his wife or children for the purpose of defrauding creditors and the transferee resists his claim for recovery he cannot be heard to rely on his illegal purpose in order to rebut the presumption of advancement (see **Gascoigne v Gascoigne** [1918] 1 KB 223 at 226). The Court agrees with Mr. Fitzpatrick that this second proposition was applicable to the instant case in that in these circumstances the Defendants should not be heard to rely on their own illegality against RBTT Trust and the bondholders.

80. Mr. Fitzpatrick has stoutly relied on the third proposition laid down by Lord Jauncey. According to Lord Jauncey, it has however for some years been recognized that a completely executed transfer of property or of an interest in property made in pursuance of an unlawful agreement is valid and the court will assist the transferee in the protection of his interest provided that he does not require to found on the unlawful agreement. The Court has examined the third proposition of Lord Jauncey and finds it applicable to this case. In the judgment of the Court, even if there is the illegality alleged by the Defendants, RBTT Trust does not found its claim against the GOAB and APUA Funding on any illegal transaction. In fact RBTT Trust's claim is made against the GOAB under the Guarantee and Indemnity and against APUA Funding under the Trust Deed.

81. It is also contended on behalf of RBTT Trust that even if the transaction is tainted with illegality, the Court can sever the illegality with the result that the Trust Deed and the Guarantee and Indemnity remain unaffected by such illegality. Mr. Fitzpatrick argued that the Sale of Receivables Agreement was only collateral

to the main transaction which was the raising of financing by the issue of bonds. Mr. Fitzpatrick further argued that the principal transaction and obligations were supported by collateral or ancillary arrangements being the security arrangements (including the Security Agreement) and that those security arrangements can be severed if the Court is of the view that they are illegal.

82. On the other hand, Mr. Martineau contended that the Court ought not to sever the illegal diversion of the Authority's revenues contrary to section 13 of the Public Utilities Act. According to Mr. Martineau, one cannot isolate the sale of receivables and pretend that it is not part and parcel of the whole transaction between these parties. Mr. Martineau submitted that a proper examination of each of the relevant documents between these parties would show that the sale of the Authority's receivables to APUA Funding and the revenues obtained there under were an integral part of the entire transaction and could not be severed.

83. In the case of **Phillip William Carney v John Edward Herbert and Others** [1985] A.C. 301, the Judicial Committee of the Privy Council examined the law as it related to the severability of illegal mortgages. In that case, a personal guarantee by the defendant to the plaintiffs was the security for the main transaction. The transaction was also secured by mortgages which were illegal. The plaintiffs brought actions against the defendant under the guarantee. Rogers J. gave judgment for the plaintiffs and there was an eventual appeal to the Judicial Committee which held that the sale agreements, mortgages and guarantee were part of a single transaction and the question whether the lawful part of a contract could be severed from the unlawful part was a matter of construction which did not depend upon whether the plaintiffs would have entered into the contract in its severed form at the time the contract was concluded; that the mortgages, which were illegal and void, were ancillary to the overall transaction and could be severed, and since the nature of the illegality did not preclude the plaintiffs on the ground of public policy from enforcing the sale agreements against I. Ltd. and the

guarantee against the defendant, the defendant was liable to the plaintiffs for the unpaid installments of the purchase price.

84. Lord Brightman who delivered the judgment of their Lordships observed that questions of severability are often difficult since there are not set rules which will decide all cases. To some extent he observed, each case must depend on its own circumstances, and in particular on the nature of the illegality. Since a plaintiff could not sue on an illegal agreement, the question therefore rose whether the illegality of the mortgages tainted the whole transaction and prevented the plaintiffs suing the defendant on the guarantee, or whether the illegal transaction could be severed for the purpose of the action from the overall transaction, leaving intact the right of action against the defendant because, by reason of such severance, a plaintiff would not need to sue on any illegal agreement.

85. Lord Brightman examined several cases. He concluded that the contract in **Carney** was basically one for the sale by the plaintiffs to the defendant of shares in Airfoil. The mortgages, like the guarantee, were ancillary to that contract for the sole purpose of ensuring the due performance of the contract by the purchaser. The mortgages did not go to the heart of the transaction, and their elimination would leave unchanged the subject matter of the contract and the primary obligations of the vendors and the purchaser.

86. Lord Brightman went on to set out what their Lordships considered to be the basic proposition on the issue of severability, that is, that although it is undesirable, if not impossible, to lay down any principles which will cover all problems in this field, as a general rule, where parties enter into a lawful contract and there is an ancillary provision which is illegal but exists for the exclusive benefit of the plaintiff, the court may, and probably will, if the justice of the case so requires, and there is no public policy objection, permit the plaintiff if he so wishes to enforce the contract without the illegal provision.

87. The Court agrees wholeheartedly with the above proposition and accepts the submission of RBTT Trust that it is applicable to the instant case. The Court agrees with Mr. Fitzpatrick that the sale of the Authority's receivables and the revenues there under did not go to the heart of the transaction and that their elimination would leave unchanged the primary obligations of the parties and in particular of the Defendants to repay the bonds. I agree that the main transaction was the issue of the bonds for the raising of finance. In my judgment, to the extent that any part of the security arrangements including the Security Agreement was illegal, this illegality can be severed being collateral or ancillary to the main transaction. Public policy dictates that the bonds subscribed by the bondholders on the inducement of the Guarantee and Indemnity of the GOAB be repaid.

ISSUE 3 – KNOWLEDGE OF ANY ILLEGALITY OR FRAUD

88. At paragraph 31 of the Derrick affidavit, Mr. Derrick deposed that RBTT Trust must have known of the illegal and ultra vires purposes for which the Authority's revenues under the Revenue Sharing Agreement had been put and were, by the said Trust Deed, continuing to be put. If RBTT Trust did not know, they certainly ought to have known unless RBTT Trust abstained deliberately from reasonable enquiry for what the enquiry might reveal, or chose to shut their eyes to the obvious. Some fourteen (14) reasons are set out in the Derrick affidavit.

89. It is interesting to note that Mr. Martineau has made it clear that the Defendants do not contend either that RBTT Trust is the agent of the bondholders or that any alleged knowledge of RBTT Trust can be imputed to the bondholders. What they contend is that RBTT Trust had knowledge of such illegality and since the cause of action was that of RBTT Trust and not that of the bondholders, the

claim could not succeed. According to Mr. Martineau, the knowledge of the bondholders was therefore irrelevant.

90. Both parties placed reliance on the case of **Swain v The Law Society** [1983] A.C. 598. In **Swain**, under section 37 of the Solicitors Act 1974 the Council of the Law Society was empowered, with the concurrence of the Master of the Rolls, to make rules concerning professional indemnity insurance for solicitors. In a circular issued in 1975 the Society gave details of a proposed compulsory professional indemnity insurance scheme, and all solicitors were subsequently asked by letter whether they were in favour of the proposed scheme. The Society indicated in the circular and in the letter that it intended to apply any brokerage commission accruing to the Society for the benefit of the profession, rather than to pay it out to individual solicitors. A majority of solicitors replied to the letter that they were in favour of the scheme. The Society accordingly made the Solicitors' Indemnity Rules 1975, which provided for a master policy to be taken out with insurers and for certificates to be issued to solicitors, who would pay the premiums. Clause 1 of the draft form of master policy scheduled to the rules provided: "The insurers agree with the Law Society on behalf of all solicitors from time to time required to be insured by indemnity rules ... to provide such insurance ...". In November, 1975, a contract was made between the Society and the insurers for the provision of insurance in accordance with the scheme and in May, 1976, a further contract was entered into by the Society which provided for a firm of insurance brokers to be appointed brokers to the Society and for a proportion of the commission earned by them from insurers to be paid to the Society.

91. After 1st September, 1976, the scheme was regarded as compulsory. The plaintiffs, two (2) practising solicitors, were dissatisfied with the scheme, but they did not formally challenge it in correspondence with the Society until January, 1979. In October, 1979, they took out an originating summons seeking, inter alia, determination of the question whether the Society was entitled to retain the

commission from the brokers or was accountable for it to solicitors. Slade J. held that the Society was not accountable for the commission. On appeal by the first plaintiff, the Court of Appeal reversed that decision. The Court of Appeal dealt with several issues which are not relevant to the instant case. On the issue of the relationship between the Society and the solicitors, Stephenson L. J. stated that he was in agreement with Slade J. that the Society was acting not as agent but as a trustee for the solicitors described in Clause 1 of the master policy to hold the benefit of its contract on the terms of the master policy, and that a fiduciary relationship was thereby established between the Society and them, which entitled them to call for the Society's co-operation in enforcing their rights (as beneficiaries under the trust created by the contract) to obtain insurance cover from the insurers. What Stephenson L. J. did not agree with was the conclusion of Slade J. that the Society was not accountable to the individual solicitors who paid premiums under the scheme for the commission received.

92. The Law Society appealed. Mr. Martineau referred the Court to the submissions of three (3) eminent Queen's Counsel, namely, Mr. Leonard Hoffmann, Mr. Patrick Phillips and Mr. Robert Walker, who appeared for the Law Society. They submitted that the Law Society criticized the finding of Slade J. and the Court of Appeal that a trust relationship was constituted in that case. They submitted, inter alia, that the Court of Appeal did not have regard to the well-established criteria for deciding whether the parties intended a contract in favour of third parties or a fiduciary obligation. The words "on behalf of" most naturally suggested agency. Agency was however rightly rejected, they submitted. Accordingly, one was driven off the most natural meaning of the phrase. Its secondary meaning, while perfectly consistent with a trust relationship, was also consistent with a contract intended to be for the benefit of solicitors. They submitted that the words "on behalf of" were words descriptive of the persons immediately entitled to benefit from the contract, but not to the extent of their having a right of action.

93. In **Swain**, their Lordships held inter alia that on the true construction of the master policy, the Law Society had not expressly or by implication constituted itself a trustee of the contract of November, 1975 for the benefit of premium paying solicitors, nor had it become a constructive trustee of the commission received and accordingly it was not liable to account to the solicitors for the commission received.

94. The Court has carefully examined the judgments delivered by their Lordships in **Swain**. In the Court's view, the circumstances of the instant case are very different from **Swain**. RBTT Trust was expressly constituted a trustee under the Trust Deed with all the powers conferred on trustees by the Trustee Ordinance Ch. 8 No. 3 of the laws of Trinidad and Tobago [clause 17.1]. By recital C of the Trust Deed, RBTT Trust agreed to act as Trustee of the Trust Deed for the benefit of the bondholders on and subject to the terms and conditions set out in the Trust Deed. Further, by clause 6.1 of the Trust Deed, at any time following an event of default, RBTT Trust may institute proceedings for recovery of the amounts due. By Clause 6.4, no bondholders shall be entitled to institute proceedings against APUA Funding. Clause 6.4 goes on to provide however that where RBTT Trust, having become bound to proceed to recover the amounts due by enforcing the rights of the bondholders, fails to do so within a reasonable time, then any such bondholder may, on giving an indemnity satisfactory to RBTT Trust, in the name of RBTT Trust, himself institute proceedings to recover the amounts due by enforcing the rights of the bondholders under the Security Instruments in respect of the bonds. In addition, all the relevant documents in this transaction refer to RBTT Trust as the Trustee for the bondholders.

95. It is clear to the Court that the cause of action is that of the bondholders, not that of RBTT Trust. The action is commenced by RBTT Trust or by a bondholder in the name of RBTT Trust under the provisions of clause 6.4. In the Court's view, there can be no doubt that RBTT Trust is acting as a trustee in the circumstances of this case. Accordingly, any knowledge of RBTT Trust as to any

illegality cannot be said to be the knowledge of the bondholders and, in any case, cannot be fatal to this claim. The bondholders can indeed be described as innocent bondholders, a term used by Mr. Fitzpatrick throughout his submissions.

ISSUE 4 – SOVEREIGN IMMUNITY

96. At paragraph 5 of the Defence, the GOAB says that it is an independent sovereign state and cannot be sued by RBTT Trust in Trinidad and Tobago without its consent as required by law and no such consent has been or is being given.

97. Mr. Fitzpatrick has countered that plea by submitting firstly, that having regard to the Civil Proceedings Rules, 1998, as amended, the GOAB must be deemed to have submitted to the Court's jurisdiction by filing a Defence. Secondly, Mr. Fitzpatrick argues that this case falls within the exception to the sovereign immunity rule from the willingness of states to enter into commercial or private law transactions with individuals.

98. The CPR Part 9.7 sets out the procedure available to a defendant who wishes to dispute the court's jurisdiction to try a claim. The CPR Parts 9.7(1) and (3) stipulate that a defendant who wishes to make an application to the court for an order declaring that it has no jurisdiction must do so within the period for filing a defence. The CPR Part 9.7(5) provides that if a defendant enters an appearance and does not make an application within the period for filing a defence, he is treated as having accepted that the court has jurisdiction to try the claim.

99. On the 17th September, 2007, the Defendants each entered an appearance and on the 7th November, 2007, indisputably the last day for the filing of their defence, the Defendants filed their Defence. Although the GOAB has raised the issue of jurisdiction in its Defence, it has made no application to the Court as required by Part 9.7 of the CPR.

100. Mr. Fitzpatrick has argued that the GOAB has since the filing of their Defence fully participated in the action and in the case management conferences, received directions and filed submissions on the merits of the case. In these circumstances, he argued, the GOAB must be deemed to have submitted to the court's jurisdiction. Further, Mr. Fitzpatrick has submitted that although the court has a general power under the CPR Part 26.1(d) to extend the time for compliance with any rule, the power should not be exercised in this case after the GOAB has submitted to the court's jurisdiction.

101. On the other hand, Mr. Martineau has submitted that the failure of the GOAB to comply with the CPR Part 9.7 was not fatal. According to Mr. Martineau, although it is a breach of the relevant rule, it is not a waiver since the GOAB has taken the point in the Defence. Mr. Martineau relied on the case of **SSQ Europe S.A. v Johann and Backes OHG** [2002] 1 Lloyd's Rep. 465.

102. In that case, the defendant's German lawyer had filed an acknowledgement of service and drafted a defence and counterclaim which complied with German rules of procedure and raised a challenge to the jurisdiction of the English court. Four (4) days after the drafting of the defence and counterclaim, the time for making an application to challenge the jurisdiction of the Court under the English rules expired. Thereafter, the claimant entered default judgment against the defendant. The defendant then instructed English solicitors and applied for the default judgment to be set aside and for an order declaring that the English court had no jurisdiction and for the claim form to be set aside; alternatively, for the period for filing a defence be extended. The district judge set aside the judgment and extended the time for filing a defence. The defendant had made a subsequent application as to jurisdiction, filed its defence and then made a third application that the time be extended for filing an application under the English equivalent of Part 9.7.

103. These were special circumstances and the court found that the culpable delay was incurred when the defendant's German lawyer had conduct of the case. In the circumstances, since the claim was not an unsubstantial claim and since an important issue of jurisdiction was being raised, where the parties were not on an equal footing, in principle the court was prepared to grant the necessary extension of time.

104. Further, on the facts and evidence, the court found that the claimant could not have ever been in doubt that the defendant was intent on pursuing its challenge to the jurisdiction of the English court notwithstanding service of the defence and counterclaim. There was no unconditional entry of appearance or unequivocal conduct which would be interpreted by a disinterested bystander as amounting to an abandonment of the jurisdictional objections.

105. In my judgment, the instant case is a wholly different situation. I agree with Mr. Fitzpatrick's submissions that by its conduct, the GOAB must be deemed to have submitted to the jurisdiction of the Court. In addition and quite importantly, to date, no application has been filed on behalf of the GOAB for an extension of time to file an application under the CPR Part 9.7.

106. As to Mr. Fitzpatrick's second contention, the Court has examined the cases of **Playa Larga v I Congreso Del Partido** [1983] 1 A.C. 244 [House of Lords] and **Trendtex Trading Corporation v Central Bank of Nigeria** [1977] Q.B. 529. These authorities suggest that the Court must examine the whole context of the case in determining whether the restrictive doctrine of sovereign immunity applied. The Court agrees with Mr. Fitzpatrick's submission that it is in the interest of justice for individuals having commercial or private transactions with states to allow them to bring such transactions before the Court. The instant case involves essentially the raising of finance by the issue of bonds. In my view, it does not involve a challenge to or any inquiry into any act of sovereignty or

governmental act. I adopt the dicta of the Court of Appeal in **Trendtex**, that the modern principle of restrictive sovereign immunity in international law, giving no immunity to acts of a commercial nature, is consonant with justice, comity and good sense [pages 556-557]. If a government department goes into the market places of the world and buys boots or cement – a commercial transaction - that government department should be subject to all the rules of the market place. Further, Lord Denning M.R. made the point that where there is a straightforward commercial transaction, as was the letter of credit in **Trendtex**, it was not open to the Government of Nigeria to claim sovereign immunity in respect of it [page 558].

CONCLUSION

107. In all the circumstances of this case, the Court finds that RBTT Trust succeeds on its application for summary judgment filed pursuant to Part 15 of the CPR. The Court does not find it necessary to determine whether the test for summary judgment that is applicable in this case is the realistic prospect of success test or the more heightened test referred to in some of the cases and argued by Mr. Fitzpatrick.

ORDER

The Court hereby orders that:

1. There shall be summary judgment for the Claimant against the First Defendant on its whole claim of US$6,862,436.00 with interest thereon at the rate of 13 per cent per annum from the 11th June, 2007 until payment pursuant to Part 15 of the Civil Proceedings Rules, 1998 (as amended).

2. There shall be summary judgment for the Claimant against the Second Defendant on its whole claim of US$6,862,436.00 with interest thereon at the rate of 13 per cent per annum from the 11th June, 2007 until payment pursuant to Part 15 of the Civil Proceedings Rules, 1998 (as amended).

3. The First Defendant and the Second Defendant shall pay to the Claimant the costs of the claim and of the application to be quantified by the Court on a date to be fixed.

MAUREEN RAJNAUTH-LEE
JUDGE